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FAULT ELEMENTS IN MURDER - A SUMMARY OF AUSTRALIAN LAW

DRAFT MEMORANDUM

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INTRODUCTION

7. Vocabulary: Physical Elements and Fault Elements

The memorandum that follows employs the vocabulary of element analysis used in the Commonwealth *Criminal Code*.¹ Intention, recklessness and negligence are 'fault elements'. Other fault elements may be devised by legislatures as required. Conduct, circumstances and results – an exhaustive list - are 'physical elements'.

8. The Meaning of 'Intention' with Respect to Incriminating Results

In his monograph, *Fault in Homicide*,² Stanley Yeo opens the discussion of Australian law with the remark that 'Australian courts have largely avoided the difficulties which their English counterparts have had over the meaning of intention as a fault element for murder.'³ In most Australian jurisdictions a defendant's realization that their conduct will probably result in death is accepted as equivalent in blameworthiness to intention to cause death or grievous bodily harm. In some jurisdictions, realization that conduct will probably result in grievous bodily harm is accepted as equivalent in blameworthiness to an intention to cause grievous bodily harm: Table 1. Since intention in murder is supplemented in this way by a fault element conventionally described as recklessness, 'have not felt the same need to define intention' to cause death or injury as their English counterparts.⁴

That cannot be a complete explanation, however, of the absence of judicial consideration of the concept of intention when liability for results is in issue. There is considerable variation in the law of offences against the person among Australian jurisdictions. Not all recognize recklessness as equivalent in blameworthiness to intention and in those jurisdictions there can be an issue over the meaning of intention with respect to death or grievous bodily harm. The issue can arise, for example, in Queensland, Western Australia and the Northern Territory where the requirements of intention to kill or cause grievous bodily harm in murder are codified in provisions that are not supplemented by recklessness. So far, however, the courts in those jurisdictions have taken the view that intention is an ordinary language concept and that attempts to explain its meaning to juries are unnecessary and likely to confuse rather than enlighten.⁵ The question whether a defendant must be taken to intend a result that was known to be certain has been raised but not

¹ *Criminal Code* 1995 (Cth), Chapter 2: *General Principles of Criminal Responsibility*. Current usage in caselaw and texts is confusing. The older terms, 'actus reus' and 'mens rea' have been largely displaced by 'external elements' and 'mental elements' which are likely, in turn, to be displaced by the *Code* terminology. The most recent general text on Australian criminal law – S Bronitt and B McSherry, *Principles of Criminal Law* (2ed 2005) Ch3, 'Principles of Criminal Responsibility' adopts the *Code* vocabulary.

² Federation Press, 1997.

³ *Fault in Homicide* (1997), 52.

⁴ *Ibid*, 55.

⁵ *Wilmot (No 2)* CCA Queensland, [1985] 2 Qd R 413. See I Campbell, 'Recklessness in Intentional Murder under the Australian Codes' (1986) 10 *Crim L J* 3.

answered. In what may seem a curious reversal of roles, the appellant in *Laycock & Stokes*⁶ sought to overturn his conviction for murder on the ground that the trial judge had not given a *Woollin*⁷ direction to the jury in explanation of the requirement of intention to kill or cause grievous bodily harm. The Queensland Court of Appeal reiterated its view that it is both unnecessary and undesirable to 'set about explaining an ordinary and well understood word in the English language'.⁸ With that exception, reported cases in the code jurisdictions do not explore the question whether intention to kill or cause grievous bodily harm includes 'oblique intention'.

There has been, indeed, very little discussion in the caselaw in any Australian jurisdiction of the question whether intention with respect to an incriminating result extends to instances where the defendant knew the result to be practically certain to follow their conduct. Justice McHugh lent vigorous support to the view that intention should be extended in this way in *Peters*,⁹ but his opinion was obiter and given in a case where the issues were far removed from the crime of murder. The Commonwealth *Criminal Code*, which defines intention, declares that a person 'has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the normal course of events'.¹⁰ Applications of that definition in cases dealing with offences against the person are likely, however, to be exceedingly rare. Though the Commonwealth Code does include a complete set of offences against the person, their application is restricted to offences against Australians abroad and UN personnel.¹¹

9. The Australian Law of Murder: Common Law, Statute and Code

In two Australian States, Victoria and South Australia, the fault elements of murder are governed by Australian common law.¹² It will be apparent from the discussion that follows that there is now considerable divergence between Australian and English common law. Divergent statutory definitions of the fault elements have been enacted in New South Wales¹³ and the Australian

⁶ [1999] QCA 307; ?????

⁷ [1998] 4 All ER 103.

⁸ [1999] QCA 307, para 65; ????. See, in addition, *Sancar* [1999] NSWCCA 284, to the same effect, declining to consider *Woollin* in circumstances where oblique intention had no possible application.

⁹ *Peters* [1998] HCA 7, ??: '[A] person may intend to do something even though it is the last thing that he or she wishes to bring about.... Intention in this context is broader than a person's inclination to act to achieve a result that he or she believes is desirable. If a person does something that is virtually certain to result in another event occurring and knows that that event is certain or virtually certain to occur, for legal purposes at least he or she intends it to occur.... In *R v Moloney*...and *R v Hancock and Shankland*..., however, the House of Lords held that foresight of a consequence, even foresight that the consequence was virtually certain, was merely evidence of intention. But if this is so, a jury would be bound to acquit a person accused of murder if the jurors believed that the accused had not committed the fatal act in order to bring about the death of the deceased even though the accused knew that death was the certain result of his or her actions.' The concluding reflection, which provided the punchline for McHugh J's argument, failed to take into account the established law on recklessness as a fault element in murder.

¹⁰ Chapter 2 – *General Principles of Criminal Responsibility*, 5.2 *Intention*.

¹¹ See *Criminal Code* (Cth) 71.4 *Intentionally causing serious harm to a UN or associated person*; 104.3 *Intentionally causing serious harm to an Australian citizen or resident of Australia*.

¹² Contrary to some earlier suggestions, there is only one common law in Australia: *Lipohar v The Queen; Winfield v The Queen* [1999] HCA 65

¹³ *Crimes Act 1900* (NSW), s18 *Murder and manslaughter defined*.

Capital Territory¹⁴. In the remaining five jurisdictions – Queensland, Northern Territory, Western Australia, Tasmania and the Commonwealth - substantive criminal law has been completely codified. No two codes define homicide in the same way. The table that follows summarises the differences in fault elements.

	Intend to kill	Intend GBH	Reckless as to death	Reckless as to GBH	Constructive murder
Commonwealth ¹⁵	YES	YES	YES	NO	NO
Aust Cap Territory ¹⁶	YES	NO	YES	NO	NO
New Sth Wales ¹⁷	YES	YES	YES	NO	YES
Nth Territory ¹⁸	YES	YES	NO	NO	YES
Queensland ¹⁹	YES	YES	NO	NO	YES
Sth Australia ²⁰	YES	YES	YES	YES	YES
Tasmania ²¹	YES	YES	YES	NO	YES
Victoria ²²	YES	YES	YES	YES	YES
1. West Australia ²³	YES	NO	NO	NO	NO
2. West Australia ²⁴	YES	YES	NO	NO	YES

10. Intoxication, Mental Illness and Proof of Fault.

In all jurisdictions evidence of intoxication, of whatever degree, is admissible on the issue of intention in murder and, in jurisdictions where the concept is recognized, on the issue of recklessness.²⁵ In *Hawkins*,²⁶ the High Court held that mental illness is also admissible on the issue of intention and recklessness in murder. Evidence of mental illness, unlike evidence of

¹⁴ *Crimes Act 1900 (ACT)*, s12 *Murder*. The ACT has embarked on codification of its criminal law, following the model provided by the Commonwealth *Criminal Code 1995*. See *Criminal Code 2002 (ACT)*. The ACT law of homicide awaits codification.

¹⁵ See *Criminal Code (Cth) 71.2 Murder of a UN or associated person*; 104.1 *Murder of an Australian citizen or resident of Australia*.

¹⁶ *Crimes Act 1900*, s12.

¹⁷ *Crimes Act 1900*, s18.

¹⁸ *Criminal Code 1983*, s162

¹⁹ *Criminal Code 1899*, s302.

²⁰ Common law.

²¹ *Criminal Code*, 1924, s157(1). Subsection (1) requires (a) proof of intention to cause death or (b) intention to cause 'bodily harm which the offender knew to be likely to cause death' or, in a constructive mode, (c) an unlawful act or omission that 'the offender knew or ought to have known, to be likely to cause death in the circumstances, though he had no wish to cause death or bodily harm to any person'. These provisions envisage a rather narrower ambit for reckless murder than other Australian jurisdictions though they also, in para (c) abandon the requirement of subjective realization of risk. Section 157 was the subject of exhaustive consideration by the High Court in *Bouhey* (1986) 161 CLR 10.

²² Common law

²³ The Western Australian *Criminal Code 1913*, exceptionally, distinguishes two grades of the offence of murder: 'Wilful murder', s278 and s279 'Murder'.

²⁴ *Ibid*, 'Murder' s279. It seems likely that the references to intention in these provisions are not meant to extend to instances of recklessness with respect to death or bodily harm. See *Draper* [2000] WASCA 160 (9 June 2000).

²⁵ *O'Connor* (1980) 146 CLR 64. For an uncontroversial application of *O'Connor* in a case of 'reckless murder', see *Faure* [1999] VSCA 1676.

²⁶ (1994) 179 CLR 500.

intoxication, is not admissible, however, when the question is whether the conduct of the offender was voluntary.²⁷

11. Anticipated Result - Unexpected Causal Path

In general, a person is taken to be criminally responsible for an intended result, even if the result occurs by an unexpected causal path.²⁸ The same rule will apply when liability is based on recklessness.²⁹

12. Manslaughter – Advertent and Inadvertent Negligence

In New South Wales and Victoria, where manslaughter is not defined by statute, a persistent minority among judges has argued, from time to time, that manslaughter requires proof that the offender realized that their conduct created a risk of death or serious injury, unless liability is based on proof of a dangerous and unlawful act.³⁰ In *Lavender*,³¹ decided this year, the High Court rejected that contention and reiterated the position that manslaughter can be committed by gross inadvertent negligence. That position is entirely consistent, of course, with the possibility that the case is one where the offender did realize that there was a risk, but their awareness of risk did not reach a level that a jury could characterize as recklessness. The decision merely states the outer limits of negligent manslaughter. With the exception of the Northern Territory, where the definition of manslaughter is codified, other jurisdictions recognize that manslaughter or its equivalent can be committed by gross inadvertent negligence.

PUNISHMENT FOR MURDER – THE VARIATIONS

Sentencing options for murder vary from jurisdiction to jurisdiction: Table 2. A majority permit sentences of imprisonment for a term of years as an alternative to life imprisonment. The distinction between jurisdictions that continue to impose a mandatory life sentence and the remainder is of comparatively minor significance. In all jurisdictions the sentencing court is permitted or required to set a non-parole period that will, in normal circumstances, result in release before the entire sentence is served. In most if not all jurisdictions courts are under continuing governmental pressure to increase the severity of sentences. In some, the judicial discretion to specify a parole date or the length of the non-parole period is increasingly circumscribed by legislative guidelines or criteria.

With one exception, variations in sentencing legislation among jurisdictions bear no discernible relationship to the substantive law governing the fault elements in murder. That is so whether one considers the gross differences between jurisdictions that require mandatory life and jurisdictions

²⁷ Discussed, S Bronitt & B McSherry, *Principles of Criminal Law* (2ed 2005); Leader-Elliott, 'Cases in the High Court: *Hawkins v The Queen*', (1994) 18 CLR 347.

²⁸ *Royall* (1991) 172 CLR 378.

²⁹ *Ince* [2001] VSCA 214, para 46 (Callaway J): 'All that is required is that an act of the accused that was done with the requisite intent or recklessness was a cause of death, even if not in the manner intended or foreseen.'

³⁰ In Victoria the controversy was brought to a end by the decision in *Nydam* [1977] VR 430.

³¹ [2005] HCA 37.

that permit a lesser sentence or the more particular legislative provisions that constrain the sentencing discretion. With the exception of Western Australia, no jurisdiction distinguishes between grades of murder. That State distinguishes between murder and willful murder, which requires proof of an intention to kill. Though the distinction can affect penalty³² and does affect non parole periods, recklessness is not involved for the West Australian *Criminal Code* does not recognize recklessness as a fault element for either form of murder. Sentencing provisions in other jurisdictions make no distinctions between constructive murder; murder by recklessness and murder arising from an intentional infliction of death or serious injury. Caselaw on the determination of sentence or non parole periods does discriminate between intention and recklessness for the purpose of determining the appropriate term of years. There is, however, no rule or presumption that murder by recklessness must draw a lesser sentence than a murder that involved intention to kill or cause grievous bodily harm and instances of murder by recklessness can occupy the same 'worst cases' category as intentional killings.³³

	TABLE 2: MURDER: AVAILABLE FORMS OF SENTENCE						MANSLAUGHTER	
	Mandatory Life	Life or term of years	Courts set non parole period	Legislative guidelines non parole period	Courts may deny parole	Indefinite sentence	Maximum Life	Period of years
Commonwealth ³⁴	NO	YES	YES	NO	YES	NO	/	25
Aust.Cap.Territory ³⁵	NO	YES	YES	NO	YES	YES	/	20
New Sth Wales ³⁶	NO	YES	YES	YES	NO ³⁷	NO	/	20
N.Territory ³⁸	YES	NO	YES	YES	YES	YES	YES	/
Queensland ³⁹	YES	NO	YES	YES	YES	YES	YES	/
Sth Aust ⁴⁰	YES	NO	YES	NO	YES	NO	YES	/
Tasmania ⁴¹	NO	YES	YES	NO	YES		/	21
Victoria ⁴²	NO	YES	YES	NO	YES	YES	/	20
1. West Aust ⁴³	YES	NO	YES	YES	YES	YES	/	20
2. West Australia ⁴⁴	YES	NO	YES	YES	YES	YES	/	20

³² Offenders convicted of wilful murder, unlike those convicted of murder, are liable, but not required, to be sentenced to 'strict security life imprisonment' rather than 'life imprisonment'. *Criminal Code* 1913, s282 *Penalty for willful murder and murder*.

³³ See below, footnote 52.

³⁴ *Criminal Code* (Cth) 71.2 *Murder of a UN or associated person*; 104.1 *Murder of an Australian citizen or resident of Australia*; *Crimes Act* 1914, s19AB

³⁵ *Crimes Act* 1900, ss12, 15; *Rehabilitation of Offenders (Interim) Act* 2001, s31.

³⁶ *Crimes Act* 1900, ss18, 19A; *Crimes (Sentencing Procedure) Act* 1999, ss21A, 44, 45, 54D-54D. For discussion of these sentencing provisions, with excerpts from the Second Reading Speech of the NSW Attorney-General (Legislative Assembly, Hansard 23 October 2002), see *Way* [2004] NSWCCA 131. See, too, *White* [2005] NSWSC 667.

³⁷ *Crimes (Sentencing Procedure) Act* 1999. In general, sentencing courts can decline to set non-parole periods when sentencing offenders. Murder and some other serious offences are an exception to this general rule: see ss45(1) and s54D together with its appended table. The object of the exceptions for these offences is to make the non-parole period the dominant measure of the offender's term of imprisonment.

³⁸ *Criminal Code Act* 1993, ss164, 167; *Sentencing (Crime of Murder) and Parole Reform Act* 2003, s53A; *Sentencing Act* s65.

³⁹ *Criminal Code* 1899, ss305, 310; *Penalties and Sentences Act* 1992, Part 10 – *Indefinite sentences*.

⁴⁰ *Criminal Law Consolidation Act* 1935, ss11, 13; *Criminal Law (Sentencing) Act* 1988, s32.

⁴¹ *Criminal Code Act* 1924, s158; *Sentencing Act* 1997, s18.

⁴² *Crimes Act* 1958, ss3, 5; *Sentencing Act* 1991, SS18A, B.

⁴³ *Criminal Code* 1913, ss282, 287; *Sentencing Act* 1995, ss90, 91, 96. The *Sentencing Act* specifies mandatory non-parole guidelines for wilful murder 15-19 years and murder 7-14 years.

⁴⁴ *Ibid*.

INTENTION AND RECKLESSNESS IN MURDER

Disregarding constructive murder, the unanimous High Court decision in *Crabbe*,⁴⁵ decided in 1985, provided a canonical statement the fault elements of common law murder⁴⁶:

If an accused knows when he does an act that death or grievous bodily harm is a probable consequence, he does the act expecting that death or grievous bodily harm will be the likely result, for the word 'probable' means likely to happen. That state of mind is comparable with an intention to kill or to do grievous bodily harm....a person who, without lawful justification or excuse, does an act knowing that it is probable that death or grievous bodily harm will result, is guilty of murder if death in fact results.⁴⁷

The facts of the case provided a plausible basis for the conclusion that Crabbe's conduct might have been accompanied by the knowledge that his conduct would cause death or grievous bodily harm rather than by an intention to do so. Crabbe, who was an interstate road train driver, was thrown out of an outback motel bar after he became drunk and quarrelsome. Some time later, in the early hours of the morning, he unhooked two trailers and returned to the motel at the controls of his prime mover and remaining trailer. He drove this rig through the wall of the motel and into the bar, killing five people and injuring many others. It is possible, perhaps likely, that he intended to kill some of the people inside. It is also possible, however, that he intended a spectacular act of destruction of the building rather than death or injury to patrons who might be inside. The trial judge gave a recklessness direction, which the High Court accepted as adequate in upholding his conviction for murder.

The caselaw that followed the decision in *Crabbe* is essentially exegetical: no court has doubted the High Court's statement of principle. Before dealing with the salient points of the principle stated by the High Court some preliminary points of clarification are necessary.

It is well established that the recklessness direction should only be given in cases where the facts provide a foundation for it. The trial judge must explain the potential application of recklessness to the facts of the case.⁴⁸ Australian courts are alive to the risk that an unfounded recklessness direction can confuse the distinction between murder and manslaughter. If the direction is given, references to 'recklessness' should be avoided – the ordinary meaning of the term is different from its legal meaning. There appear to be no restrictions on the kind of conduct that might provide the grounds for a recklessness direction: no distinctions are drawn between act and omission;⁴⁹ there is no requirement of hostility⁵⁰ and there is no requirement that the reckless conduct be aimed at any particular individual.

⁴⁵ (1985) 156 CLR 464.

⁴⁶ Though the case arose in the Northern Territory, which has codified its criminal law, the events occurred in 1983, before the *Criminal Code* came into effect.

⁴⁷ (1985) 156 CLR 464, ????: Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ.

⁴⁸ See *Royall* (1990) 172 CLR 378, ???, Deane & Dawson JJ, ??? and authorities cited. For a recent example of a court refraining from giving a recklessness direction on the ground that it was more likely to confuse than assist the jury, see *Murphy & Watson* (2001) VSC 523, per Flatman J. See, in addition, I Leader-Elliott, 'Recklessness and Murder – The Facts of the Case' (1986) 10 *Criminal Law Journal* 359.

⁴⁹ *Lawford & Van Der Wiel* [1993] SASC 4247, par 27.

⁵⁰ *Boughey* (1986) 161 CLR 10, ?? (Mason, Wilson and Deane JJ).

In general, Australian courts have agreed with the principle stated in *Crabbe* that a person who acts in the knowledge that death or grievous bodily harm is a probable result of their conduct, can be regarded for the purposes of the criminal law as just as blameworthy as one who intended to kill or do grievous bodily harm.⁵¹ That proposition is reinforced by the practice of sentencing courts when determining non-parole periods for murderers. In general, courts accept that cases of reckless murder will be less likely than instances of intentional murder to fall within the category of 'worst cases' where a penalty or non parole period in the maximum range will be imposed. But exceptional cases of murder by recklessness can fall within the worst case category⁵² and draw sentences equivalent to those for utterly unmitigated instances of murder where the offender intended death or grievous bodily harm.⁵³ As a consequence, there is a conflict of principle between the caselaw governing sentences for murder and the many statutory provisions that create lesser offences against the person, which do distinguish between injuries inflicted intentionally and injuries inflicted intentionally, imposing higher maximum penalties for the latter class of offences.⁵⁴

There is, however, much to be said for the view that the courts have taken when sentencing offenders for murder. Particular instances of intentional murder and murder by recklessness can be matched in moral horror in one dimension at least – that of callousness - when the conduct of the offender displays utter indifference to the value of the victim's life. That level of indifference may be uncommon in cases of recklessness: in most instances of reckless murder one might surmise that the offender would not have persisted in the conduct had they realized that the fatal outcome was certain.⁵⁵ There can, however, be cases where reckless and intentional killings are matched in callousness, when the reasons for killing intentionally or persisting in conduct known to be likely to cause death are equally trivial and equally indicative of contempt for the value of the victims' life.

The conclusion that reckless killing can match or approach the degree of blameworthiness associated with death caused intentionally leaves the central problem posed by *Crabbe* untouched.

⁵¹ *Crabbe* (1985) 156 CLR 464., ???

⁵² The maximum sentence is appropriate when a murder falls within the 'worst case category': *Veen* 1988 164 CLR 465. For discussion, see *Leach* [2004] NTSC 60; *Clarke* [2005] NSWSC 413.

⁵³ R Fox & A Freiberg, *Sentencing: State and Federal Law in Victoria* (2ed 1999) 880-1, citing *Aiton* (1993) 68 A Crim R 58; *Chan* (1994) 76 A Crim R 252; *Ainsworth* (1994) 76 A Crim R 127. See also, *Grant* [2002] NSW CCA 243, paras 72-3; *Holton* [2004] NSWCCA 214, para 59; *Crabbe* [2004] NTSC 63, para 137. In *Holton* (2004) NSWCCA 214, paras 120-1, Grove J took the point that recklessness as to the probability that conduct will cause *death* can exceed, in blameworthiness, death resulting from conduct intended to cause *grievous bodily harm*.???? Compare, however, *Clarke* 2005 NSWSC 413 paras 35-6. A finding that death was caused intentionally, rather than recklessly, can be taken as an aggravation: *Plevac* (2004) NSWSC 916.

⁵⁴ See, for example, ss??? in the Victorian *Crimes Act* 1958; Commonwealth *Criminal Code* 104.3 *Intentionally causing serious harm to an Australian citizen or resident* (20 years maximum) and 104.4 *Recklessly causing harm to an Australian citizen or resident*, 104.4 (15 years maximum). Similar examples can be found in all other jurisdictions. For an instance where the Court insists on the distinction between intention and recklessness, see *McKnoulty* (1995) 77 A Crim R 333. See also, *Livingstone* [2004] NSWCCA 122.

⁵⁵ See, for discussions bearing on this issue: See B Mitchell, 'Culpably Indifferent Murder' (1996) *Anglo-American Law Review* 64, 72, on the 'value-deficit killer'; A Halpin, 'Intended Consequences and Unintended Fallacies' (1987) *Oxford Journal of Legal Studies* 104; Alan Michaels, 'Acceptance: the Missing Mental State' (1998) 71 *Southern California Law Review* 953.

Worst cases aside, murder by recklessness has no readily definable lower boundary of seriousness that can mark the difference between murder committed in this way and manslaughter. The difficulty of articulating that distinction would matter less if the courts enjoyed an unfettered discretion to determine the penalty for murder when setting the head sentence or the period of imprisonment to be served prior to parole. That is not true, however, in New South Wales, where legislation sets a presumptive non-parole period for murder and specifies aggravating and mitigating factors that courts must take into account if that period is to be varied.⁵⁶ The list of aggravations and mitigations is exhaustive and it makes no reference to the fault elements for the offence of murder. Nor is it true in other jurisdictions where similar though less rigid constraints militate against a seamless merger of penalties for murder and manslaughter.

The discussion that follows isolates six issues arising from the High Court decision in *Crabbe*. In each case, the courts' failure to enunciate a clear distinction between murder and manslaughter is central to the discussion.

1. Nomenclature: Is 'Recklessness' the Right Name for the Concept?

I have followed the conventional practice of courts and text writers in referring to murder by 'recklessness'.⁵⁷ In fact, the joint judgement of the High Court in *Crabbe* made no reference to the concept. The joint judgement drew its formulation of principle from Stephen's Digest, in which malice aforethought was defined as including 'knowledge that the act which causes death will probably cause the death of or grievous bodily harm to, some person...although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused.'⁵⁸ In an earlier High Court decision Gibbs CJ expressed concern about the general practice of 'judges and textwriters alike' in describing this form of fault as recklessness.⁵⁹ In his view, the practice invited confusion between murder and manslaughter, since many courts also referred to 'recklessness' when explaining the degree of negligence required for manslaughter.⁶⁰ In any event, the expression was quite unsuited for use in jury instructions on the fault element in murder. In practice it appears that trial judges in Victoria and South Australia, where the common law still determines the fault elements of murder, do avoid any reference to recklessness when instructing juries. So also in other jurisdictions, apart from New South Wales, where the concept is used to indicate a requirement of knowledge of likely results.⁶¹

⁵⁶ *Crimes (Sentencing Procedure) Act* 1999, s54B.

⁵⁷ Among textbooks, see: S Bronitt & Bernadette McSherry, *Principles of Criminal Law* (2ed 2005) 180-1, 470-2; L Waller & CR Williams, *Criminal Law: Text and Cases* (10ed 2005) 161; D Brown, D Farrier, S Egger, L McNamara, *Criminal Laws* (3ed 2001)524-5; B. Fisse, *Howard's Criminal Law* (1990) 58-612; S Yeo, *Fault in Homicide* (1997) 62ff. Caselaw in Victoria, South Australia and ACT commonly refers to recklessness when describing the fault element in murder. See, for example, the important Victorian decision in *Faure* [1999] VSCA 166, which speaks of 'wilful murder' and 'reckless murder'. In New South Wales, s18 of the *Crimes Act* 1900 further compounds the risk of confusion by defining the fault element of murder by reference to 'reckless indifference'.

⁵⁸ *Crabbe*, (1985) 156 CLR 464, ???, quoting from Stephen's *Digest of Criminal Law* (1ed, 1877) art 223.

⁵⁹ *La Fontaine* (1976) 136 CLR 62, ????

⁶⁰ That practice continues in Western Australia – see *Agnew* [2003] WASCA 188 – and in Queensland *Stott & Van Embden* [2001] QCA 313. See also the remarks on 'reckless indifference' in the judgement of McHugh J in the High Court decision in *Royall* (1991) 172 CLR 378.

⁶¹ Section 18 of the *Crimes Act* 1900 (NSW) defines the fault element of murder by reference to 'reckless indifference to human life'.

The term is reserved for use as technical shorthand for use among lawyers. There is, indeed, no convenient and generally accepted alternative.

Even if 'recklessness' is reserved for technical use among lawyers, the possibility of confusion remains. In murder, *Crabbe* declares that liability requires proof of intention to kill or cause grievous bodily harm or proof that one or other of those results was known to be probable or likely. That requirement has been the subject of controversy in subsequent cases, which will be discussed below. It appears, however, that lesser offences against the person, for which recklessness as to a result is a sufficient fault element, do not require proof that the result was known to be probable. Realisation of some lesser degree of risk is sufficient for those offences⁶² And in offences where recklessness as to a circumstance is in issue, as for example in the offence of rape in jurisdictions where recklessness is a fault element for the offence, realization of any risk at all that consent has not been given is sufficient for guilt.

Recklessness is increasingly accepted as the versatile workhorse among fault elements in Australian criminal law. Its applications range from the most minor offences to the most serious. Apart from occasional divergent usage in Queensland and Western Australia, where recklessness is used as a synonym for gross negligence, it always requires proof that the defendant was aware – to some degree - of a risk that a circumstance existed or that a result might occur. The threshold for murder is meant to be higher than that. It is open to question whether the same concept can be effectively employed both as a fault element for the most serious of offences and as a general, presumptive fault element for all offences.⁶³ The possibility of confusion in other areas of law when courts rely on *Crabbe* as a general authority on the meaning of recklessness, is obvious. The possibility that decisions made in contexts far removed from murder might affect the definition of that offence is even more troubling. It would have been better had the message implicit in *Crabbe* been followed and references to 'recklessness' avoided when defining the fault elements in murder.

There is an additional terminological problem. In its usual technical sense 'recklessness' is often said to require more than knowledge of risk. The commonly accepted technical definition of the term also includes a requirement that the risk was unjustifiable in the circumstances.⁶⁴ It is uncertain, however, what role if any this additional requirement plays in murder or other offences that permit conviction on proof of recklessness. The problem is discussed below.

2. Does Intention in Murder Include Recklessness?

The joint judgement in *Crabbe* reinforced the assertion that recklessness and intention could count as equivalents in blameworthiness with the reflection, drawn from earlier English caselaw, that 'on

⁶² See, for example, the discussion in *Lee* [2001] ATSC 133, in which D was charged with reckless infliction of grievous bodily harm.

⁶³ The potential for incongruity is particularly marked in the Commonwealth *Criminal Code*.

⁶⁴ The Australian origins of this requirement can be traced to the first edition of Professor Colin Howard's *Australian Criminal Law* (1965), which adopted the definition from 2.02 *General Requirements of Culpability* in the *Model Penal Code*, Proposed Official Draft of 1962. Chapter 2 of the *Australian Criminal Code* 1995, defines recklessness as to results as awareness of a risk that is both substantial and, in the circumstances, 'unjustifiable': 5.4 *Recklessness*. For a recent example of judicial definition along similar lines, see *Wilson & Carman* [2005] VSCA 78, para 17.

one view, a person who does an act, knowing of its probable consequences may be regarded as having intended those consequences to occur'.⁶⁵ That suggestion, which was advanced but not endorsed by the Court, was unnecessary to the decision and it has not found favour in subsequent caselaw.⁶⁶ It is, indeed, inconsistent with the accepted view, in trial directions for murder, that intention is a word in ordinary use that does not require explanation. When it is necessary to give a direction on the fault element of knowledge that death or grievous bodily harm was probable, that direction will require a careful distinction of this basis for conviction from liability based on intention to bring about the prohibited result.

3. Possibilities, Probabilities and Expectations

The decision in *Crabbe* makes liability for murder depend on proof of intention to kill or cause grievous bodily harm or on knowledge that those are 'probable or likely' results of the defendant's conduct. No distinction appears to have been intended between likelihood and probability: 'the word "probable" means likely to happen'. It is unlikely that the court meant to imply that the defendant is only guilty of murder if death or grievous bodily harm was known to be more likely than not.⁶⁷ It became clear, however, that probable did not bear that meaning in the subsequent High Court decision in *Boughey*⁶⁸ in which a majority of the Court held that it was sufficient if the prosecution established that the accused knew that there was a 'substantial or real chance, as distinct from a mere possibility' that his conduct might result in death or grievous bodily harm.⁶⁹ The facts of the case are relevant to the statement of principle. The defendant, who was a medical practitioner, caused the death of his sexual partner by manual strangulation. There was evidence that he meant to kill her. The defendant maintained, however, that her death was an accidental consequence of pressure applied to her carotid arteries, with her consent, in an endeavour to heighten her sexual pleasure. That alternative account of events prompted the trial judge to direct the jury that they were to convict even if Boughey meant no harm, if he realized that there was 'a good chance' that death might result or that death was 'something that might well happen'. The majority of the Court found no fault with the direction. Gibbs CJ thought it would have been better to avoid the reference to 'chance', which suggested that realization of a mere possibility might be enough for murder, but concurred with the majority. Consideration of the dissent by Brennan J will be deferred for the moment: his judgement raises a deeper question than these slippery issues of

⁶⁵ *Crabbe*, (1985) 156 CLR 464, ??? citing, among other sources, *Hyam v DPP* [1975] QCA 55 and the judgement of Dixon CJ in *Vallance* (1961) 108 CLR 56, 59.

⁶⁶ See, for example, *Grant* [2002] NSW CCA 243, paras 65-6. Though Brennan J lent support to the passage in *He Kaw Teh* (1985) 157 CLR 527, 570, his discussion in *Boughey* (1986) 161 CLR 10, 43, distinguishes between intention in murder and foresight of the probability of death or grievous bodily harm. In Queensland, the remarkable decision in *Thomson* [1996] QCA 258, entails a firm distinction between intention and foresight of probable consequences. The Appendix to the judgement of Fitzgerald P provides a useful compendium of divergent judicial usage.

⁶⁷ There were earlier indications, in Victorian caselaw, that recklessness did require realization that a result was more likely than not *Sergi* [1974] VR 110. Queensland courts have consistently taken the view that these expressions were to be taken as meaning that a person is reckless only if the result was known to be more likely than not. *Hind & Harwood* [1995] QCA 202; *Deemal-Hall, Darkan & McIvor* [2005] QCA 206; *Thomson*, *ibid*. But those expressions of opinion occurred in cases that involved issues far removed from the fault element of recklessness in murder.

⁶⁸ (1986) 161 CLR 10.

⁶⁹ *Ibid*, Mason, Wilson & Deane JJ, para 15. See, in addition, the subsequent High Court decision in *Wilson* (1992) 174 CLR 313.

chance, likelihood and possibility. So far as current Australian law is concerned, *Boughey* can be taken to have established the propriety of a direction, in an appropriate case, that it is murder if the defendant knew that there was a substantial or real chance, as distinct from a mere possibility, that their conduct would cause death or grievous bodily harm.

The High Court was unanimous in its rejection of the appellant's suggestion that the jury might be directed to quantify the risk in mathematical terms. That was, in any event, impossible in the circumstances of the *Boughey* case. The issue of quantification took a more palpable form in *Faure*,⁷⁰ where the Victorian Court of Appeal expressed the view that a man who said that he killed his girlfriend while playing Russian Roulette with her might be convicted of murder though the odds of causing death were considerably less than 50/50.⁷¹ *Faure*'s conviction was quashed on other grounds and the Court's expression of opinion on the question was not essential to the appeal: it was addressed to the possibility of a retrial.⁷² It does, however, represent the current state of the law on the issue. *Boughey* was paraphrased and *Crabbe* re-stated in a compendious formula:

[A] reasonable jury, properly instructed, should find that the necessary element of danger existed in such a case... 'probable' as contrasted with 'possible but not likely' (*Crabbe* at 469-70) means a substantial, or real and not remote chance, whether or not it is more than 50% (*Boughey* at 21 per Mason, Wilson and Deane JJ)...⁷³

The Commonwealth *Criminal Code* similarly defines recklessness by reference to awareness of a 'substantial' risk.⁷⁴

The caselaw on recklessness and awareness of risk appears to have reached a dead end. Nothing in these slippery permutations of probability, likelihood, real and substantial chances offers any determinate guidance for a jury that must decide whether an accused is to be convicted of murder or manslaughter. Members of the jury are far more likely to be guided by a global view of the circumstances of the death and their intuitive sense of what it takes, morally speaking, for a killing to amount to murder rather than a lesser form of unlawful homicide..

The possibility of a different approach to the problem runs like an occasionally discernible thread through these cases. It surfaces briefly in the unanimous formulation in *Crabbe*, that it is murder if

⁷⁰ [1999] VSCA 166.

⁷¹ The main ground of the prosecution case was that *Faure* meant to kill or injure his victim. *Faure* said that he placed a single cartridge in the chamber of a six shot revolver. He said that his girlfriend agreed that they were each to pull the trigger twice, taking it in turns to hold the muzzle to the other's head. The chamber was spun each time. The fatal shot occurred when he took his fourth and final turn. The Court appears to confuse the estimate of the odds that the cartridge might be discharged with the chance that discharge of the cartridge might kill the girl rather than *Faure*: 'The probability of getting as six in four throws of a die is 671/1296: Eggleston, *Evidence, Proof and Probability*, (2ed), p16.' The Court accepted, however that a jury would be entitled to convict even if the trigger was only pulled once and only one chance was to be taken.

⁷² In the event, *Faure* pleaded guilty to murder at his second trial: *Faure* [2000] VSC 208.

⁷³ *Ibid*, para 36. In *Crabbe*, the High Court suggested an alternative route to the conclusion that a person who plays Russian Roulette with another's life might be guilty of murder: A person who realized that their conduct might possibly caused death or grievous bodily harm could be convicted of murder if 'the act was done with the intention and the for the sole purpose of creating a risk of death or grievous bodily harm.'

The suggestion was not elaborated and it has been ignored in subsequent cases.

⁷⁴ Chapter 2: *General Principles of Criminal Responsibility*, 5.4 *Recklessness*.

the accused person 'does the act *expecting* that death or grievous bodily harm is a probable consequence' (my emphasis). It is the reference to 'expectation' that is significant here, though nothing is said in the judgement to explain its significance and it has been largely ignored in the caselaw that followed the decision in *Crabbe*. Since this is a path not taken, I will be brief.

It seems likely that the origin of the reference to expectation in *Crabbe* derives from the judgement of Jacobs J in the High Court decision in *La Fontaine*.⁷⁵ That was a case involving a fatal gunshot that the offender said was fired to frighten rather than injure his victim. Like other members of the Court, Jacobs J rejected any attempt to quantify the degree of risk in recklessness. He insisted that nothing less than awareness that death or grievous bodily harm was probable would do when liability for murder was in issue. That merely foreshadowed the decision in *Crabbe*. Unlike other members of the court, however, he endeavoured to shift the discussion from the preoccupation with chance or risk to what may be described as the defendant's attitude to the risk or his appreciation of the occasion:

To say that a man knows in his mind that a consequence of his act is probable is to say that he expects that it will happen even though he would be prepared to concede that it is not certain that it will happen. To say that a man who knows in his mind that a consequence of his act is possible though not probable is to say that he believes the consequence is not certain or that he expects it will not happen even though he would be prepared to concede that it may happen. There is a great difference in moral and social content between the first state of mind and the second....The difference...should be preserved in the law of murder.⁷⁶

The sense that Jacobs J sought to give to 'expectation' is elusive and it is not surprising that it has been elided in subsequent cases. It may be that one could elucidate his suggestion by drawing on academic arguments that the critical difference between murder and manslaughter is that the murderer accepts – is prepared to cause – death or grievous bodily harm as a concomitant of their intended course of conduct.⁷⁷ Brennan J, who dissented in *Boughey*, is the only member of the High Court to have perceived the significance of Jacobs J's insistence on the offender's expectations as the critical factor that distinguishes murder from manslaughter. He does not, however, attempt to elucidate the idea: his formulation is gnomic:

Knowledge that there is a good chance that an event may happen is a different state of mind from knowledge (or foresight) that the event will probably happen. One state of mind is an appreciation of a risk, perhaps a substantial risk; the other state of mind is an expectation. I do not put this on any basis of mathematical odds. It is simply that one form of words conveys the meaning of a state of mind different from the state of mind meant by the other form of words.⁷⁸

The effect of the distinction only becomes apparent towards the end of his judgement, when he formulates the question that the trial judge should have asked the jury. It is a blunt question and

⁷⁵ (1976) 136 CLR 62.

⁷⁶ *Ibid.*, ? Discussion of recklessness issues in S Yeo, *Fault in Homicide* (1997), Ch 3: 'The Fault Elements for Murder Under Australian Law'

⁷⁷ See B Mitchell, 'Culpably Indifferent Murder' (1996) *Anglo-American Law Review* 64, 72, on the 'value-deficit killer'; A Halpin, 'Intended Consequences and Unintended Fallacies' (1987) *Oxford Journal of Legal Studies* 104; Alan Michaels, 'Acceptance: the Missing Mental State' (1998) 71 *Southern California Law Review* 953?

⁷⁸ *Boughey* (1986) 161 CLR 10, Brennan J, para 26.

one that eliminates any reference to the offender's 'appreciation of a risk'. If the jury was not satisfied that Boughey intended to kill his sexual partner or cause her grievous bodily harm, Brennan J says that they should have been directed to consider whether, 'when he applied pressure to the carotid arteries...he knew that his action would probably kill her'.⁷⁹

Neither the majority judgement in *Boughey* nor subsequent caselaw lends support to Brennan J's suggestion that trial judges are required to direct juries in these blunt and uncompromising terms when recklessness is in issue in a prosecution for murder.

4. Wilful Blindness

The High Court held that the trial judge had erred in directing the jury that Crabbe might be convicted of murder if the prosecution proved that he was willfully blind to the possibility that his conduct might cause death. The High Court adopted the definition of wilful blindness that Glanville Williams had given in *Criminal Law: The General Part*, which refers to a person who refrained from enquiry concerning a *probable* fact.⁸⁰ If that was the meaning of wilful blindness, the concept had no role to play in the definition of murder, when recklessness with respect to death or grievous bodily harm was in issue. That definition of wilful blindness merely repeats the test for recklessness with the addition of the further and unnecessary requirement that the defendant refrained from enquiry. The reasoning of the court on wilful blindness is shaky and reflects uncertainties about the role of the concept in other High Court decisions of that year.⁸¹ Those uncertainties persist in other areas of criminal law. Whatever the merits of the argument, however, the decision in *Crabbe* effectively banished the notion of wilful blindness from the law of murder when the liability of a principal or solo offender is in issue.

5. Recklessness as to Grievous Bodily Harm?

Only in the two common law states of Victoria and South Australia can recklessness as to grievous bodily harm provide a ground for conviction of murder. In other jurisdictions, where the fault elements for murder are defined by statute or code, recklessness is either not recognized as a fault element, or recklessness as to death is required: Table 1.

There is a persuasive case for restricting liability for recklessness to cases where the accused was reckless as to the probability of causing death. If this restriction is not recognized, the fault element of intention to cause grievous bodily harm becomes redundant. An instruction that the defendant is guilty of murder if the prosecution can establish an intention to cause *some* harm, coupled with awareness that grievous bodily harm is probable will displace the traditional grievous bodily harm instruction in every case. That would amount to an extension of the law of murder that could not be justified, in this particular application, on the ground that recklessness and intention can be taken to be moral equivalents.⁸²

⁷⁹ *Ibid*, para 32.

⁸⁰ Glanville Williams, *Criminal Law: The General Part* (2ed 1961) 159.

⁸¹ See: *Giorgianni* (1985) 156 CLR 473 (complicity); *He Kaw The* (1985) 157 CLR 523 (intention to import/possess prohibited drugs). For a skeptical discussion of the High Court reasoning on the point at issue in *Crabbe*, see S Yeo, *Fault in Homicide* (1997) 70-3. The most recent High Court consideration of the concept can be found in *Roberts v Bass* [2002] HCA 57 (defamation).

⁸² See I Leader-Elliott, 'Recklessness in Murder' (1981) 5 *Criminal Law Journal* 84; S Yeo, *ibid* 73-5

6. Recklessness, Justification, Excuse, Lack of Social Utility and Wanton Conduct

The Commonwealth *Criminal Code* definition of recklessness adopts the requirement that the defendant be aware of a risk that is both substantial and unjustifiable.⁸³ That reflects a common view among academics and practitioners that something more than awareness of risk is required.⁸⁴ Recklessness, in this sense, is the fault element for the specialized forms of murder in the Commonwealth *Criminal Code*. In other jurisdictions there is an arguable case for the conclusion that something more than realization of the risk is required.

A related issue arises in New South Wales, where the definition of murder includes a fault element of 'reckless indifference to human life'. Does that reference to 'indifference' require the prosecution to establish something in addition to the fact that the defendant was aware that death was probable or likely?

There are two possible positions suggested by caselaw and text writers on the question whether the prosecution must prove something additional the defendant's knowledge of probable or likely result, in order to establish recklessness. Since only the first appears to find any substantial support in the caselaw, this account of the alternatives will be brief:

- ***Recklessness in Murder Does Not Include Absence of Justification or Excuse:*** Though contemporary courts and commentators refer to 'recklessness' in murder, the decision in *Crabbe* suggest that recklessness, in this context at least, means nothing more than knowledge that the result was probable. It will be recalled that the Court made no reference to 'recklessness' when stating the law. The point of that abstention appears to have been to emphasise the distinction between this form of fault and negligence. The judgement insists that intention to cause a result and knowledge that a result is likely or probable are equivalent in blameworthiness and, hence, alternative fault elements for murder. That insistence should have procedural consequences in trials for murder. Whether liability is based on intention or knowledge of risk, there may be justification or excuse for the conduct. The possibility that conduct is justified or excused is taken to be quite distinct, however, from the definition of the 'mental state necessary to constitute the crime of murder': 'lack of social purpose is not an element of the mental state with which we are here concerned'.⁸⁵ The accused would have to adduce evidence in support of such a defence before a jury direction would be required. Moreover the trial judge would be required to formulate the elements of the defence for the jury's consideration. So, for example, a competent surgeon who 'performs a hazardous but necessary operation is not criminally liable if the patient dies, even if the surgeon foresaw

⁸³ *Criminal Code* 1995 (Cth), 5.4 *Recklessness*.

⁸⁴ Among textbook authors, see: S Bronitt & B McSherry, *Principles of Criminal Law* (2ed 2005) 179-81 (No requirement that the risk be unjustifiable or unreasonable); B Fisse, *Howard's Criminal Law* (1990) 486-94 (Risk must be 'unjustifiable'); D Brown, D Farrier, S Egger, L McNamara, *Criminal Laws* (3ed 2001) 376-7 (Risk must be 'unjustifiable'). Professor Stanley Yeo discusses the question in his monograph *Fault in Homicide* (1997) 79-90. Though he agrees that 'unjustifiable risk taking should be a necessary requirement of reckless murder', his discussion of the issue is more nuanced and the differences between his eventual position and that adopted in *Howard's Criminal Law* are more significant than their superficial agreement that the risk must be unjustifiable.

⁸⁵ *Crabbe* (1985) 156 CLR 464, para 10.

that...death was probable.⁸⁶ Though the elements of murder can be established, the surgeon has a defence and the conduct is justifiable in the circumstances. There remains, of course, a question whether the range of justifications and excuses is more generous when the prosecution case is based on knowledge that a result is probable, rather than intention to cause that result. That question is considered below.

- ***Recklessness in Murder is an Amalgam of Realisation of Risk and Absence of Social Value:*** Four editions of Professor Colin Howard's text on Australian criminal law between 1965 and 1981 vigorously promoted the view that the 'social value' of the defendant's conduct cannot be separated from consideration of the degree of risk necessary for liability when recklessness is in issue.⁸⁷ The argument was presented, with scarcely diminished force, in Professor Brent Fisse's reworking of Professor Howard's text in 1990.⁸⁸ They agree that the disregard of a risk that accompanies conduct is not reckless, if the conduct has 'social value that outweighs the social harm of the danger inherent in the risk'.⁸⁹ If the risk is unjustified, however, 'its degree of probability or substantiality need be only very slight to suffice for recklessness, no more than enough to move from the apparently impossible to the apparently possible'.⁹⁰ Later, it is suggested that realization of a 'bare possibility' is sufficient.⁹¹

There are two conclusive objections to the proposal advanced by Howard and Fisse when liability for murder is in issue. The first is simply that the argument has failed to persuade the courts, which continue to insist that murder requires proof of intention or knowledge of something more than a 'slight' or merely 'possible' chance that death or grievous bodily harm will result. The second is that the threshold for murder would be unacceptably low if mere lack of 'justification' was sufficient for conviction when combined with realization of a slight risk of death or grievous bodily harm. Justification is a demanding standard and one that is not divisible by degrees of departure from a norm. If, as Howard and Fisse suggest, murder requires nothing more than knowledge of a 'bare possibility'⁹² that the worst will happen, some more significant departure from acceptable standards of conduct should be required, if the distinction in moral blameworthiness between murder and manslaughter is to be maintained.⁹³

⁸⁶ Ibid.

⁸⁷ *Australian Criminal Law* (1ed, 1965); *Australian Criminal Law* (2ed, 1970); *Criminal Law* (3ed, 1977); *Criminal Law* (4ed, 1991).

⁸⁸ *Howard's Criminal Law* (1990) 486-94. Some degree of doubt is apparent in Prof Fisse's additions to the original text at 491: 'It may be argued that murder is a distinctively egregious offence...&c'

⁸⁹ Ibid, 490.

⁹⁰ Ibid, 490-1.

⁹¹ Ibid, 493.

⁹² Ibid 493.

⁹³ The problem is equally apparent in the Commonwealth *Criminal Code* formulation in 5.4 *Recklessness*, which similarly makes liability depend on proof that the risk was unjustifiable. Compare the formulation in the US *Model Penal Code* – Proposed Official Draft (American Law Institute 1962), s2.02(2)(c) which adds to the requirement of a 'substantial and unjustifiable risk' the further requirement that disregard of the risk 'involves a gross deviation from the standard of conduct that a law-abiding person would observe....' Compare Jacobs J in *La Fontaine* (1976) 136 CLR 62, ?? . If the question of motive or social value is to be taken into account when murder by recklessness is in issue, 'then I have no better expression of the elements than that by Traynor J in *People v Thomas*....who referred to a "base, anti-social motive...with wanton disregard for human life"'.

In New South Wales, s18(1) of the *Crimes Act* 1900 requires conviction for murder if the prosecution can prove intention to kill or cause grievous bodily harm or 'reckless indifference to human life'. There is a question whether the reference to 'indifference' requires something in addition to proof that the defendant knew that death or grievous bodily harm was likely to result from their conduct. Several members of the High Court considered the meaning of reckless indifference in *Royall*.⁹⁴ All agreed that *Crabbe* provided authoritative guidance on the meaning of the NSW statutory provision. It requires proof that the defendant knew that death was probable or likely. Unlike common law, the statute does not recognize knowledge of the risk of grievous bodily harm as a fault element for murder. Toohey and Gaudron JJ said that the direction must make it clear to the jury that 'reckless indifference involves a willingness to run the risk of the probability, as distinct from the possibility of death ensuing.'⁹⁵ That reference to 'willingness' effectively dilutes the original requirement of 'indifference'. There is no distinction between deciding to take a risk, with whatever regret or reluctance, and being willing to take a risk. Of the other members of the Court who considered the issue, none imposed any requirement additional to *Crabbe*. Appellate decisions in the New South Wales Court of Criminal Appeal since *Royall* tend to confirm the view that knowledge that death is likely or probable – as those terms are currently understood - is all that the prosecution need prove in order to establish fault in murder.⁹⁶

INTENTION AND RECKLESSNESS IN MURDER: THE PROBLEM OF COMPLICITY

People who band together in a joint criminal enterprise are guilty of any offence that is within the scope of their criminal plan. That will include offences that may have seemed highly unlikely at the outset. Burglars may have taken every precaution to ensure that they timed their break-in to occur when the householder was absent. One does the break and enter and the other is the driver of the getaway car. Suppose, however, that the householder appears quite unexpectedly and is shot and killed intentionally by the burglar who broke into the house. If they had resolved to shoot the householder, in the remote eventuality that she might unexpectedly return, the getaway driver is equally guilty with the burglar who fired the shot. It does not matter that the chance of a shooting was a remote one. Suppose, however, that violence was no part of their plan. The driver made it quite clear to his fellow burglar that he wanted no part in violence. Australian common law still holds him guilty of murder, however, if the prosecution can prove that he knew that his fellow burglar might use his gun to shoot the householder. This is the 'extended' joint enterprise or common purpose rule. There is no requirement, in this case, of proof that the driver knew that a shooting was likely or probable. It is sufficient if the driver foresaw the shooting 'as a possible incident of the venture'.⁹⁷ And, if that were so, it would make no difference if the driver was a dupe who had been tricked into believing that he was engaged in a burglary by the other offender who

⁹⁴ (1991) 172 CLR 378; [1991] HCA 27.

⁹⁵ *Ibid*, para 37.

⁹⁶ See, for example: *Grant* [2002] NSWCCA 243; *Katarsynski* [2005] NSWCCA 72

⁹⁷ *Gillard* [2003] HCA 64, para 112, per Hayne J: 'the contemplation of a party to a joint enterprise includes what that party foresees as a possible incident of the venture. If the party foresees that another crime might be committed and continues to participate in the venture, that party is a party to the commission of that other, incidental, crime even if the party did not agree to its being committed.' Hayne J's statement of the principle is uncontroversial and accepted by other members of the Court. The case is the most recent of a series in which the High Court has enunciated the same rule. See *Johns* (1980) 143 CLR 108; *McAuliffe* (1995) 183 CLR 108.

was in fact a contract killer, who knew the householder would be at home and who had been hired to shoot her.⁹⁸

It has been argued that the extended joint enterprise doctrine is unjust in its inculpatory breadth when murder is in issue. In *Gillard*,⁹⁹ the most recent High Court authority, Kirby J was particularly concerned that the extended operation of the joint enterprise or common purpose rule came close to eliminating the possibility that the jury might return a verdict of manslaughter in these cases. Though Kirby J indicated his willingness to reconsider the doctrine in that case, other members of the High Court declined to do so.¹⁰⁰

A person who is a minor participant in a joint enterprise may be convicted of murder though one could not say that that the person was reckless, in the current sense of the word, with respect to death or grievous bodily harm. There is a difference between the knowledge of 'possibility' required by the extended joint enterprise doctrine and the requirement of knowledge of likelihood, probability or of a substantial, or real and not remote chance that is required when recklessness is in issue. It must be doubtful, however, whether the difference would be readily identifiable by a jury. To the extent to which that difference can be identified, the comparative severity of the extended joint enterprise doctrine might be justified as an adjunct to doctrines of constructive murder which prevail, in one version or another, in most Australian jurisdictions. That appears to have been the underlying argument in favour of the extended doctrine since the decision of the High Court in *Johns*.¹⁰¹

In the Commonwealth *Criminal Code*, recklessness in murder and the common purpose rule merge. Recklessness requires proof of awareness of a 'substantial and unjustifiable risk' of death. Complicity and common purpose extend to include 'recklessness' as to the 'offence (including its fault elements) that the other person in fact committed'.¹⁰² Elsewhere, courts appear to avoid references to recklessness when complicity is in issue.

RECKLESSNESS AND THE DEFENCES

The Victorian Court of Criminal Appeal has accepted that directions on provocation and self defence would be required in appropriate circumstances.¹⁰³ Of more significance, however, is the suggestion in *Crabbe* that necessity would provide a defence to murder when liability rests on an allegation of recklessness rather than intention. In general, Australian common law does not permit defences of necessity or duress to justify or excuse murder when death is caused intentionally.¹⁰⁴ Cases involving the separation of conjoined twins, where one twin's life must be

⁹⁸ *Gillard*, *ibid.*

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.* See, in particular, Kirby J at para 88; Hayne and Gummow JJ, at paras 31 and 113.

¹⁰¹ *Johns* (1980) 143 CLR 108

¹⁰² See Chapter 2: *General Principles of Criminal Responsibility*, 5.3 *Recklessness*; 11.2 *Complicity and common purpose*, ss(3)(a).

¹⁰³ *Ince* [2001] VSCA 214 (12 December 2001)

¹⁰⁴ If surgical operations and the like are characterised as intentional inflictions of 'harm' (as for an example in *Consent in the Criminal Law*, Law Com CP No139, 1995, Part VIII 'Medical and Surgical Treatment; and, similarly, in the *Australian Model Criminal Code* – Chapter 5: *Non Fatal Offences Against the Person*, Report (1998) 119-29), then it is obvious that necessity will excuse the intentional infliction of 'grievous bodily harm' when the operation is done with the consent of the patient for good medical cause.

sacrificed to save the other are an exception, but that exception can hardly be generalized.¹⁰⁵ When death is not intended, however, conduct that imposes a risk of death or grievous bodily harm may be justified by necessity and perhaps excused by duress. Caselaw since *Crabbe* provides no further guidance on the possibility. The Commonwealth *Criminal Code* offences of murder do permit duress and necessity to excuse murder, whether intention or recklessness provides the basis for conviction.¹⁰⁶ It is unlikely, however, that many State legislatures will follow the Commonwealth lead in this respect and prosecutions for the Commonwealth offences will be rare.

It may be that a far more generous definition of the necessity defence would be appropriate when liability is based on knowledge of a risk rather than intention to bring about the result. Necessity, however formulated, might not exhaust the possibilities. In his monograph on *Fault in Homicide*, Professor Stanley Yeo argues that a 'broad rendition of justification and excuse is required to reflect the human reality that dangerous behaviour is often tolerated by the community in situations where the recognised defences are inapplicable'.¹⁰⁷ The High Court found it unnecessary to consider the issue in *Crabbe* and subsequent cases take the debate no further. Almost always, the defendant in these cases has engaged in conduct that is utterly inexcusable. The one possible exception is Dr Boughey, if one suspends disbelief and accepts his story that he intended to give his partner sexual pleasure, rather than kill or injure her. There is, however, no trace of any suggestion in the majority or minority judgements that consensual sexual activity might excuse conduct that was known by the accused to involve a real rather than remote chance or possibility of death or grievous bodily harm. The question whether 'reckless murder' might require the development of more extended forms of defence than 'wilful murder' is one of great theoretical interest which also involves issues of 'oblique intent'. It is unlikely, however, to receive much consideration in the caselaw. Insistence on realization that recklessness requires proof that grievous harm was known to be probable or likely or a real not a remote chance, coupled with the exercise of prosecutorial discretion, can be expected to restrict the applications of recklessness to cases lacking any semblance of justification or excuse.

¹⁰⁵ See *Re A (Children) (Conjoined Twins: Surgical Separation)* [2001] 2 WLR 480. The case has been followed in Queensland. See: *State of Queensland v. Nolan & Anor* [2001] QSC 174 (31 May 2001)

¹⁰⁶ See *Criminal Code* (Cth) 71.2 *Murder of a UN or associated person*; 104.1 *Murder of an Australian citizen or resident of Australia*. The defences can be found in Chapter 2, *General Principles of Criminal Responsibility* – 10.2 *Duress*; 10.3 *Sudden or extraordinary emergency*.

¹⁰⁷ *Fault in Homicide* (1997) 86.

Murder and Related Issues: An Analysis of the Law in Canada

Report for The Law Commission

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July 27th, 2005

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I: Murder²

1. An Overview³

Under the Canadian Constitution⁴, Criminal Law is a matter within federal legislative competence, and so, unlike the U.S. or Australia, Canada has one uniform system of Criminal Law that applies across Canada⁵

The homicide provisions are found within Part VIII the *Criminal Code*⁶ and Section 229, which defines murder, provides:

“Culpable homicide is murder

- (a) where the person who causes the death of a human being
 - (i) means to cause his death, or
 - (ii) means to cause him bodily harm that he knows is likely to cause his death and is reckless whether death ensues or not;
- (b) where a person meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or

² Manslaughter and other related offences, including causing death by criminal negligence, dangerous driving causing death and impaired driving causing death are outside the scope of this paper.

³ www.canlii.org is a very useful website which permits free access to Canadian legislation (federal and provincial) and decisions from all provinces.

⁴ *Constitution Act, 1867* (U.K.), 30 & 21 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 91(27). (formerly *The British North America Act*)

⁵ The provinces can create *regulatory* offences and can impose penal consequences, (ibid s. 92) but cannot create “criminal” offences.

⁶ Part VIII of the *Criminal Code*, R.S.C. 1985 C. C-46, as amended. All references to section numbers are to sections of the Criminal Code (unless otherwise indicated)).

Part VIII “ Offences Against the Person and Reputation” includes the section on “Homicide” That section includes a definition of “culpable homicide”; the poorly drafted causation provisions; the sections dealing with murder; manslaughter (all culpable homicide that is not murder or infanticide) and infanticide and a section defining first degree murder. It also includes the offence of killing an unborn child in the act of birth (s. 238), and separate provisions dealing with attempts to commit murder (s. 239) and accessory after the fact to murder (s. 240) both necessitated because of the increased punishment for such offences (maximum of life imprisonment). Other provisions dealing with the parole eligibility for 1st and 2nd degree murder are found in Part XXII of the Code on “Sentencing”).

- not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being; or
- (c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

A conviction for murder under s. 229 carries a mandatory sentence of life imprisonment (s. 235(1)). In the case of first degree murder there is no parole eligibility for 25 years⁷ (subject to s. 745.6(1) which permits the possibility of judicial review of the parole ineligibility period after 15 years).⁸ In the case of second degree murders (all murders which are not first degree) the period of parole ineligibility is anywhere from 10 to 25 years⁹.

2. Proof of culpable homicide

Section 229 is rather tortuous in that it requires proof of culpable homicide as a necessary first step in establishing murder (“culpable homicide is murder where...”) ¹⁰. If culpable homicide has been established, but the Crown cannot prove that the accused had the requisite intent for murder, then the accused will be convicted of manslaughter. ¹¹

Culpable homicide is dealt with in the Code in sections 222 - 228. A person commits culpable homicide when he causes the death of a human being in one of the ways specified in s. 225 (5). In the vast majority of cases the subsections relied on are 222(5)(a) “by means of an unlawful act” or (b) “by criminal negligence”¹². While those sections are of key significance in manslaughter cases, they do not play a major role in the vast majority of murder since there is usually no problem in establishing that death was caused by an unlawful act¹³ and the most contentious issue is whether the accused possessed the requisite *mens rea*.

⁷Section 745(a).

⁸ That possibility does not apply in the case of multiple murders where the period of parole ineligibility cannot be reviewed. (s. 745.6(2))

⁹Code, ss. 235 and 745. The period is determined by the judge (s. 745.4) but he/she must give the jury the option of recommending the requisite period. The jury is not obliged to make a recommendation, and if it does make one, the judge is not obliged to follow it.

¹⁰It follows the English Draft Code of 1879.

¹¹Section 234. The third, and rarely encountered form of culpable homicide, infanticide, is defined in s. 233. It is discussed in more detail infra.

¹²S.222(5)(c) and (d) are seldom used ((c) causing death by threats, fear of violence or deception and (d) wilfully frightening children or sick persons).

¹³Theoretically culpable homicide caused by criminal negligence could be used as a foundation for

The issue of causation, however, does deserve brief mention. The culpable homicide provisions speak of “causing the death¹⁴ of a human being”¹⁵ and the Code, without attempting to define causation, contains a number of poorly drafted examples of causation in action (sections 224-228). Because these provisions are poorly drafted, and even tautologous, courts have tended to ignore them and have developed their own rules on causation.¹⁶ The general rule, which applies to all homicide cases, is that a person causes a death when his conduct can be described as “outside the *de minimis* range” in relation to the death of the victim. That rule, described in one case as a “a sweeping rule of accountability”¹⁷ has been challenged as contrary to section 7 of the *Charter*. However, in a recent decision, *R. v. Nette*, the Supreme Court by a 5-4 majority affirmed the rule but indicated that it was preferable that the rule be reworded as “significant contributing cause” in relation to the death. The majority specifically disavowed any intention to alter the law, and indicated it was simply making the rule easier for jurors to understand by avoiding Latin expressions, and by expressing the rule positively rather than negatively. A minority of the court was of the view that the redrafting meant a change in substance and that the rewording would be interpreted as creating a more stringent rule on causation. It seems clear, especially following the clarification of the rules in *Nette*, that the causation rules in England and Canada are relatively similar in their application.¹⁸

There is, however, a more stringent causation rule (the “Harbottle rule”) which applies *only*

murder, but in practice is extremely unlikely to do so. One example might be that of a parent who withholds necessities of life in order to kill a dependent child. Incidentally this would also involve an unlawful act (failure to provide necessities under s. 215).

¹⁴Section 222(1): A person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.

¹⁵“Human being” is defined in s. 223 - the child must have proceeded in a living state from its mother but it is immaterial whether it has breathed, has an independent circulation or the navel string has been severed. The archaic language used indicates the vintage of this provision. It is homicide when a person causes injury to a child before or during its birth if the child dies of the injury after becoming a human being - s. 223(2).

¹⁶See *Smithers v. R* [1978] 1 S.C.R. 506 but note that more recently in *Nette* [2001] 3 SCR 488 the Supreme Court emphasized that courts should be applying both statutory and common law rules..

¹⁷ *R. v. F (D.L.)* (1989), 73 C.R. (3d) 391 (Alta C.A.)

¹⁸The “thin- skull” rule is alive and well in Canada - see *Smithers supra note 16* and it was approved more recently in *Creighton* [1993] 3 S.C.R. 3 (S.C.C.) and survived a Charter challenge in *Cribbin* (1994), 89 C.C.C. (3d) 67 (Ont C.A.). While there are no cases similar to the English decision in *Blaue* [1975] 1 WLR 1411 (Eng C.A.) on the refusal by a Jehovah’s Witness to have a blood transfusion, it is assumed that the finding would be similar.

to parties to first degree murder within s. 231(5)¹⁹ It is first degree murder under s. 231(5) where the murder is “caused by that person” while committing or attempting to commit one of a list of enumerated offences,(including kidnapping and sexual assault), and the Supreme Court held that the Crown must establish that the actions of the accused were a “substantial and integral cause of death”. To be liable for first degree murder (with ensuing ineligibility for parole for 25 years) the accused will usually have had actual physical contact with the victim . In *Harbottle*, for example the accused held the legs of the victim while his co -accused strangled her. It was held that his participation was sufficient to render the party liable for first degree murder s. 214(5) now s. 231(5). On the other hand if he had simply kept watch at the door or sat in a getaway car he would have been guilty only of second degree murder.²⁰

3.. The Impact of the Charter²¹ on Murder: The Supreme Court strikes down the “Felony/Murder” provisions.

Prior to the Supreme Court of Canada decisions in *Vallaincourt*²² and *Martineau*²³ there were two separate Code provisions dealing with murder : the present s. 229 (formerly s. 212) and another section dealing with “felony murder”²⁴ (s 230 formerly s. 213) but those decisions resulted in the striking down of the “felony murder” provisions of the Code, leaving only what is now section 229.

In *Vaillancourt* the court considered the constitutionality of s. 213(d) which provided that it was murder where the accused caused the death during the course of one of the listed triggering offences (or subsequent flight after commission), the *accused used a weapon or had it upon his person, and death ensued as a consequence*. The court found that s. 213(d) infringed s. 7 of the *Charter*²⁵ and the government was unsuccessful in its attempt to have the section upheld under s.

¹⁹ *Harbottle* [1993] 3 S.C.R. 306. It will also apply under s. 231(6) which is worded similarly.

²⁰There are dicta suggesting that both could have been convicted of first degree murder under s. 231(2) (planned and deliberate murder) even though the decision to kill the victim was formed quite shortly before her death.

²¹ *Canadian Charter of Rights and Freedoms*, Part I of the *Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

²²[1987] 2 S.C.R. 636, 39 C.C.C. (3d) 118

²³ [1990] 2 S.C.R. 633, 58 C.C.C. (3d) 353

²⁴This is a nickname because Canada has never used the felony/misdemeanour distinction.

²⁵Section 7 provides: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” In the *B.C. Motor Vehicle Reference case (Reference re s. 94(2) of the Motor Vehicle Act (B.C.))* [1985] 2 S.C.R. 486

¹²⁶. Under the impugned subsection, an accused could be convicted of murder in the absence of objective foresight of death, a principle that the court considered to be a fundamental principle of criminal liability. Following that decision there was a cosmetic repeal of the subsection in 1991 and it no longer appears in the Code.

In its subsequent decision in *Martineau* the Supreme Court considered another of the felony/murder subsections - now still printed in the Code as s. 230(a) (formerly 213(a)). Under that provision it was murder where the accused “means to cause bodily harm for the purpose of facilitating the commission” of one of the triggering offences (or flight afterwards). That, too, was found to be contrary to the Charter. A majority of the court went even further than it was prepared to go in *Vaillancourt*, and held that *subjective* foresight of death is a constitutional requirement for murder, and a provision defining murder as requiring anything less than that level of *mens rea* was unconstitutional, and could not be saved under s. 1.²⁷ Since those Supreme Court decisions the felony murder sections of the Code have been a dead letter but, because they have never been repealed by Parliament, they are still printed in the Code which must create confusion for anyone who happens to read the Code.

The Charter has also had an impact on other murder provisions. For example what is now s. 229(c) (formerly s. 212(c)) (discussed in more detail *infra*) was used quite frequently during the eighties prior to the decisions in *Vaillancourt* and *Martineau*. However, since the Supreme Court had held in *Martineau* that murder requires proof of subjective foresight of death then s. 229(c) which contains the words “ought to know” was clearly problematic and in *Martineau* the Court had indicated that its reasoning cast serious, if not fatal doubt, on the objective portion of s. 229(c). It was unclear whether that rendered the whole section suspect, but in *Meiler*²⁸ the Ontario Court of Appeal held that the objective portion of the section (“ought to know”), was unconstitutional, but otherwise upheld the section. Thus section 229(c) now requires proof of an unlawful object,

one of the most important decisions ever rendered by the Court, the Supreme Court had decided that section 7 permitted substantive review of legislation and it was not confined to a review of procedural issues.

In *Vaillancourt* the Court also found a violation of s. (11(d) of the Charter (the presumption of innocence).

²⁶Section 1 provides: The Canadian Charter of Rights and Freedoms guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society. The onus is on the government to justify infringement of Charter rights.

The key decision on point is *R. v. Oakes* [1986] 1 S.C.R. 103). There have been innumerable appeals to the Supreme Court on the interpretation of this ruling. A detailed consideration of the ruling is outside the scope of this paper.

²⁷ See too *Sit* [1991] 3 S.C.R. 124, 66 C.C.C. (3d) 449).

²⁸(1999), 136 CCC (3d) 11 (Ont. C.A.).

and that the accused did something that *he knew* was likely to cause death and thereby caused death, notwithstanding that he did not desire that death.

The Charter has also played a significant role in interpreting the first degree murder provisions (s. 231).²⁹

4. The Mens Rea of Murder under s. 229.

(i) Section 229(a)(i) :Means to Cause Death

This covers the paradigm case of murder : where the accused’s purpose was to cause the death of the victim. Since the accused’s motive in killing the victim is irrelevant, “mercy killing”³⁰ is included along with the most vicious and depraved murders.

The section speaks of meaning to cause “his death” which seems to assume the existence of a particular victim (transferred intent is addressed in s. 229(b)). However this section must surely also cover the case of the terrorist who plants a bomb hoping to cause the deaths of anyone caught in the ensuing explosion.

While English courts have been grappling over the past 40-50 years with the requisite intent for murder, stretching from the notorious decision in *DPP v. Smith*³¹ to the more recent decisions in *Moloney*, *Hancock*, *Nedrin* and *Woollin*.³² Canadian courts, on the other hand, seem to have given the matter much less consideration (perhaps not surprisingly, given that there is an extended definition of murder under s. 229(a)(ii) (discussed below) and as a consequence the mental element under section 229(a)(i) has not been the subject of extensive discussion.

Does this subsection include other mental states, for example “oblique intent” where consequences are foreseen as virtually certain but were not desired by the accused? In other contexts Canadian courts have approved of the use of “oblique intent”, for example under the

²⁹Discussed in more detail infra

³⁰*Latimer* [2001] 1 S.C.R. 3 (discussed in more detail infra. See “Defences - Necessity).. There has been much criticism of the failure to acknowledge the acceptability of some forms of euthanasia (see for example the Special Senate Committee on Euthanasia and Assisted Suicide “Of Life and Death” (Ottawa: Minister of Supply and Services, 1995) advocating a new offence of compassionate homicide.

³¹[1961] A.C. 290

³²*R. v Moloney* (1985), [1985] AC 905, [1985] 1 All ER 1025 (H.L.).
R. v Hancock (1986), [1986] A.C. 455, [1986] 2 W.L.R. 357 (H.L.).
R. v Nedrick (1986), [1986] 1 W.L.R. 1025, 83 Cr. App. R. 267 (CA (Crim Div)).
R. v Woollin (1998), [1999] 1 A.C. 82, [1998] 3 W.L.R. 382 (H.L.).

section dealing with promotion of racial hatred³³ but the issue does not appear to have arisen in the context of murder. However, it seems generally assumed that the classic bomb in the airplane where the accused wanted to collect insurance proceeds, but hoped not to kill the crew when the bomb exploded in flight, would be found to have the requisite intent for murder.³⁴ It can certainly be argued that a doctor who administers large quantities of medication for the immediate purpose of relieving the patient's suffering and who knows that the drugs will certainly hasten death, should be held to have intended the death, though one would hope that prosecutorial discretion would play a significant role in such cases.

Under Canadian law, one issue that deserves mention in the context of proof of intent is that of the so-called "rolled-up charge" where multiple defences have been raised by the accused, most commonly self defence, intoxication and provocation. The jury may reject each individual defence but should it consider the *cumulative* effect of all of them on the issue of whether the accused had the requisite intent for murder?³⁵ This has an impact on both s. 229 (a)(i) and 229 (a)(ii) but is best considered after a discussion of defences to murder. That issue is clearly related to the issue of proof of intent but is better dealt with after consideration of the defences to murder.

(ii). Section 229(a)(ii) "Means to cause bodily harm that he knows is likely to cause his death and is reckless whether death ensues or not"

This subsection has proved more problematic than that discussed above. It is awkwardly expressed and its meaning is not clear. Cory J. in *R. v. Nygaard*³⁶ states that the culpability scale between what are now s. 229(a)(i) and (ii) "varies so little as to be indistinguishable". In both *Nygaard* and *Cooper* (infra) Cory J. opined that the part of the section that refers to recklessness is redundant. because once it is established that the accused intentionally caused bodily harm, knowing that death was likely, then almost inevitably it will be found that the accused was reckless about the ensuing death.

³³*R. v. Buzzanga and Durocher* (1979), 49 C.C.C. (2d) 369 (Ont C.A.). Wilfully promoting hatred included the situation where accused foresaw that the promotion of hatred was certain or morally certain to result from distribution of a pamphlet. Applied in *Chartrand* (1994) 31 C.R. (4th) 1 (S.C.C.) Although Canadian courts have acknowledged the legitimacy of "oblique intent", there are no Canadian authorities exploring whether the accused himself must be aware of the inevitability of the consequences.

³⁴See for example Stuart: *Canadian Criminal Law*, 4th ed (Toronto: Carswell 2001) at p 219 (hereafter "Stuart") while accepting that this would constitute intention, doubts the value of a concept such as "foresight of certainty" which in his opinion is an unnecessarily complicated and esoteric adjunct to the comprehensible concept of intention.

³⁵ See e.g., *Rv. Nealy* (1986), 30 C.C.C. (3d) 460 (Ont C.A.) approved obiter in *R. v. Robinson* [1996] 1 S.C.R. 683 (S.C.C.). This is discussed more fully at the conclusion of the section on "defences"

³⁶[1989] 2 S.C.R. 1074

In *Cooper*³⁷ the accused became angry with the deceased, grabbed her by the throat with both hands and shook her. He said he could recall nothing after that until he awoke in his car and found her body beside him (he had consumed a considerable quantity of alcohol). The Supreme Court held that the requisite *mens rea* for murder under s. 212(a)(ii) (now s. 229(a)(ii)) represents only a slight relaxation of the *mens rea* for intentional killing. There must be subjective intent to cause bodily harm and subjective knowledge that the bodily harm is of such a nature that it is likely to result in death. While the *mens rea* must be concurrent with the impugned act, it is not always necessary for the act and the intent to be completely concurrent. Where there is a series of wrongful acts resulting in death, it is sufficient that the *mens rea* at some point coincides with the acts. Nor was it necessary for the Crown to establish that the intent persisted throughout the entire act of strangulation. (Lamer J. dissenting of the view that intentionally choking someone for a few seconds might not fall within the section since there was no intention to cause death, or to cause harm that knew likely to cause death, particularly in a case where alcohol played a role).

Situations of pure recklessness, for example driving at 100 k.p.h. along a busy street knowing that pedestrians are exposed to serious risk, fall outside the murder provisions because there is no intent to cause harm (as required by this subsection) and even if oblique intent can be utilized, the result is not practically certain to result. But what of the terrorist who places a bomb and gives notice of it, intending to cause panic, alarm and confusion but with the expectation that it will be disarmed before it explodes? What if the bomb explodes unexpectedly killing bystanders – is he guilty of murder? He falls outside s. 229(a)(i) but what of (ii)? There may well be a problem in convicting him under s. 229(a)(ii) because he did not have the intent to cause bodily harm, and even if oblique intent were argued, it may be doubtful whether bodily harm was certain or virtually certain to result. In any event it might be simpler to use s. 229 (c) (*infra*) in such a situation.

Is murder ever appropriate in cases involving transmission of HIV? What about the accused who is HIV positive and has been warned not to have sex without informing his partners of his status and that he must never have unprotected sex? What if he goes ahead anyway, infects the victim who subsequently dies? These cases are certainly problematic and there is no easy solution. Prosecutions have been brought under a number of provisions including criminal negligence causing bodily harm, sexual assault, aggravated assault and so on³⁹ with the courts

³⁷[1993] 1 S.C.R.. 146, 78 C.C.C. (3d) 289

³⁹In *Cuerrier* [1998] 2 S.C.R. 371, the Supreme Court approved of the use of aggravated assault (assault that *inter alia* endangers life) reasoning that the complainant's consent had been vitiated by the non-disclosure of the accused's status which was found to constitute fraud. The later Supreme Court decision in *Williams* (2003), 176 C.C.C. (3d) 449 (S.C.C.) illustrates some of the difficulties in this area. Accused was charged with aggravated assault (assault endangering life). The Crown could not establish that the transmission occurred after the accused was aware of his status (the relationship existed both before and after he was tested and if transmission occurred before he was aware of being HIV positive then the Crown could not establish the concurrence of *actus reus* and *mens rea*) and the solution was to enter a conviction for *attempted* aggravated assault.

being forced to shoe-horn a new problem into existing offences. Because of the difficulties in establishing *mens rea*, it has generally been the view that murder or attempted murder charges would not be successful in this situation. However, just recently, and somewhat surprisingly, one, *Azega*, who knowingly infected two women who subsequently died of AIDS, has been charged with first degree murder. Since it is unlikely that the accused intended to kill the women, it is assumed that the Crown will be relying on s. 229(a)(ii) - but even that seems problematic. It seems doubtful whether he intended to cause bodily harm - and even the use of oblique intent in this situation also presents problems, given that the consequence (the bodily harm by transmission of the virus) was not virtually certain to occur nor is it likely that the Crown will be able to establish that the accused had foresight of *death*. The trial is scheduled to commence in Hamilton, Ontario in August of this year (2005) but first degree murder seems something of a stretch in this situation.

The subsection requires proof that the accused knew that the bodily harm was “likely” to cause death and such terms are likely to tempt judges to go into a detailed explanation of degrees of probability. As far as directions to the jury are concerned, the best advice seems to be to stick as closely as possible to the actual words used in the sub-section. Efforts to explain what is meant by “likely” may well provide a ground of appeal and are best avoided³⁸

In *Nygaard & Schimmens*⁴⁰, the Supreme Court has held that what is now s. 229(a)(ii) can be used in conjunction with s. 231(2) so that this second type of murder can constitute first degree murder that is “planned and deliberate”. The two accused had planned and executed a vicious attack on the victim with a baseball bat knowing full well it could result in his death, and it was held that intention to carry out such an assault leading to the victim’s death could constitute a planned and deliberate first degree murder.

(iii) Section 229(b) Transferred intent

Culpable homicide is murder.....

(b) where a person meaning to cause death to a human being or meaning to cause him bodily harm that he knows is likely to cause his death, and being reckless whether death ensues or not, by accident or mistake causes death to another human being, notwithstanding that he does not mean to cause death or bodily harm to that human being.

This is one of the few Code provisions that expressly recognize transferred intent, although the courts have also recognized the common law doctrine of “transferred malice”⁴¹

³⁸ See e.g. *R. v. Edelenbos* (2004), 187 C.C.C. (3d) 465 (Ont C.A.) (although no prejudice was shown in the particular facts of the case); *R. v. Dove* (2004), 187 C.C.C. (3d) 506 (B.C.C.A.)

⁴⁰ *supra* note 36

⁴¹ *Deakin* (1974), 16 C.C.C. (2d) 1 (Man C.A.) and approved obiter in *R. v. Droste* (No 2) (1984), 10 C.C.C. (3d) 404 (S.C.C.)

The section covers both accidental and mistaken deaths. A shoots at B but hits C instead and the situation where A shoots at B thinking he is C. In *Droste*⁴² the accused, intending to kill his wife, soaked the inside of the car with gasoline. A fire started and their two children were killed but he and the wife survived. He was convicted of the first degree murder of the children. This situation is clearly within s. 229(b) and so D was certainly guilty of murder but was it first degree murder on the basis that it was “planned and deliberate”? The Supreme Court agreed that it was. Dickson J. for the majority relied on the courts earlier decision in *Farrant*⁴³ that s. 231 (the first degree murder section) is only a sentence-classifying provision and that the distinction between first and second degree murder is not based on intent. It did not matter that he had planned the death of the wife, not the children - it was simply a matter of statutory construction and there was no need to apply the common law doctrine of transferred intent (though in obiter the court approved of its use had it been necessary).

Is s. 229(b) applicable where A intending to kill *himself*, by accident or mistake kills another? In *Fontaine*⁴⁴ the accused, intending to commit suicide, deliberately drove his car with 3 passengers into a parked trailer, killing one and injuring the other passengers. On appeal it was held that the section does not apply in this situation because the intention to commit suicide carries a lesser moral blameworthiness than the intention to kill another (attempted suicide is not even an offence) and the two situations are so different that this should not be encompassed within s. 229(b)

iv . Section 229(c) Unlawful Object Murder

Culpable homicide is murder

- (c) where a person, for an unlawful object, does anything that he knows or ought to know is likely to cause death, and thereby causes death to a human being, notwithstanding that he desires to effect his object without causing death or bodily harm to any human being.

This section, formerly used with some regularity, has for the time being fallen out of favour. It is based on English Draft Code of 1878 and has been in Code since 1892, with only some cosmetic changes.

The leading decision on this subsection is *Vasil*⁴⁵. In that case the accused, a chronic

⁴²supra note 41

⁴³[1983] 1 S.C.R. 124

⁴⁴(2002), 162 C.C.C. (3d) 360 (Man C.A.) - rejecting *R. v. Brown* (1983), 4 C.C.C. (3d) 571 (Ont H.C.)

⁴⁵[1978] 1 S.C.R. 469, (1981), 58 C.C.C. 97

alcoholic, was convicted of murder following the death of two children of the woman with whom he was living. Following an argument between the two of them at a party, the accused had returned home, taken the babysitter home and then returned to spread lighter fluid throughout the house before setting it on fire thus causing the death of the children. He said his objective was to destroy the woman's property. The Supreme Court held:-

1. Under this subsection the element of unlawfulness necessary to qualify a homicide as culpable is that which is the result of the prosecution of the unlawful object by an act which is dangerous to life;
- 2 There is no requirement that the dangerous act be itself unlawful (though it usually is);
3. When the dangerous act is unlawful the jury must be told that there must be the prosecution of a *further* unlawful object clearly distinct from the immediate object of the dangerous act;
- 4 "unlawful object" means the object of conduct, which if prosecuted fully, would amount to a serious crime (i.e. an indictable offence requiring *mens rea*). (Lamer J. did not make it clear whether this could cover offences where mens rea is determined objectively although it seems more likely that he had in mind offences requiring proof of subjective *mens rea*). In this case the unlawful object would be the destruction of property (mischief is an indictable offence under what is now s. 430 of the Code) and the "dangerous act" would be resorting to the use of fire to accomplish his objective (although this was not essential, this was also an unlawful act).
5. Although s. 212(c) (as it then was) was based on an objective assessment of potential consequences, it was based on a subjective test as far as the accused's knowledge of circumstances was concerned. Thus if the accused were intoxicated that should be taken into consideration in determining the accused's knowledge of the actual circumstances particularly the presence of the children.

Following the Supreme Court decision in *Martineau*⁴⁶ it was clear that s. 229(c) was problematic. In that decision the Court adverted to subsection (c), and indicated that their reasoning on the constitutionally mandated principle of subjective foresight of death cast serious, if not fatal, doubt on the constitutionality of the objective wording in the subsection.

In *Meiler*⁴⁷ the accused wanted to kill his estranged wife's boyfriend and he went to a party with loaded and cocked shotgun. After a scuffle in an attempt to disarm him the gun discharged and a third party was killed. On M's appeal of his second degree murder conviction, the Ontario Court of Appeal held that there could be murder within this subsection, even if a different victim was killed and not the one intended. As long as accused had subjective awareness of the likelihood of someone's death there was no need to show that the intended victim was killed. This is obviously an extension of transferred intent within s. 229(b)(which only applies where accused

⁴⁶supra note 23

⁴⁷ (1999), 136 CCC (3d) 11 (Ont C.A.)

does act intending to kill A and B is killed) whereas in the present case the gun discharged accidentally.

It would appear that this section might be used in the case of a terrorist bombing in a situation where it might be difficult to prove the *mens rea* required under s. 229(a). Under s. 229(c) there is no need to prove an intention to kill or to cause bodily harm and all that is required is proof of an unlawful object coupled with subjective *foresight* of death. Thus recklessness is enough for murder if the activity takes part in the furtherance of an unlawful object (but this is different from the old “felony-murder” provisions which did not require proof of subjective foresight of death).

At the present time there is little evidence that this section is being invoked with any regularity and it appears to have fallen out of favour. However, if an appropriate case presented itself, and terrorist bombings might well provide the necessary catalyst for its revival⁴⁸ it could be used in cases where it is difficult to establish *mens rea* under s. 229(a).

5. Sentencing and Parole Eligibility

(i) Overview

In 1976 capital punishment was abolished and replaced with mandatory life sentences for high treason, and first and second degree murder. Parole eligibility requirements were also established at that time: In the case of first degree murder there is an automatic twenty five year period of parole ineligibility.⁴⁹ For second degree murder the minimum period of parole ineligibility is ten years and it may be anywhere from ten - twenty five years.⁵⁰ The precise period of ineligibility is determined by the trial judge⁵¹ who may take into account any jury recommendations on the appropriate length⁵².

⁴⁸Most situations, including those similar to the recent London bombings, could be addressed under s. 229 (a)(i) or (ii) since there is undoubtedly an intent (direct or oblique) to kill, or at the very least to inflict serious injury. It can be argued that in such situations recklessness about death should suffice for a murder conviction.

⁴⁹Section 745(a). This is subject to judicial review after 15 years (s.745.6(1) (the “faint hope clause”) except in the case of multiple murders (s. 745.6(2)). If granted by the review judge the application then goes to a jury (s.745.61(5))

⁵⁰Section 745(b)

⁵¹Section 745.2

⁵²Code, ss. 235 and 745. The period if determined by the judge (s. 745.4) but he/she must give the jury the option of recommending the requisite period. They are not obliged to make a recommendation and if they do make one the judge is not obliged to follow it.

Even after the accused is eligible to apply for parole it may not be granted and the Parole Board will consider the risks to the public in releasing the accused. If successful in securing parole the accused is still subject to parole conditions and parole will be revoked if the accused violates those conditions or commits a new offence.

A life sentence can be broken down into 3 stages:-

1. Ineligibility to apply for parole (which varies depending on whether the accused was convicted of first or second degree murder)
2. Eligibility to apply for parole which is not necessarily granted, and if granted is likely to be in stages - temporary absence then day parole, before full parole.
3. The final period after parole when the accused is still subject to parole conditions.

As far as murder statistics are concerned,⁵³ murders count for around 3% each year of total admissions to federal jails but they accumulate because of long periods that murderers are required to serve. On March 31st 2002 there were 3721 murderers under federal jurisdiction - 2360 were actually incarcerated for murder and 1361 were on some form of parole (1182 on full parole) Most offenders (78%) had been convicted of second degree murder.

(ii) Section 231- First Degree Murder⁵⁴

The following constitute first degree murder within s. 231:-

Planned and deliberate murders⁵⁵

The section includes planning a serious assault under s. 229(a)(ii)⁵⁶ where the accused knew that the attack was likely to result in death and also includes a murder based on transferred

⁵³The National Parole Board: Offenders Serving a Life Sentence for Murder: A Statistical Overview (November 2002).

⁵⁴ Stuart supra n. 34 at 242 criticizes the Canadian adoption of degrees of murder.

⁵⁵The courts have adopted a restrictive interpretation. In *More* [1963] 2 S.C.R.522 for the majority Cartwright J. held that both planning and deliberation must be established and both required proof of premeditation. As Culliton J.A. said in *Smith* (1979), 51 C.C.C. (2d) 381 (Sask. C.A.)

" Clearly, planning must not be confused with intention as the planning would only occur after the intent to murder had been formed. There must be some evidence the killing was the result of a scheme or design previously formulated or designed by the accused and the killing was the implementation of that scheme or design. It is obvious a murder committed on a sudden impulse and without prior consideration, even though the intent to kill is clearly proven, would not constitute a planned murder."

However the Supreme Court stated, obiter, that a murder might have been "planned and deliberate" in a case where the intent was formed very shortly before the plan was carried out (*Harbottle* [1993] 3 S.C.R. 306)

⁵⁶*R. v. Nygaard & Schimmens*(1989) 51 C.C.C. (3d) 417 (SCC)

intent within s. 229(b) (accused intended to kill his wife but his plan caused the deaths of his children instead)⁵⁷

Murder for consideration - murder by contract⁵⁸

Murder of a peace officer, prison guard, warden (and other similar officials)⁵⁹

(Accused must be aware of the person's status (*Collins*⁶⁰) but that almost certainly includes wilful blindness)

Murder⁶¹ caused⁶² in the course of committing or attempting to commit one of the named offences: hijacking an aircraft, sexual assault⁶³, aggravated forms of sexual assault, kidnapping and forcible confinement⁶⁴, or hostage taking.⁶⁵

⁵⁷*R. v. Droste* supra note 41

⁵⁸Section 231(3)

⁵⁹Section 231(4)

⁶⁰(1989) 32 O.A.C. 296 (Ont C.A.) This ruling, although understandable, seems contrary to the Supreme Court decision in *Farrant* supra which held that s.231 is a sentencing classification provision and does not create a separate offence of first degree. The finding that s. 231(4) requires proof of subjective mens rea seems contrary to that conclusion.

⁶¹Section 231(5). This subsection was challenged, unsuccessfully, under s.7 of the Charter on the basis of a lack of a coherent underlying rationale. *R. v. Arkell* [1990] 2 S.C.R. 695 (“Parliament’s decision to treat more seriously murders that have been committed while the offender is exploiting a position of power through illegal domination of the victims accords with the principle that there must be a proportionality between a sentence and the moral blameworthiness of the offender.....”)

⁶²See *Harbottle* [1993] 3 S.C.R. 306- “murder caused by that person” includes a party to the murder but only if the actions of the accused were a substantial and integral cause of the death.

⁶³Contemporaneity can be problematic. If it is clear from the evidence that the victim was already dead before the “sexual assault” began there cannot be a sexual assault on a dead victim and it would only constitute interference with a dead body. However in many cases the sexual assault may be seen to be part of one continuing transaction with some acts occurring before and others immediately after the death. See e.g. *R v. Westergard* (2004) 185 O.A.C. 281 (Ont CA.)

⁶⁴Confinement may occur in the course of committing another offence e.g. robbery though robbery is not necessarily accompanied by confinement *Hein* (2004), 189 C.C.C. (3d) 381 (Sask C.A.)

⁶⁵*Russell* [2001] 2 S.C.R. 804 - Accused sexually assaulted X and then beat and killed Y, another occupant of the house. The Supreme Court held that s. 231(5) applies even where the victim of the murder and the victim of the enumerated offence are not the same.

Murder committed during or while attempting to commit criminal harassment⁶⁶; during or while committing an indictable offence where the offence also constitutes a “terrorist activity” (defined in s. 83.01); where the murder takes place while committing or attempting to commit an offence under s. 81 (use of explosives) for the benefit of or under the direction of a criminal organization⁶⁷; or the commission of an offence under s. 423.1 (intimidation)⁶⁸. All of the subsections noted in this paragraph were added relatively recently (between 1997 and 2002).

(iii) Second Degree Murder

All murders, other than those listed above, are classified as second degree murder⁶⁹ and while still attracting an automatic sentence of life imprisonment, have a lower period of parole ineligibility (as discussed above).

II Liability of Parties to Murder

1. Section 21(1) Perpetrators, Aiders and Abettors

1. Generally

The provisions dealing with liability of parties are found in sections 21 and 22 of the *Code*. The former deals with aiding or abetting (the terms are used separately under the *Code*) and the latter with counselling. In the context of murder only the former (s. 21) has played any significant role and s. 22 is seldom invoked, perhaps because of the broad scope of s. 21.

⁶⁶The section reflects Parliament’s intent to restrict this section to those who murder the victim they are criminally harassing. Dicta in *Russell* (supra at para 34)

⁶⁷Sections 231(6.01) and (6.1) respectively). “Criminal Organization” is defined in s. 467.1(1) - A group of 3 or more persons which has as its main purpose or main activity the facilitation or commission of one or more serious offences that if committed would likely result in receipt of a material benefit by the group or individuals in the group.

⁶⁸Section 231(6.2)

⁶⁹Section 231(7)

Section 21(1) provides as follows⁷⁰:-

Everyone is a party to an offence who

- (a) actually commits it;
- (b) does or omits to do anything for the purpose of aiding any person to commit it; or
- (c) abets any person in committing it.

For most purposes it is irrelevant whether an accused is a perpetrator (or co-perpetrator), aider or abettor: under s. 21 all are parties to the offence that was committed. Sometimes it may not be clear what role was played by a party , for example in the Colin Thatcher case⁷¹ the Crown actually relied on two theories to explain the accused's participation in his wife's murder: the first was based on Thatcher actually killing his wife, while the second scenario was based on his having hired the killer. The Supreme Court held that both modes of participation were legally indistinguishable and it was not necessary for the jury to be unanimous on which it had accepted.

There may be more than one principal offender, and where the accused were acting in concert or jointly involved in a fatal attack, they are all co- principals even though it is not possible to establish who actually struck the fatal blow⁷²

Occasionally, however, it may be important to determine the level of participation of the particular accused. For example in determining whether duress is available as a defence⁷³ it may be important to determine whether the accused was a perpetrator or simply an aider .

Section 23.1 of the Code makes it clear that there can be a conviction under s. 21-23 (of aiders, abettors, counsellors or accessories after the fact) even though the principal offender cannot be convicted of the offence.

⁷⁰The provision on parties contained in the first Criminal Code of 1892 was substantially similar except that it also covered counselling. The intent of the provision was to abolish the common law distinction between principals in the second degree and accessories before the fact. In 1955 for no obvious reason counselling was put under a separate section (see Martins Criminal Code 1955 referred to in Stuart supra note 34 at p 602

⁷¹*R. v. Thatcher* [1987] 1 SCR 652

⁷²*R. v. H (L.I.)* (2003) 176 C.C.C. (3d) 526 (Man CA)

⁷³ A perpetrator of one of the excluded offences in s. 17 (and murder is one of them) will not be able to use the defence of duress, but an aider or abettor of an excluded offence can use the common law defence of duress. (*Paquette, S.C.C.*). Canadian courts have yet to determine whether murder is also an excluded offence at common law. That issue is discussed below under Defences - Duress

(ii). Actus Reus of Aiding or Abetting

Aiding can take a variety of forms for example, providing an instrument for use in the crime, driving the getaway car, or acting as a lookout. Abetting has its own separate subsection and involves acts done to encourage or support the actions of the perpetrator and it appears to overlap with counselling under s. 22. Although there can be aiding by omission there are few cases on point and those have involved manslaughter rather than murder⁷⁴

Presence at the scene is not a prerequisite for liability as an aider and, conversely, mere presence at the scene does not constitute aiding and abetting⁷⁵ but presence can be construed as providing evidence of encouragement, for example if the party had prior knowledge of the offence to be committed (ibid).

(iii) Mens rea - Aiding or Abetting

Under s. 21(1)(b) or (c) a party to murder must have a similar level of *mens rea* to that of the perpetrator - that is he must intend to aid or abet the principal in killing the victim, or intend to aid the perpetrator in causing bodily harm of a kind likely to result in death and be reckless whether death ensues or not. The aider must do the acts of assistance for the purpose⁷⁶ of assisting the principal offender to commit murder (explicit in s. 21(1)(b) and read in by the courts under (c) (abetting)) so abetting must also be for the purpose of assisting the principal⁷⁷. Intoxication may provide a defence because murder is a crime of specific intent (discussed below under “defences”).

Presumably if A assists B to murder C but by mistake B hits D, A ought also to be liable by extension of the transferred intent principle.

4. S. 21(2) - Extended Liability

Section 21(2) expands the liability of accomplices and makes them liable for *further* offences that are committed by the principal offender. For that section to apply

1. Two or more persons must form an intention common to carry out an unlawful purpose and

⁷⁴*Popen* (1981), 60 C.C.C. (2d) 232 (Ont C.A.)

⁷⁵*Dunlop & Sylvester*[1979] 2 S.C.R. 881

⁷⁶But “purpose” does not require that the accused view the commission of the offence he is aiding as desirable. In this context purpose = intention and so the *mens rea* under s. 21(1)(b) is not negated by duress *Hibbert* (1995), 99 C.C.C. (3d) 193 at 214 (S.C.C.)

⁷⁷*R v. Curran* (1977) 38 CCC (2nd) 151 (Alta CA);

2. To assist each other therein
3. And if any one of them commits an offence in carrying out that common purpose and
4. If the party knew (or ought to have known) that the commission of that offence would be a probable consequence of carrying out the common purpose...
- 5 That person is a party to the further offence committed by the perpetrator.

As McIntyre J. explained in *Simpson*⁷⁸ the purpose of the two subsections (1) and (2) is rather different

“Subsection 1 applies to make everyone a party to an offence who commits it or aids and abets in its commission. Subsection (2) covers the case where in the absence of aiding and abetting a person may become a party to an offence committed by another which he knew or ought to have known was a probable consequence of carrying out an unlawful purpose in common with the perpetrator. *Thus it addresses the situation where the perpetrator goes beyond the original agreed unlawful purpose.* (emphasis added)

The Impact of the Charter

While liability under s. 21(1) is based on the full subjective standard of *mens rea*, s. 21(2) is more problematic. As noted above, s. 21(2) contains objective language “ought to know”, and it was not surprising that the Supreme Court found this to be contrary to Charter standards. In *R. v. Logan*⁷⁹ (a case involving attempted murder and liability of parties to the offence) the Supreme Court, based on its reasoning in the earlier decision in *Martineau*⁸⁰, held that if the offence is “a stigma offence” with a constitutionally required level of *mens rea* for the perpetrator (as is the case with murder or attempted murder) then a party to that offence must also have a similar level of *mens rea* and cannot be convicted on the basis of an offence that contains significant objective elements. The Court held that attempted murder was a “stigma” offence and that subjective *mens rea* was constitutionally mandated for both the perpetrator and any parties to the offence under s. 21(2).

The courts have been reluctant to extend the “stigma” analysis in *Martineau* to other offences, and have found that very few offences have a *constitutionally mandated* minimum level of *mens rea*⁸¹ Consequently murder is one of the few offences where a subjective level of *mens*

⁷⁸*Simpson* [1988] 1 S.C.R. 3

⁷⁹[1990] 2 S.C.R. 731

⁸⁰Discussed supra under “Impact of the Charter on Felony-Murder”

⁸¹So far the courts have decided that murder, attempted murder, accessory liability to an offence that constitutionally requires a subjective test, and war crimes and crimes against humanity fall within the “stigma” category *requiring* subjective *mens rea*. In dicta it has been suggested that theft is also included (*Martineau*). It would appear that *Martineau* represents the high water mark of this development. The courts often read in subjective *mens rea* even when it is not expressly required, but this is done as a matter of interpretation -and not because there would be an infringement of the Charter if they did not do so.

rea (foresight of death) is mandated by the Charter. While the Crown can rely on s. 21(2) in a murder case, the words “ought to know” must not be used and the accomplice will only be liable under that section if he *actually knew* that the commission of the further offence was a probable consequence of carrying out the common unlawful purpose. If A and B agree to rob a store and A knows that B is carrying a loaded gun and will use it, if needed, to kill or to cause serious harm that he knows is likely to cause death, then A will also be liable for murder using a combination of s. 21(2) and s. 229 because he had subjective foresight that B might commit murder. It is no longer sufficient to show that he *ought* to have known of the consequences of their joint enterprise.

5. Perpetrators and Other Parties: Liability for Different Offences?

The principal offender may be convicted of murder, while a party may be convicted of either murder or manslaughter. The party may be guilty of murder either as a co-perpetrator (under s. 21(1)(a)), or as an aider or abettor (s. 21(1)(b) or (c)), but this will only be possible if the Crown can establish the requisite *mens rea* for murder.

If the perpetrator went beyond the common unlawful purpose the party will be liable for murder under 21(2) if the party knew⁸² that the principal offender was likely to commit murder (as defined in s. 229) in carrying out the common unlawful purpose.

On the other hand if Crown cannot establish the requisite *mens rea* for murder then the accomplice can be convicted of manslaughter. For example if the accused knew that the perpetrator would commit bodily harm - less than harm likely to cause death - then the party can be convicted of manslaughter rather than murder. In *Kirkness*⁸³ A and B broke into the home of a frail 83 year old woman. A sexually assaulted and then suffocated the old woman while B ransacked house, having placed chair at front door to prevent entry during the sexual assault. At trial A was convicted of first degree murder but B was acquitted. On appeal to the Manitoba Court of Appeal the acquittal was set aside and new trial ordered because there was a possibility that B might be liable for manslaughter. The Supreme Court allowed the appeal and restored the acquittal. The evidence failed to show that the accused had the intent to aid or abet murder or that accused knew that A would sexually assault or kill the victim in the course of the break and enter. The death occurred as a result of strangulation that occurred after the sexual assault. At that time B gave A timely notice not to strangle the woman and from that time A was acting on his own., A manslaughter verdict would have been possible for B if jury had found that the accused was a party to the sexual assault and the death was result of the sexual assault (i.e. if the unlawful act which was aided or abetted was one that he *knew* was likely to cause some harm short of death).

There was a strong dissent from L’Heureux-Dube and Wilson JJ who supported the possibility of a manslaughter conviction. B had assisted by placing chair during the sexual assault

⁸²Subjective standard is required as a result of *Logan* (supra)

⁸³(1990), 60 C.C.C. (3d) 97 reversing 51 C.C.C. (3d) 444

and he did not alter his behaviour when the violence escalated. He had not done enough to dissociate himself from the killing of the victim.

In a subsequent decision, the Supreme Court revisited its earlier ruling in *Kirkness* and expanded the limits of liability of an aider in light of its ruling in *Creighton* that the mens rea for manslaughter is objective foreseeability of bodily harm. In *Jackson (sub nom R. v Davy)*⁸⁴ D & J were charged with first degree murder following the killing of R. who was J's employee and lover. J was found guilty of first degree murder, and D of second degree murder. On appeal to the Ontario Court of Appeal D's conviction was set aside, a new trial was ordered and a subsequent Crown appeal to the Supreme Court was unsuccessful. The Court confirmed that a principal offender can be guilty of murder while an aider/abettor is guilty only of manslaughter (if he lacks the *mens rea* for murder) and that the test is an objective one. Where someone is involved as a party in the offence of murder but does not possess the *mens rea* for murder, he can be convicted of manslaughter if a reasonable person in all the circumstances would have appreciated that non-trivial bodily harm was a foreseeable consequence of the dangerous act. Because manslaughter is not a "stigma" offence with a constitutionally mandated subjective level of *mens rea* it was quite appropriate to convict an aider of manslaughter based on an objective standard. Similarly if the situation fell within s. 21(2) (extended liability) the party could be guilty of manslaughter if the perpetrator in carrying out a common unlawful purpose (robbery or arson to take but two examples) killed the victim and the party, although he did not participate in the homicide, ought to have known that bodily harm was a probable consequence of carrying out the common purpose.

Is the converse true and can a party be convicted as a party to a more serious offence than the perpetrator? If the perpetrator has a valid defence or did not have capacity to commit the offence (s. 16- mental disorder) then there seem every reason to convict the party who had full *mens rea* and realized what would ensue from the actions of the perpetrator. In such a case it should be possible to convict the party of murder.

6. Section 22 - Counselling

(1)

Where a person counsels another person to be a party to an offence and that other person is afterwards a party to that offence, the person who counselled is a party to that offence, notwithstanding that the offence was committed in a way different from that which was counselled

(2)

Every one who counsels another person to be a party to an offence is a party to every offence that the other commits in consequence of the counselling that the person who counselled knew or ought to have known was likely to be committed in consequence of the counselling.

⁸⁴ (1991), 68 C.C.C. (3d) 385 (Ont CA), affirmed, 86 C.C.C. (3d) 385 (SCC); see too *Portillo* (2003), 176 C.C.C. (3d) 467 (Ont C.A.)

This section deals with offences counselled by the accused and actually committed. If the offence is counselled, but not committed, the appropriate section is section 464 which expressly provides for that eventuality. There are hardly any cases of counselling murder⁸⁵ and in most cases where the accused has encouraged the offence the crown would rely on s. 21 rather than s. 22.

Section 22 makes it clear that the person counselling is liable “notwithstanding that the offence was committed in a way different from that which was counselled.” That raises issue of whether s.21 should be interpreted similarly. What if A supplies a gun to commit murder and the perpetrator uses a knife instead? Has A aided the murder? A has certainly provided encouragement to B even though a different weapon was used but since s. 22 expressly adverts to this situation, while s. 21 does not, it might be argued as a matter of statutory construction that s. 21 does not cover this situation. On the other hand the Code provisions are often out of kilter, having been added to and revised at different points over the past century, and differences in wording are often downplayed. The courts may assume that s. 21 should be similarly interpreted for the sake of consistency.

What if A counsels the murder of X and B instead kills Y? If the killing is by mistake then transferred intent should ensure liability but if B deliberately deviates from the advice then the only possibility should be liability for counselling an offence not committed (s.464)

Section 22(2), like its counterpart s. 21(2), provides for extended liability where the perpetrator commits further offences that the counsellor knew or ought to have known were likely to be committed. Clearly the objective aspect cannot stand in light of decisions on objective liability under s. 21(2) in the case of murder or attempted murder (*Logan supra*) and the objective component will be omitted in such cases.

7. Accessories After the Fact

An accessory after the fact is one who, knowing that a person has been a party to the offence, receives, comforts or assists that person for the purpose of enabling that person to escape.

In *Duong*⁸⁶ the accused was charged with being an accessory after the fact to murder. The court pointed out that there is little Canadian authority on the knowledge requirement in section 23 and the court went on to hold that the Crown must prove actual knowledge of the offence -or wilful blindness.

The present provisions on party liability have been described as “unduly complex and

⁸⁵. *McNulty* (1910), 17 C.C.C. 26 (Ont C.A.) is a rare example where the putative father of a child counselled the mother to drown the child.

⁸⁶(1998), 124 C.C.C. (3d) 392 (Ont C.A.)

illogical”⁸⁷ It is not clear why we retain the distinction between aiders and abettors and between aiders/abettors and counsellors but there seem to be few practical problems arising from these distinctions. The major problem is in dealing with party liability for murder and manslaughter, an area which is particularly complex and extremely difficult for jurors to comprehend. Unfortunately, there does not appear to be an easy solution. When there are so many permutations of possibilities in the murder/manslaughter context (a jury is often directed on murder, manslaughter and party liability under s. 21(1)(a) and (b) and s. 21(2)), simplification may not be an attainable goal.

III Infanticide⁸⁸

1. Generally

S. 233 provides:

A female person commits infanticide when by a wilful act or omission she causes the death of her newly-born child⁸⁹, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.

Infanticide, a form of culpable homicide (s. 222(4)), is an indictable offence carrying a maximum of 5 years imprisonment.

This offence was added to the Code in 1948⁹⁰ and assumed its present form in 1955. It appears that the objective was to prevent women being convicted of murder of their infants while in a state of mental impairment after the birth of an infant. It is one of few gender specific offences in the Code and is not open to men who kill their offspring. Nor is it open to women who kill children other than the “newly-born” infant. It is anomalous and is in reality a defence framed as an offence. The section seems to be based on assumptions that no longer hold water for example it is doubtful whether anyone would accept that lactation by itself might cause some form of mental disturbance.

⁸⁷Stuart supra note 34 at p. 619

⁸⁸See Grant, Boyle and Chunn: *The Law of Homicide* looseleaf (Toronto: Carswell) (updating ceased in 1999).

⁸⁹S2 “newly born child” means a person under the age of one year.

⁹⁰1948 (Can), c. 39, s. 7

2. Actus Reus

Although it is not easy to separate the *actus reus* and *mens rea* components it would appear that the following *actus reus* components must be established by the Crown:-

1. The accused was a female person
2. She did or omitted to do an act
3. The child died
4. The death was caused by the act or omission
5. The child was “newly-born” as defined in s. 2 i.e. a child under 1 year of age
6. At the time of the act or omission the accused had not fully recovered from the effects of giving birth
7. As result of the lack of recovery from those effects, or as a result of lactation after the birth, her mind was disturbed.

(This requires proof of a causal link between the birth or lactation and the mental disturbance but does not require proof that the disturbance caused her to kill the child).

But what does it mean to say that a woman has not fully recovered from effects of giving birth or that her mind was disturbed as a result of lactation? This surely requires proof of something less than the full blown mental disorder defence within s. 16 and seems to involve a form of diminished responsibility. In any event it does seem strange that the Crown is required to prove mental disturbance as part of the offence.

The new offence created in 1948 was soon perceived as having problems and it was necessary to add a definition of “newly born” in 1955 amendments. Another difficulty also highlighted in *Marchello*⁹¹ was the very difficult burden imposed on the Crown - the need to prove a negative - i.e. that the mother had not recovered from the effects of the birthand a positive i.e. that by reason of the birth or effect of lactation her mind was disturbed. McRuer J. described this burden as “almost impossible”. All an accused had to do was to raise a reasonable doubt about either and she would be entitled to an acquittal, even though she had wilfully killed her child.

It was that anomaly that led to the passing of what is now section s 663⁹². Under this rather odd provision a woman may be convicted of infanticide even if the evidence does *not* establish that she was not fully recovered from the effects of the birth, or from the effect of lactation, and the balance of her mind was at that time disturbed by reason of the effect of the birth or of the effect of lactation! Despite the absence of these key elements the woman may still be convicted of infanticide unless the evidence establishes that the act was not wilful!! The section is not without its own problems. When does it come into play? Does it render much of the offence redundant?

⁹¹(1951) 100 C.C.C. 137 (Ont H.C.)

⁹²The Code provisions on infanticide were amended in 1953-54

The authorities are conflicting⁹³

The offence of infanticide is obviously based on a medical model - that the woman's mind has been disturbed and essentially the issue relates to diminished capacity - that the woman because of the birth (or lactation) is less culpable. However it has been pointed out by several critics that in the 19th century, when juries were extremely reluctant to convict mothers, the predominant factors were socio-economic rather than medical, but when a number of jurisdictions chose to enact infanticide provisions in the 20th century⁹⁴ the draftsmen focused on "the barely perceived medical reasons for such behaviour which had the apparent advantages of being scientific and individually rooted"⁹⁵ The Law Reform Commission of Canada, in its Working Paper on Homicide which supported the repeal of the provision also notes the lack of medical evidence to support this offence.

3. *Mens Rea*

What is the *mens rea* of the offence? While it is clear that the act or omission must be "wilful", it is not clear whether the death must be caused wilfully. In other words is infanticide only applicable in cases that would otherwise be murder, or is it also available in cases that might otherwise be manslaughter?

According to *Smith*⁹⁶ the act must be done with a bad motive or purpose,⁹⁷ or with evil intent. In that case the mother (a 17 year old girl who did not believe that she was pregnant) after giving birth put her hand across child's mouth to stop it from crying which would have alerted the household to the birth. It was held that the accused did not cause the death "wilfully". This

⁹³In *R. v. Smith* (1976) 32 C.C.C. (2d) 224 (Nfld Dist Ct) the court was of the opinion that the two sections are to be applied in sequence. What is now s. 663 does not have any significance if all the elements of the infanticide provisions are satisfied. But if all the elements save those relating to a disturbed mind are established then s. 663 takes effect to prevent a female who was of sound mind when she caused the death of her child from going free. However in *Lalli* [1993] B.C.J. No. 2010 (B.C. Provt Ct) the court was of the view that s. 663 applies only where she is actually charged with infanticide (not murder) and that in such a case the Crown need not establish mental disturbance or that the mother had not recovered from the birth. It is only where she is charged with murder and infanticide is being considered as an included offence that the crown must then prove all the elements in s. 233.

⁹⁴The English Infanticide Act of 1922 was one of the first.

⁹⁵Judith A Osborne "The Crime of Infanticide: Throwing out the Baby with the Bathwater" (1987), 6 Can J. Fam L. 47 and see too C.B. Backhouse "Desperate Women and Compassionate Courts: Infanticide in 19th Century Canada" (1984) 34 U. of Toronto L.J. 447 and K O'Donovan "The Medicalization of Infanticide [1984] Crim L. R. 259

⁹⁶(1976) 32 C.C.C. (2d) 224 (Nfld Dist Ct)

⁹⁷This seems to take motive into account in determining *mens rea*.

reasoning seems to treat infanticide as mitigating murder and that it may not be available in a case that otherwise would be manslaughter (the English legislation is clear that infanticide converts murder to manslaughter: the Canadian legislation is not). However in *Lalli*⁹⁸ the court held that it was sufficient that the accused “ought to have realized that what she did might be harmful” and this extends infanticide to cases that would otherwise be manslaughter.

In cases where the accused is mentally disturbed but there is no causal link between the birth or lactation and the mental disorder, the accused may be able to rely on the ordinary mental disorder defence under s. 16 of the Code.⁹⁹ In *Irwin*¹⁰⁰ the accused was charged with murder after she killed her 7 month old child. She had a history of mental problems, was an alcoholic and after birth of the child had been suffering from post partum depression. She was found not guilty by reason of insanity (after 1992 the verdict would be Not Criminally Responsible on account of Mental Disorder (NCRMD) (s. 672.34). Until 1992 such a verdict would have resulted in indefinite detention with few safeguards for the accused, but all that was changed in 1991. (explored more fully under “Defences”)

4. Related Offences

There are related offences involving unborn or newly born children and they are noted briefly. Section 238 provides for the killing of an unborn child in act of birth (before it has become a “human being” as defined in s.223) in such a manner that if it were a human being it would have been murder (maximum of life imprisonment)

Section 242 covers a mother’s neglect to obtain assistance in child birth where that failure results in permanent injury or death (maximum of 5 years imprisonment)
Disposal of the dead body of a child in order to conceal the birth is an offence under s. 243 and carries a maximum of 2 years imprisonment.

5. Charter Issues and Possible Reforms

It may be that the offence of infanticide will be subject to scrutiny under the *Charter* and, because of its gender specificity, it may be found to infringe the equality provisions in s. 15(1) of the Charter. To the extent that the offence/defence is predicated on a medical model (and it is clear that it is), it is based on issues that are only applicable to women (hormonal imbalance, post partum depression following birth), and it almost certainly would be upheld under s. 15 as not infringing equality concerns or, if it is held to infringe s. 15, a strong argument could be made that it could be justified under s. 1 of the Charter. If the offence were reformed in such a way that the focus became socio-economic, rather than medical, the exclusion of fathers would certainly be

⁹⁸Supra note 93

⁹⁹Discussed infra. under Defences: Mental Disorder

¹⁰⁰(1977), 36 C.C.C. (2d) 1 (Ont C.A.)

more problematic.

There have been calls for reform or abolition of this anomalous offence¹⁰¹

One option is to simply repeal the section and deal with these cases as sentencing issues, but this would only be feasible if we were to abolish the fixed sentence for second degree murder (which seems unlikely). Otherwise abolition of the offence, without change in the fixed penalty for murder, would leave the s. 16 mental disorder defence as the only viable option. The other option is to employ a form of diminished responsibility which would have the advantage of also providing a defence to a mother who kills children other than the “newly-born”. To date Canadian courts have only been willing to use a somewhat similar concept to question whether the crown has established the mens rea of murder. It does not apply in cases of intentional killing¹⁰²

It must be acknowledged that this is a very complex, multi-faceted issue, and it is impossible to do justice to it in this paper. A separate report canvassing all the options would be advisable.

IV Defences

In a paper of this size it is simply impossible to do justice to all defences that might be relevant in the context of murder. I have chosen specific points where I think that Canadian law has developed in an interesting direction.

1. Defences Specific to Murder: The Partial Defence of Provocation:

Professor Ives has already provided a detailed account of the law relating to provocation¹⁰³ and it would be redundant to duplicate her extensive discussion of the problems.

Professor Ives reviewed the criticisms of the Canadian defence and canvassed a number of options for reform. I am in the camp that would abolish the defence should we eventually depart from the mandatory sentence for murder. Since this is unlikely I am reluctantly in favour of

¹⁰¹See e.g. The Law Reform Commission of Canada Working Paper No. 33 “Homicide” (1984) p 74. The Commission advocated abolishing the fixed penalty for second degree intentional homicide which would provide flexibility in sentencing. There is a very good discussion in Grant, Boyle & Chunn “The Law on Homicide” p 4-80 et seq. The authors, although critical of the offence, are concerned about the impact of its repeal.

¹⁰²See Defences - The Rolled-Up Plea” infra

¹⁰³ Law Commission Study on Partial Defences to Murder - Overseas Studies Consultation Paper No. 173 (Appendix B pp 73 et seq)

retaining some form of the defence, but it does need to be more strictly applied, particularly in the area of spousal or similar homicides where it has been successfully invoked in a number of very questionable circumstances. *Thibert*¹⁰⁴ provides an obvious example of the potential abuses. A man who was told by his wife that she was leaving him, followed her around, took a sawed off shot gun and eventually shot her boyfriend after he uttered a somewhat ill-advised comment. The Supreme Court held that the defence of provocation was a viable one and approved a very generous use of “ordinary person” standard which takes into account a plethora of individual factors (in this case the “ordinary person” was a married man facing the breakup of his marriage). It also had the effect of downplaying the requirement of “suddenness” (*Thibert* seems to ignore the fact that the accused was stalking his wife with a loaded shotgun).

There is a fear that use of an expanded range of personal factors, including cultural ones, would be problematic. Take for example the case of the fanatically religious father who kills his daughter because she is promiscuous or dating someone of another race. Surely such factors should not be considered under the “ordinary person”¹⁰⁵ test, and we should reject the injection of cultural values in this context. Racial insults are one thing (and should be acknowledged within the provocation defence) but it would be dangerous to permit an expansion of the ordinary or reasonable person standard to take into account such cultural values. The legal system should set its face against honour and other similar killings which are driven by cultural considerations that do not prevail in the host country.

2 Other Defences

(i) Mental Disorder

Section 16 provides for the general defence of mental disorder. Although it is not confined to murder, it is a defence more frequently encountered in that context, given the fixed penalty for murder. Prior to 1992 it was known as the defence of insanity and the verdict was “not guilty by reason of insanity.” In 1992, as a result of the Supreme Court decision in *Swain*¹⁰⁶, a new part XX.I was added to the Code¹⁰⁷ which now provides a comprehensive scheme for dealing with mentally disordered accused. The verdict is now “not criminally responsible on account of mental disorder” (NCRMD) and there are new provisions dealing with the post-trial disposition hearings following upon such a verdict. One important consequence is that once an accused is found to be NCRMD, under s. 672.54 the Court or Review Board must make a disposition that is the least onerous and least restrictive to the accused. If the person does not pose a significant threat to public safety then he should be discharged absolutely - otherwise he will be discharged

¹⁰⁴[1996] 1 S.C.R. 37

¹⁰⁵The Canadian equivalent of the reasonable person

¹⁰⁶[1991] 1 S.C.R.933

¹⁰⁷S.C. 1991, c. 43

conditionally or hospitalized (Prior to 1992 the accused was subject to indefinite detention with few safeguards).

As far as the definition of mental disorder in s. 16 is concerned, the new legislation provides little more than cosmetic changes¹⁰⁸

What is the ambit of “mental disorder” (disease of the mind)? The oft-quoted passage from *Cooper*¹⁰⁹ makes it clear that it has a broad meaning....

“it embraces any illness, disorder or abnormal condition which impairs the human mind and its functioning, excluding however self-induced states caused by alcohol or drugs, as well as transitory mental states such as hysteria, or concussion. In order to support a defence of insanity, the disease must, of course, be of such intensity as to render the accused incapable of appreciating the nature and quality of the violent act or of knowing that it is wrong.”¹¹⁰

The formulation under s. 16 is rather different than that under the McNaghten Rules. In particular the accused must be incapable of appreciating the nature and quality of his acts”. The term used is “appreciate” rather than “know” and it has been held that this includes estimating consequences of one’s actions. The accused may know that he is causing some harm to the victim by squeezing her neck, but not understand that his actions can lead to death (*Cooper supra*).

The onus is on the accused to establish mental disorder on a balance of probabilities. Theoretically if crown seeks to rely on mental disorder (for example in response to an automatism defence) it, too, bears burden of establishing mental disorder on a balance of probabilities, However according to recent decision in *Stone* (discussed below under automatism) where the accused establishes that he acted involuntarily it will be assumed that he or she was suffering from a mental disorder which thus becomes the default option.

Alternatively the accused can fit within s. 16 if he was incapable of “knowing that what he did was “wrong” Initially this was interpreted to mean “legally wrong”¹¹¹, but the Supreme Court overturned that decision and held that “wrong” means “morally wrong according to the moral

¹⁰⁸S.16(1) provides that no one is criminally responsible for an act or omission while suffering from a mental disorder (defined in s. 2 as a “disease of the mind” so there was no intention to change the existing law) that rendered the person incapable of appreciating the nature and quality of the act or omission or of knowing that it was wrong. There is a presumption of sanity and the onus is on the party alleging mental disorder to establish it on a balance of probabilities (s. 16 (2) and (3)). The amended section omits any reference to “specific delusions” or “natural imbecility” formerly found in the definition.

¹⁰⁹[1980] 1 S.C.R. 1149 per Dickson C.J.

¹¹⁰ibid

¹¹¹ *Schwartz* [1977] 1 SCR 673

standards of society.”¹¹² If the accused does not know that the act is one that others would disapprove of then he is within the s. 16 defence. If he understands that others would not approve of his actions then he is fully responsible.

The s. 16 defence is generally acknowledged to be narrow in scope and does not include cases of irresistible impulse (unless such a condition can be considered a symptom of another mental disorder). Given the changes in disposition after the finding of NCRMD - and in particular the recent abolition of the former automatic indefinite detention- there is every reason to consider expanding the scope of the defence which seems preferable to creating a separate defence of diminished responsibility.

(ii) Diminished Responsibility?

Canada does not have a provision similar to the English diminished responsibility provision that operates to reduce murder to manslaughter on the basis of an abnormality of the mind substantially impairing the accused’s responsibility for the offence. The only special statutory provision that does recognize a lesser form of impairment is the offence of infanticide (supra). There are some decisions, however, that appear to have recognized mental impairment less than that required under the s. 16 mental disorder defence. First, the Supreme Court has recognized a form of “diminished responsibility”, in determining whether a murder was “planned and deliberate” which prior to 1975 would have been a capital offence and since now constitutes first degree murder (without eligibility for parole for 25 years).¹¹³ However, this is not really a recognition of “diminished responsibility” because s. 231 is simply a sentence- classifying provision and does not create a separate offence with *mens rea* requirements¹¹⁴. Indeed the Supreme Court in its later decision in *Chartrand*¹¹⁵ states quite clearly that diminished responsibility is not recognized under Canadian law.

While *More* is relatively uncontroversial (and simply serves to reduce first to second degree murder), there are other statements approving of a defence based on lack of *mens rea* and stemming from mental impairment short of the mental disorder defence under s. 16, which seem to fly in the face of the clear ruling in *Chartrand*. Most significantly the Supreme Court in the later

¹¹²*Chaulk* [1990] 3 S.C.R. 1303

¹¹³*More* [1963] 2 S.C.R. 522 Cartwright J. held that evidence of impaired mental functioning had a direct bearing on the question of whether the killing had been deliberate. Fauteux J. dissenting was of the view that admitting evidence of mental impairment short of the s. 16 defence would be “tantamount to introducing in Canadian law a new and secondary test of legal irresponsibility” (ibid at 529).

¹¹⁴*Farrant* [1983] 1 S.C.R. 124

¹¹⁵ [1977] 1 SCR 314 at 318

decisions *Swain*¹¹⁶ and *Jacquard*¹¹⁷ has acknowledged that mental impairment short of s. 16 is relevant in determining whether the accused actually formed the intent for murder. In *Swain* Lamer C.J. for the majority states..

“ if ...evidence of mental impairment is, in the view of the trier of fact, insufficient to meet the requirements of s. 16, the accused is still entitled to have such evidence considered with respect to the essential element of *mens rea*. This accords with the current practice wherein an accused has been able to deny the element of planning and deliberation or the specific intent required for murder, despite the fact that s. 16 has not been satisfied.”¹¹⁸

However, although Lamer C.J. speaks of the “current practice” as if this principle were routinely applied, he cites no authority on point, and it is clear that most of the decisions which support that proposition seem to involve dicta or are brief judgments in which few relevant authorities are cited.¹¹⁹

Although this development has been welcomed by some commentators¹²⁰ because it is seen a evidence of “a commendable judicial concern to take the subjective *mens rea* inquiry seriously”¹²¹, it is not without its problems.. The law provides that certain accused are not to be found criminally responsible and sets out the criteria in the mental disorder defence under s. 16. It would seem that if an accused fails at that hurdle it should not be possible to adopt a different tactic and plead lack of *mens rea*. Is it appropriate to provide an “escape route” from s. 16¹²² which is likely to create further uncertainty? If there are some accused suffering from a mental impairment to the point where they could not form the intent for murder , but who fall outside the s. 16 defence, then the solution should be to expand s. 16 rather than to fudge the issue by permitting arguments based on lack of *mens rea*.

There also appears to be growing acceptance of the combined use of other failed defences (frequently a combination of provocation, self defence and intoxication) where the accused may not be able to satisfy any particular defence, but the cumulative effect of the defences is sufficient to

¹¹⁶ [1991] 1 SCR 933, 987

¹¹⁷[1997] 1 SCR 314, 333.

¹¹⁸ibid at 987

¹¹⁹See e.g. *Browning (1976)*, 34 C.C.C. (2d) 200 (Ont C.A.)

¹²⁰See e.g. Stuart supra note 34 at p. 403

¹²¹Stuart supra note 34 at p. 403

¹²²See Bayne” “Automatism and Provocation in Canadian Case Law” (1975), 31 C.R.N.S. 257 at 271

raise a doubt about the existence of the *mens rea* for the offence. This will be explored more fully below.¹²³

(iii) Automatism

This, too, is a “defence” of general application and not confined to murder and so apparently outside the scope of this paper. However, the landmark Supreme Court decision in *Stone*¹²⁴ does deserve mention. In that case accused was allegedly provoked by his wife who taunted him with his sexual inadequacy and told him that she had falsely reported to the police that he was abusing her. At the time he killed her he said he had felt a “whoosh” sensation washing over him. When he “came to” he found his wife slumped on the seat and later it was determined that he had stabbed her 47 times. The defences raised were insane automatism, sane automatism, lack of intent and provocation but the judge left only insane automatism, intention in relation to second degree murder and provocation with the jury. He was found guilty of manslaughter.

The Supreme Court accepted that this was an appropriate case for the use of the partial defence of provocation, but also took the opportunity to engage in a detailed discussion of the automatism/mental disorder interface. The court split 5-4 on the issue of whether non mental disorder automatism should have been left with the jury, Bastarache J writing for the 5-4 majority found that the trial judge was correct in not leaving the defence to the jury.

The court approved of a two-step process in all cases of automatism, whether psychological blow (as in this case) or otherwise. First, the defence must lay a proper foundation. Expert evidence will be required but other factors must also be considered including evidence of bystanders, corroborating medical history, whether there is a motive and so on. In the face of a very strong dissent from Binnie J. and based on rather uncertain authority(it was not sought by the Crown or interveners), the majority reversed the onus and held that the onus is on the accused to establish involuntariness on a balance of probabilities.

In step 2 the judge must decide whether the involuntariness gives rise to sane automatism or to a s. 16 mental disorder defence (only one will be left with the jury) and s. 16 is the default position - the involuntariness is assumed to be the result of mental disorder. The court is to adopt a holistic approach using both the internal cause and continuing danger approaches (is the *trigger* likely to recur?) and it should also look at policy factors in determining whether the condition falls within mental disorder or non -mental disorder automatism.

The earlier decision in *Parks*¹²⁵ where an accused was acquitted of murder and attempted

¹²³Under Defences “the Rolled-Up Plea”

¹²⁴[1999] 2 S.C.R. 290

¹²⁵[1992] 2 S.C.R. 871

murder¹²⁶ based on a sleepwalking defence, and walked out of court a free man, provides an interesting contrast. The Supreme Court accepted that there was no reason to classify sleepwalking as a mental disorder and it should be treated as a case of sane automatism. Clearly in *Stone* the pendulum has swung very much in the opposite direction. Given the concerns about releasing someone like Parks without any adequate supervision or indeed any ongoing evaluation the decision in *Stone* is understandable though it has attracted much criticism¹²⁷. Given that a finding of mental disorder does not any longer lead to the inevitability of indefinite detention and the accused can be released where he poses no danger to himself or the public then there is much to be said for subsuming many of the cases of involuntariness/impaired consciousness cases under the rubric of mental disorder and that this is preferable to a complete acquittal.

iv Intoxication

Canada has retained the specific/general intent categorization¹²⁸. Murder is crime of specific intent (that has always been the case, even when Canada used the “felony/murder” rule) and so if an accused is intoxicated to the point where he did not form the *mens rea*¹²⁹ for murder then intoxication will provide a defence to murder. However, the accused will be convicted of manslaughter, an offence of general intent where intoxication is not a defence.

In *Daviault*¹³⁰ (a case of sexual assault) the Supreme Court recognized a defence of extreme intoxication¹³¹ which would have applied to all general intent offences (including manslaughter), but the ensuing public outcry led to swift legislative action. Shortly after the decision, Parliament passed s.33.1 which essentially abrogates the extreme intoxication defence if the offence charged is one involving personal integrity (but it is still available for other offences e.g. property offences). The matter is by no means finally settled, however, and it is possible that

¹²⁶ After driving 23 km on a busy highway, entering the house of his parents in law and stabbing them.

¹²⁷ See for example David M. Paciocco- “Death by *Stone*-ing: The Demise of the Defence of Simple Automatism” (1999) 26 C.R. (5th) 273

¹²⁸ Over the strenuous objections of Dickson CJ. See in particular his judgment in *Bernard* [1988] 2 S.C.R. 833.

¹²⁹ *Robinson* [1996] 1 S.C.R. 683 . The SCC disapproved generally of the test previously used in some provinces that was framed in terms of *incapacity* to form the requisite intent. However, the Court did acknowledge a limited role for the use of the incapacity test.

¹³⁰ [1994] 3 SCR 63

¹³¹ Based on s. 7 and s. 11(d) of the *Charter*. The substituted *mens rea* of an intention to become drunk could not be used to supply the *mens rea* of assault and constituted an infringement of the accused’s *Charter* rights. The court devised a new common law rule which permitted a defence of extreme intoxication akin to automatism or insanity. The onus was on the defence on a balance of probabilities.

s. 33.1 might not survive a Charter challenge under Section 7 , based on arguments similar to those already accepted in *Daviault*. So far the constitutional challenges have met with a mixed response from the courts and the matter has not yet been dealt with by Courts of Appeal, let alone the Supreme Court.

v. Necessity

In *Perka*¹³² the Supreme Court acknowledged that there is a common law defence¹³³ of necessity “preserved” by s. 8(3) of the Code. More recently the Supreme Court had occasion to return to the formulation of the defence in *Latimer*,¹³⁴. In that case a father was charged with the murder of his 12 year old severely disabled daughter, who had a mental capacity of a 4 month old baby, and who had frequent seizures. She had already experienced numerous medical procedures, was often in pain and was facing the prospect of additional major surgery, and the father decided to end her life by the use of carbon monoxide gas.

At the first trial the judge refused to put the defence of necessity to the jury, a decision that was upheld by the Saskatchewan Court of Appeal. The Supreme Court ordered a new trial (on a different issue) and at the second trial the judge again withdrew the issue of necessity from the jury, and L. was convicted of second degree murder. The jury recommended a 1 year sentence¹³⁵, which was accepted by the judge, but which was upset on further appeal to the Saskatchewan Court of Appeal. Under the Code the only option was life imprisonment with a minimum of ten years imprisonment without eligibility for parole - a sentence which was upheld on further and final appeal to the Supreme Court¹³⁶. The Court held that there was no air of reality to the defence of necessity, a defence which they indicated is narrow, and of limited application.

Building on the foundations laid down in *Perka* the court held that there are three elements of the defence.

First, there is a requirement of imminent peril or danger.

¹³²[1984] 2 S.C.R. 233

¹³³Characterized as an excuse, rather than a justification and based on the principle of “normative involuntariness” advocated by Fletcher *Rethinking Criminal Law*(Toronto and Boston: Little Brown & Co., 1978) p 803 et seq

¹³⁴[2001] 1 S.C.R. 3

¹³⁵Apparently they were quite astonished when asked to recommend a period between 10 and 25 years without eligibility for parole as required under Section 745.2 and instead recommended 1 year.

¹³⁶(2001) 150 C.C.C. (3d) 129 (S.C.C.)

Second, the accused must have had no reasonable legal alternative to the course of action he or she undertook.

Third, there must be proportionality between the harm inflicted and the harm avoided.

The first and second requirements are to be determined on a modified objective basis i.e. one that takes into account the situation and characteristics of the particular accused, as long as the accused's subjective perceptions are based on reasonable grounds. The third requirement, proportionality, is to be measured on a purely objective standard.

Here, the trial judge was correct to remove the defence from the jury since there was no air of reality to any of the three requirements for necessity. The accused did not himself face any peril, and the daughter's ongoing pain did not constitute an emergency in this case. Her proposed surgery did not pose an imminent threat to her life, nor did her medical condition. It was not reasonable for the accused to form the belief that further surgery amounted to imminent peril, particularly when better pain management was available. Moreover, the accused had at least one reasonable legal alternative to killing his daughter: he could have struggled on, with what was unquestionably a difficult situation, by helping her to live and by minimizing her pain as much as possible or by permitting an institution to do so. Leaving open the question of whether the proportionality requirement could ever be met in a murder case, the Court noted that the harm inflicted in this case was immeasurably more serious than the pain resulting from the impending operation which the accused sought to avoid. Killing a person -- in order to relieve the suffering produced by a medically manageable physical or mental condition -- is not a proportionate response to the harm represented by the non-life-threatening suffering resulting from that condition.

The Court also rejected an argument based on s. 12 of the Charter ("cruel and unusual punishment") and refused the remedy of a constitutional exemption from the operation of the mandatory sentence.

vi Duress¹³⁷

In *Carker No 2*¹³⁸ the Court adopted a very restrictive interpretation of the requirements of "presence" and "immediacy" which are found in s. 17 of the Code which defines the defence of duress.¹³⁹ It also held that the defence of duress is exhaustively defined in s. 17. However, in its

¹³⁷[1977] 2 S.C.R. 189

¹³⁸[1967] S.C.R. 114

¹³⁹Section 17 provides: A person who commits an offence under compulsion by threats of immediate death or bodily harm from a person who is present when the offence is committed is excused for committing the offence if the person believes that the threats will be carried out and if the person is not a party to a conspiracy or association whereby the person is subject to compulsion, but this section does not where the offence committed is {there follows a list of 22 excluded offences which includes murder and attempted murder}.

later decision in *Paquette*¹⁴⁰ the Court held that s. 17 is *not* exhaustive and that there are two separate defences of duress - one under s. 17 that applies to perpetrators, and the other, the common law defence, that applies to other parties. Section 17 contains a list of 22 excluded offences where the statutory defence of duress cannot be used. However if the accused is a party (for example an aider) to the offence, even one of the excluded offences within s. 17, then he can use the common law defence which is much less restrictive than its statutory counterpart

(In *Hibbert* the Supreme Court also held that duress will negate the *mens rea*¹⁴¹ of an offence only in very exceptional cases).

Thus following *Paquette*, Canada had a bifurcated defence of duress until the recent Supreme Court decision in *Ruzic* which considered the effect of the Charter on the statutory defence in s. 17. In *Ruzic*¹⁴² (involving a charge of importing drugs), the Supreme Court, adopting the principle of normative involuntariness as a principle of fundamental justice (it is contrary to the Charter to find an accused liable for offence where his or her actions were normatively involuntary¹⁴³) found the presence and immediacy requirements in s. 17 to be unduly restrictive since they might exclude some accused whose conduct was normatively involuntary from using the defence- and the Court struck down those requirements. While that aspect of the judgment is clear, the remainder is not: it is not clear whether the court simply excised the restrictive words from s. 17, or whether it went even further and struck down the whole of section 17 (with the exception of the list of excluded offences). However looking at the judgment as a whole and considering the fact that the trial judge directed the jury on the common law defence (even though *Ruzic*. was in fact a perpetrator not an aider) it seems that the Court intended to substitute the common law defence of duress and to make it available for all offenders (whether parties or principals).

One thing is quite certain, though, and that is that the list of excluded offences, all 22 of them, were not struck down in *Ruzic* and await further Charter challenge¹⁴⁴ At the present time if

¹⁴⁰[1977] 2 S.C.R. 189

¹⁴¹*Hibbert*[1995] 2.C.R. 973

¹⁴²[2001] 1 S.C.R. 687

¹⁴³Based on work of George Fletcher Rethinking Criminal Law. (1978) supra note 133 – first adopted by the Supreme Court in the context of necessity (*Perka*,) then applied in *Hibbert* (supra) in context of common law defence of duress, and used by the Supreme Court in the context of a constitutional challenge under s. 7 of the Charter to the restrictively defined defence of duress within s. 17. The example given by Fletcher is that of the lost alpinist on the point of freezing to death, who breaks open a mountain cabin. His “choice” to break the law is no true choice - it is remorselessly compelled by normal human instincts (cited in *Perka*)

¹⁴⁴See e.g. *Fraser* [2002] NSJ No 400 (Prov Ct) - lower court authority striking down “robbery”

the accused is the perpetrator of one of the named offences e.g. murder or sexual assault, he cannot use s. 17 or the common law defence and his only remedy will be to challenge the list of excluded offences as contrary to the Charter, and invoke arguments similar those already accepted in *Ruzic* on the issue of moral involuntariness.

It is assumed that as a result of *Ruzic* the common law defence of duress has now become the only defence available and that section 17 (apart from the list of excluded offences) is a dead letter. It is generally acknowledged that the common law defence is broader than the defence in s. 17 but its exact contours are still far from clear. So far the requirements appear to be as follows:-

1. Threats of death or serious harm to himself or others
2. That the accused had no safe avenue of escape - judged on a combined objective/subjective standard - the reasonable person in the shoes of the accused.
3. In some decisions there is mention of a proportionality requirement¹⁴⁵
4. The absence of prior involvement with those likely to exert pressure on the accused - for example membership in a gang prior to the use of the threats¹⁴⁶
5. Higher courts have yet to deal with the issue of excluded offences. As noted above s. 17 contains a list of 22 offences that are excluded. Many will be challenged under the Charter but the most difficult issue will be whether murder should remain an excluded offence. This is yet to be determined but a strong argument can be made for denying the defence both to perpetrators and to parties. That would certainly be in line with the law in England and other Commonwealth jurisdictions.

vii Self- Defence and “Battered Womens Syndrome

The Code provisions on self- defence (sections 34-37 of the Code) have been the subject of unrelenting judicial criticism (example see *Pintar*¹⁴⁷) but the repeated calls for reform have fallen on deaf ears. The provisions are so complex confusing and overlapping that little is to be gained from a review of them in this study.

However there is one point which is of more general interest and that is the treatment of “battered woman syndrome” under our self defence provisions. The key decision is *Lavallee*¹⁴⁸. The accused, a woman with a history of abuse from her husband, killed him by shooting him in the back of the head. He had made threats on day in question but at the time was walking out of the room. The traditional concept of self defence involves a response to an immediate threat to one’s safety but this case involved a pre-emptive strike in self-

¹⁴⁵Li (2002), 162 C.C.C. (3d) 360 (Ont C.A.) (kidnapping case)

¹⁴⁶ *ibid*

¹⁴⁷(1996), 110 CCC (3d) 402 (Ont. C.A.)

¹⁴⁸[1990] 1 S.C.R. 852

defence.

The Supreme Court addressed the appropriateness of the use of expert evidence in this case - evidence that was based on the work of Lenore Walker on the “cycle of violence” experienced by battered women. This is a landmark decision because Wilson J’s judgment broke new ground in expanding the self defence provisions. Because the shooting of the H was deliberate the accused relied on s. 34(2) of the Code ¹⁴⁹ and in the past the requirement that the attack be imminent had been read into the section and would have precluded the use of the section in this case.

The court held that expert evidence can be useful in these cases in explaining a number of factors for the jury 1. It can dispel myths and stereotypes about abused women and can help to explain why the accused’s beliefs were reasonable, given her circumstances of abuse (in particular her increased sensitivity to an impending attack by the H.) and 2. It also explains why it is very difficult for battered woman to leave their spouses, thus explaining why leaving the husband may not be a viable option (“learned helplessness”) and in explaining why an accused believed that the killing the spouse was the only way to save herself.

As a result of *Lavallee* battered women have been able to fit within the self -defence provisions, even in cases where there is no immediate attack¹⁵⁰ and it has in effect sanctioned pre-emptive strikes in self defence at least where an attack was anticipated within a short interval of time.

While the decision has been welcomed it has also been criticized from a number of perspectives - feminist and otherwise.. Feminists have criticized the “syndromization” of what is in essence a social problem - battered women are responding to a terrible reality of abuse that was largely ignored by the social system and the focus should be on social factors rather than on “learned helplessness”¹⁵¹. It is also pointed out that increased funding and resources, while addressing some of the more immediate concerns of abuse spouses by providing shelter and other services, have still left the essential problem of male violence against intimate partners largely unresolved.

¹⁴⁹Every one who is unlawfully assaulted and who causes death or grievous bodily harm in repelling the assault is justified if (a) he causes it under reasonable apprehension of death or grievous bodily harm from the violence with which the assault was originally made, or with which the assailant pursues his purposes; and (b) he believes, on reasonable grounds, that he cannot otherwise preserve himself from death or grievous bodily harm.

This section (unlike s. 34(1)) applies even where there is an intention to kill or cause grievous bodily harm.

¹⁵⁰Prior to that decision such women had no defence - see *Whynot*(1983) 37 C.R. (3d) 198 (N.S.C.A.)

¹⁵¹See comments of L’Heureux-Dube and McLachlin J. (as she then was) in *Petel* [1994] 1 S.C.R. 3 Both women indicated that we should focus on the reasonableness of the response of battered women, given their social circumstances, rather than on the pathology of “learned helplessness”

The *Lavallee* decision has been extended to cover what has been called “prison environment syndrome” (*McConnell*)¹⁵² The Supreme Court, however, seems to have become aware of the dangers of adopting too liberal an interpretation of self-defence and has refused to accept pre-emptive strikes against fellow criminals or gang members.¹⁵³

The reasoning in *Lavallee* has had far-reaching implications outside self-defence and it has been in the vanguard of an increasing trend towards the contextualization of defences with objective criteria. Increasingly “reasonableness” has come to be determined on the basis of the accused’s personal characteristics(the reasonable person in the shoes of the accused.)¹⁵⁴ While this is an interesting development, it is not without its dangers. After all the tests are objective and the focus should be on the reasonableness of the accused’s action. Too generous an injection of subjectivity into essentially objective standards might well lead to an increasing slide into subjectivity. If we attach too much weight to the particular circumstances of the accused the objective standard will become meaningless.

3, Intent and the Impact of “Failed Defences”- the “Rolled-Up Plea”

I have already discussed the use of mental impairment short of mental disorder within s. 16 above and it was noted that Canadian courts have shown some willingness to allow evidence of such impaired mental functioning to be considered in determining whether the accused in fact had the requisite intent for murder¹⁵⁵

There has also been acceptance of what has become known as a “rolled-up plea”. The accused raises a number of defences, typically intoxication, self defence, and provocation. The question is should the jury also consider the impact of the *cumulative* effect of such defences on the issue of intent, even if the evidence considered separately, would not be capable of supporting any of those defences? In the particular context of this paper the question is - might the cumulative effect of the separate failed defences be sufficient to raise a reasonable doubt about whether the accused had the requisite intent for murder?

¹⁵²[1996] 1 S.C.R. 1075 . The Supreme Court adopted the dissenting judgment of Conrad J.A. in the Alberta Court of Appeal. “Prison environment syndrome” is similar to “battered women syndrome” - it was a situation of kill or be killed. There was a history of assault, earlier threats and escalating activity with present ability to carry out the threats. A pre-emptive strike was justified.

¹⁵³*Cinous* [2002] 2 S.C.R. 3; *Charlebois* [2000] 2 S.C.R. 674

¹⁵⁴See for example *R. v. Petel* [1994] 1 S.C.R. 3(self defence and impact of prior threats; *R. v. Hibbert* [1995] 2 SCR 973 (common law defence of duress); *Ruzic* [2001] 1 S.C.R. 687 (duress); *R. v. Thibert* [1996] 1 S.C.R. 37 (characteristics of ordinary person in context of provocation); *R. v. Latimer* [2001] SCR 3 (necessity)

¹⁵⁵ Discussed under “Diminished Responsibility”

The answer is not clear. The Supreme Court seems to have rejected such an approach in *Perrault v. R*¹⁵⁶ (if accused falls outside the provocation provisions, he cannot argue that because of provocation he did not form the intent for murder)) but there are several court of appeal decisions which seem to accept the possibility. For example in *Campbell*¹⁵⁷ Martin J.A. noted that provocation might produce in the accused a state of excitement, anger or disturbance as a result of which he might not contemplate the consequences of his actions and not intend those consequences. In *Nealy* (Cory J. as he then was) noted that all the circumstances surrounding the act of killing must be taken into account in determining whether or not the accused has the requisite intent for murder:-

‘It may well be that the evidence does not give rise to a reasonable doubt as to whether there was provocation or whether the accused lacked the ability to form that intent as a result of consuming alcohol or drugs. Nevertheless, the evidence adduced on those issues, viewed cumulatively, may be of great importance in determining the crucial issue of intent¹⁵⁸ and so the jury must be instructed to consider the cumulative effect of alcohol or drugs, provocation and excessive force in self defence.

There is also Supreme Court support for the “rolled up plea”. In *Robinson*¹⁵⁹, a case involving murder (specific intent) and the impact of intoxication the Court expressly acknowledged that while the jury might reject individual defences they may still have had a reasonable doubt about intent and they could still consider the cumulative effect of intoxication, provocation and self defence on the issue of intent.

In the earlier decision in *Faid*¹⁶⁰ a case involving excessive force in self defence where the court acknowledged that in a failed case of self defence the evidence might still be relevant in determining whether the accused lacked the intent for murder.

However the whole development may have been halted by the more recent SCC decision in *Parent*¹⁶¹. P was charged with murder after he shot his estranged wife at an auction to dispose of their business assets. At trial he relied on lack of intent to kill and the defence of provocation (he alleged she had uttered provocative words prior to the shooting). The jury returned a verdict of

¹⁵⁶[1971] SCR 196

¹⁵⁷(1977), 17 O.R. (2d) 673 (Ont C.A.). See too *Clow* (1985), 44 C.R. (3d) 228 at 231, *R. v. Nealy* (1986), 17 O.A.C. 164

¹⁵⁸*Nealy* at p. 170

¹⁵⁹[1996] S.C.R.683

¹⁶⁰[1983] 1 S.C.R. 265

¹⁶¹[2001] 1 S.C.R. 761

manslaughter. When the matter reached the Supreme Court the court was clear that anger is not a stand-alone defence (the judge had instructed the jury that anger might negate intent). The Court held that outside of the defence of provocation anger has no role to play in reducing murder to manslaughter. However in extreme cases anger might lead to a state of automatism.

The rejection of anger as relevant to the issue of intent certainly seems contrary to earlier authority. However it may be that in *Parent* the court was dealing only with the issue of anger and was acknowledging that in that context only the defence of provocation (with its attendant limitations) can be considered. It would be dangerous to permit evidence of anger without the objective requirements of the provocation defence. The court did not deal with other aspects of the rolled up plea - simply with the issue of anger -and it could be argued that in general the rolled- up plea has survived the decision.

While it is not without its problems (and the prospect of side-stepping the ordinary person requirements of provocation are potentially problematic) the “rolled-up plea” is certainly consistent with generally accepted principles of *mens rea*. The accused should be entitled to raise a reasonable doubt about intent by tendering any evidence that might raise such a doubt but the fact that it is tendered and considered by the trier of fact is no guarantee of its acceptance.

4. Conclusion

The Canadian law of homicide is itself in need of further examination and does not provide a good model for reform. The homicide provisions have been the subject of considerable criticism and in 1984 the then Law Reform Commission of Canada¹⁶², having drawn attention to the illogical location of General Part provisions (for example the causation rules) within a Special Part, the tortuous structure of the homicide provisions and their unnecessary detail, proposed extensive revisions. The Working Paper recommended, inter alia,

- that homicide should no longer be classified as culpable and non-culpable;
- that the causation sections should be replaced by a general provision
- that “intentional” homicide should apply only to cases of actual intent to kill
- that “reckless” homicide should be included in a separate category and should apply only to the causing of death by knowingly exposing another to a serious and socially unacceptable risk of death
- if there is an offence of “negligent” homicide it should carry a lower penalty than reckless homicide
- that there should be 2 degrees of intentional homicide and the second degree offence should carry a *maximum* of life imprisonment, thus allowing judicial discretion in sentencing.

¹⁶² L.R.C.C. Working Paper No. 33. The Law Reform Commission of Canada (which focused on reforming specific areas of law (particularly Criminal Law) was disbanded in the 90’s and replaced by the Law Commission which has a very different mandate requiring a much broader, more theoretical approach to law reform.

- only the first degree offence should carry a minimum penalty and be defined in principle as comprising intentional homicide involving the deliberate subordination of the victim's life to the offender's purpose.
- infanticide should be abolished and the matter dealt with under second degree murder where there is flexibility in sentencing.

The LRCC Paper was very critical of our “felony/murder” provisions and recommended their abolition. While Parliament did nothing it fell to the Courts to deal with the matter and, as noted above, the Supreme Court has found those provisions to be an infringement of the Charter and thus unconstitutional. While that problem has been addressed, other proposals have not been implemented and it is unlikely that they will be, given the amount of time that has elapsed and the lack of any political will to engage in reform (particularly one that would involve restricting murder to intentional killing). In any event the Working Paper is now very much out of date and a new government study which takes into account vitally important Charter jurisprudence which has evolved since the Working Paper was published, is long overdue.

INTENTIONAL KILLINGS IN FRENCH LAW

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INTRODUCTION

This document examines the parts of French criminal law that cover the ground of murder and voluntary manslaughter in English law. As in Ms Pedain's report on German law, "intentional killing" will be used here to designate killings done with intent to kill or to cause grievous bodily harm, and "intended killing" to refer to killings done with nothing less than an intent to death.

French legal sources: the Code pénal

As in Germany, the source of French law on the subject is a Criminal Code, the *Code pénal* (usually abbreviated to CP). The current Code is modern, dating from 1994 – and for this reason it is still widely referred to as the *Nouveau Code penal* (or NPC). Although this introduced many changes, much of the underlying thought derives from the earlier Code of 1810 that it replaced. A complete picture of French criminal law still frequently requires a backward glance to the earlier Code.

A significant matter that still affects public debate about the law of homicide in France is the fact that it was only in 1981 that the death penalty was abolished. As in England, the shape of some of the French rules governing the punishment of homicide still bear the marks of the political compromises needed to bring about the abolition.

Different types of imprisonment; maximum and minimum penalties

For offences in the most serious category (*crimes*²) the main punishment prescribed is *réclusion criminelle*. Although this is in theory different from ordinary imprisonment (*emprisonnement*), in practice it amounts to the same thing. When the new Code was being prepared there was a proposal to abolish it, but traditionalists argued that there was value in the stigmatic quality that attached to its name,³ and the decision was taken to retain it.

The 1810 CP operated with what was known as *la forchette*: the law laid down both a maximum and a minimum penalty, within which the court had a discretion as to sentence; although it could impose a sentence lower than the prescribed minimum if it found the existence of extenuating circumstances (*circonstances atténuantes*). The New CP departs from this by abolishing minimum penalties, so that the penalty prescribed by the relevant article of the CP is (as in English law) the maximum, and the court is usually left free to impose a lesser penalty. However, an exception is made to this in respect of very serious offences. By CP article 132-18:

¹ I am grateful to my eminent French colleague Professor Jean Pradel for his comments and corrections to my earlier draft.

² There are three types of offence in French law: *crimes*, *délits* and *contraventions*.

³ Rather as with "penal servitude" in England.

Where an offence is punished by *réclusion criminelle* or criminal detention for life the court may impose *réclusion criminelle* or detention for a term, or imprisonment for not less than two years.

Where an offence is punished by a determinate sentence of *réclusion criminelle* or criminal detention, the court may impose a sentence of *réclusion criminelle* or detention shorter than the maximum, or a sentence of ordinary imprisonment of not less than a year.

However, this is less grave a matter for persons convicted of homicide than at first appears. This is because, when imposing a prison sentence of up to five years the court is free to make it *sous sursis* (i.e. suspend it).⁴ **Thus French law, unlike English law, does not subject a defendant who has been convicted of a murder to any mandatory period of imprisonment; and in theory, a French court could allow a defendant to “walk free” after convicting him for murder, even of the most atrocious kind.**⁵ That this possibility exists, and that French public opinion tolerates it, probably relates to the fact that in serious cases the sentence is imposed not by a judge, but by a jury (albeit one composed of nine lay people plus three professional judges). Furthermore, where a derisory sentence is imposed in a serious case the prosecutor has a right of appeal.⁶

The “safety period”

In France, the “get tough on crime” debate that in England has taken place around the issue of minimum sentences has mainly centred on the related but different question of how much of the sentence imposed by the court the convicted defendant must actually serve. In reaction to an increasing range of possibilities for premature release, the French legislator

“...brought in, by the law of 22 November 1978, a “safety period” (*période de sûreté*) that prevents, while it runs, the grant of any measure of “individualisation” [i.e. premature release]. A very controversial topic, the safety period has been at the centre of political debate, exacerbating the traditional division between those who are said to be “soft” and those who claim to be “tough”. The debate intensified after the death penalty was abolished, when the safety period, as applied to life imprisonment, took on the appearance of a substitute for capital punishment.”⁷

Since 1981, the rules governing the safety period have been repeatedly amended, being alternatively strengthened and weakened according to the penal tastes of the government of the day, and the resulting law is complicated.

Limiting the discussion here to what is directly relevant to intentional killings, there is no “safety period” for the offence of “ordinary” murder (CP 222-1); but unless the court decides otherwise, aggravated forms of murder are subject to a safety period of half the sentence where it is a fixed term, or 18 years in the case of a life sentence. The court that imposes the sentence may reduce the safety period – and in certain particularly grave cases (notably sexual murders or the sadistic murder of children) it also has the power to increase it.

⁴ CP art. 132-29. By art. 132-30 it cannot do this if the sentence is imposed for *un crime* and the defendant has received a prison sentence during the previous five years.

⁵ I have stressed this when revising my text because, although I stated the position correctly in my earlier draft, in §2.54 of its Report no. 290 on Partial Defences to Murder the Law Commission incorrectly said that in France “There are aggravated forms of murder which carry a mandatory life penalty”: to my embarrassment, because I was cited as the source of its information on French law!

⁶ But, surprisingly, only since 2000 where the sentence was imposed by a jury.

⁷ Desportes and Gunehec, *Droit pénal général*, 10th ed 2003, §1064.

The account of the law that follows is limited to the law relating to intentional killings, and does not cover the French equivalents of manslaughter by gross negligence. But it does include a discussion of the general defences that bear on the issues raised in English law by provocation, diminished responsibility and the use of excessive force in private or public defence.

VOLUNTARY HOMICIDE IN FRENCH LAW

The basic legislative scheme

The structure of the French law on intentional killing consists of a basic offence of homicide, called *meurtre*. Despite the similarity of name, this is more narrowly defined than the English crime of murder, because it is limited to homicides carried out with the intention of causing death; and again unlike murder in England, it does not carry a mandatory life sentence. It is the equivalent of the German offence of *Todschlag*, and as in German law, there are several “upgraded versions” of the offence, to which a heavier maximum penalty applies. However, unlike in German law there are no “downgraded versions”, and in particular there no equivalent of the special German offence of “killing on request”.

Unlike in England, but as in Germany, the defendant who kills by acts that were intended to cause harm short of death does not commit a *meurtre* (or, a fortiori, any of the aggravated versions of this offence); instead, he commits an aggravated version of one of the lesser offences against the person.

The conduct covered by the offence of *meurtre* (both in its simple and its aggravated forms) obviously depends on how French law interprets the meaning of intention.

Neither statute nor French case-law provide any general definition of intention, and for a discussion of its meaning it is necessary to look at French legal writing (*la doctrine*). Here, intention is usually described by the synonym *dol* (from the Latin *dolus*). Of *dol* there are two accepted forms, either of which will satisfy the requirement of the Code for intention: *dol direct*, where the forbidden action or the prohibited consequence is desired, and *dol indirect*, where

the agent knows that his voluntary act will cause (certainly or almost certainly) a consequence that is not truly desired. Our case-law, without saying so expressly, accepts this notion and assimilates *dol indirect* and *dol direct*; so a murder may exist by reason of the knowledge that the blows could result in death as well as in the desire to produce the precise result, which is the extinction of a life.⁸

Thus in broad terms, intention in French law bears much the same meaning as intention in the current English case-law on murder.

French writers also describe a related concept called *dol éventuel* (from the Latin *dolus eventualis*), which is where the agent merely foresees the possibility of the result - which English lawyers would call subjective recklessness. In French law this is not treated as a form of intention. There is no suggestion in French law of the German theory of “*Bedingter Vorsatz*”, under which a person is considered to intend the consequence where he not only

⁸ J. Pradel, *Droit pénal général*, 14th ed (2002), §502.

foresees the risk, but willingly embraces it.⁹ In principle, *dol éventuel* is not a mental state that will support a conviction for *meurtre*, whether in its simple or one of its aggravated forms.

I. The basic offence of homicide (*meurtre*)

By article 221-1 CP,

The wilful causing of the death of another person is murder (*meurtre*). It is punished with thirty years' *réclusion criminelle*.

II. Aggravated forms of homicide

By article 221-2,

A murder which precedes, accompanies or follows another *crime* is punished by *réclusion criminelle* for life.

A murder which is intended either to prepare or to facilitate a *délit*, or to assist an escape or to ensure the impunity of the author or accomplice, is punished by *réclusion criminelle* for life.

Article 221-3 creates an aggravated version of the offence where there was premeditation.

Murder committed with premeditation is assassination. Assassination is punished by *réclusion criminelle* for life.

Article 221-4 creates a further aggravated form of *meurtre*, also punishable with life imprisonment, where it was committed against one of range of specified victims. The list was extended in 2003 as part of the current French government's "get tough on crime" policy. The current list consists of nine different categories and ranges from minors aged less than 15, through a group of close relatives, to a range of public officials (from judges to bus-conductors and firemen), and homosexuals and members of ethnic minorities where the motive was homophobia or racism.

(To stress again what has been previously mentioned, the sentence of life imprisonment in these cases is the maximum: it is not, as in English law, mandatory.)

III. Less serious cases of voluntary homicide: death as an aggravating factor in other offences against the person

CP article 222-1 creates an offence of "torture or acts of barbarity". This carries 15 years *réclusion criminelle*. The penalty is higher if any of a list of aggravating factors are present. By article 222-6, one of these is the unintended death of the victim - in which case the maximum penalty is imprisonment for life.

By article 222-7 "Acts of violence causing an unintended death are punished by fifteen years' *réclusion criminelle*." As in German law, this is probably the offence of which the defendant in *Woolin* would have been convicted.

By article 222-23, rape is widely defined as "Any act of sexual penetration, whatever its nature, committed against another person by violence, constraint, threat or surprise" It is

⁹ Explained by Antje Pedain in [2003] Criminal Law Review 579, 591.

normally punishable with up to fifteen years' *réclusion criminelle*; but by article 222-25 it is punishable by thirty years' *réclusion criminelle* where it resulted in the death of the victim.

IV Provocation, excessive force in self-defence and diminished responsibility.

(i) Provocation

Under the old CP, French law had a general concept of “provocation”. This operated as a partial defence, reducing the penalty otherwise applicable. Articles 321, 322 and 323 set out the circumstances that that could rise to the defence – which by 1994 looked strangely archaic. Provocation could arise from “blows or serious violence”, burglary committed during daylight hours, or a husband discovering his wife in the act of adultery within the matrimonial home. Provocation, so defined, reduced the penalties otherwise applicable to offences of murder and wounding. The old Code contained a specific offence of castration – and for good measure, article 325 provided a defence of provocation where the defendant castrated his victim as an “immediate reaction to an indecent assault committed with violence”. The partial defence of provocation disappeared with the new Criminal Code, the view prevailing that there was no need for it after minimum penalties were abolished. However, some French writers regret its passing and think that a modernised version of the partial defence of provocation should have been incorporated in the new Code.¹⁰

(ii) self-defence and excessive force in self-defence

The rules on “legitimate defence” are contained in article 122-5:

A person is not criminally liable if, confronted with an unjustified attack upon himself or upon another, he performs at that moment an action compelled by the necessity of self-defence or the defence of another person, except where the means of defence used are not proportionate to the seriousness of the attack.

A person is not criminally liable if, to interrupt the commission of a *crime* or a *délit* against property, he performs an act of defence other than wilful murder, where the act is strictly necessary for the intended objective the means used are proportionate to the gravity of the offence.

French case-law provides that the defendant who misunderstood the situation is in principle to be judged on the facts as he believed them to be. So as in English law, the defendant who uses force that is excessive only because he misread the situation is not guilty if the force he used would have been appropriate had the facts been as imagined.

Unlike in English law, however, French law does not give the defendant the benefit of a mistake if it was wholly unreasonable.¹¹ And there is no direct French equivalent of the German defence of *Notwehrexcess*, which provides a defence for the person who overreacts in panic and uses an unreasonable degree of force in a situation that he has understood correctly.

The French equivalent of Tony Martin is sometimes helped by article 122-6:

A person is presumed to have acted in a state of self-defence if he performs an action

¹⁰ Desportes and Gunehec §741.

¹¹ Desportes and Gunehec §730.

- 1° to repulse at night an entry to an inhabited place committed by breaking in, violence or deception;
- 2° to defend himself against the perpetrators of theft or pillage carried out with violence.

This provision was carried over from the Napoleonic Code of 1810, and in the C19 was originally interpreted as creating a presumption that was irrebuttable. Thus at one time, for example, it even applied to protect a husband who shot his wife's lover as he climbed into the house, the husband knowing full well who he was and the purpose of his visit.¹² Nowadays, however, the courts treat it as creating a rebuttable presumption only – which means in practice that the householder who shoots an intruder, though normally taken to have acted in self-defence, is convicted if the prosecution can persuade the court that when he shot he was no longer in fear for the safety of himself or of his family. Thus in one case, the householder was convicted where he saw an intruder in the garden and fired a warning shot, at which the intruder ran away: whereupon the householder fired again directly at him, and hit him.¹³

So as French law currently stands, Tony Martin would probably stand a better chance of acquittal than he would in England, but, depending on the precise facts, he might still fail in his defence. However, if convicted he would still be better off than under English law, for two reasons. First, if he were convicted it would probably not be for *meurtre*, because as we have seen, in French law this requires an intention to kill, and an intention to cause grievous bodily harm is not sufficient. Secondly, even if he was convicted for an offence of *meurtre*, this does not carry a mandatory life sentence. The minimum sentence for a *meurtre* is only a year's imprisonment, and even this can be suspended. So if convicted, a French equivalent of Tony Martin might not even go to jail at all, if the court decided to give him a suspended sentence.

(iii) *Mercy killing*

Like English law, unlike in German law, French law makes no special provision for intended killings carried out at the request of the victim. So in France, voluntary euthanasia – and involuntary euthanasia a fortiori – amounts to *meurtre*. However, as already mentioned, the court has a wide discretion as to sentence. In France a life sentence for a genuine mercy killer would be virtually inconceivable.

But despite this, the issue of euthanasia has recently provoked a great deal of discussion.¹⁴ In April 2005, after a lengthy enquiry, the French legislature enacted a new law¹⁵: but the scope of it is limited. Whilst it makes it legal for doctors in certain circumstances to withdraw life-supporting treatment, it stops short of legalising the deliberate ending of life by taking positive steps (e.g. the administration of a fatal dose of medicine in order to “put the patient to sleep” permanently).

(iv) *Diminished responsibility*

Although French law no longer provides for a partial defence of provocation, it does have something that closely resembles a partial defence of diminished responsibility. This is contained in CP 122-1.

The first paragraph of this article deals with what in English law would be mainly covered by the defence of insanity.

¹² Desportes and Gunehec §740.

¹³ Crim. 8 July 1942, Bull. Crim.. No. 88; Dalloz, Code penal (2005) p.128.

¹⁴ See J. Pradel, *Droit pénal général*, 14th ed (2002), §540.

¹⁵ Loi no. 2005-370 du 22 avril 2005 relative aux droits des malades et à la fin de vie.

A person is not criminally liable who, when the act was committed, was suffering from a psychological or neuropsychological disorder which destroyed his discernment or his ability to control his actions.

This article obviously provides the French defendant with a complete defence where under English law he would fall under the M'Naghten Rules. But it goes wider than this, because it potentially covers the case of the mentally disordered defendant who knew what he was doing, but was unable to control himself. Unlike the defence of insanity in English law, it is probably also wide enough to cover the case of the defendant whose self-control was undermined by drink or drugs (at any rate, those that, as in *Kingston*, he had consumed involuntarily¹⁶).

The second paragraph of article 122-1 deals with what English law would view as diminished responsibility.

A person who, at the time he acted, was suffering from a psychological or neuropsychological disorder which reduced his discernment or impeded his ability to control his actions, remains punishable; however, the court shall take this into account when it decides the penalty and determines its regime.

Unlike section 2 of the Homicide Act 1957, this provision is general and operates in favour of defendants no matter what offence they have been charged with. To that extent, it is like the partial defence in German law of *Verminderte Schuldfähigkeit* (StGB §21). However, unlike the German provision, and indeed section 2 of the Homicide Act, article 122-1 (2) CP fails to lay down any precise legal consequence. All it does is to remind the French court to take account of the defendant's mental state when sentencing him. As one writer puts it:

“So the last line of article 122-1 (2) goes against the traditional tendency of the judges (and the lawyers) to consider at the trial only matters relating to culpability and the types of penalty, without any great reflection on how they are to be carried out, which really is essential.”¹⁷

APPENDIX

Provisions of the French Criminal Code relevant to intentional homicide

ARTICLE 132-23

In the case of an immediate custodial sentence for a term of ten years or more imposed for offences specifically set out by statute, the convicted person is not entitled to benefit from provisions governing the suspension or division of the penalty, posting to a non-custodial assignment, temporary leave, semi-detention or parole, during the safety period.

The safety period is half that of the custodial sentence or, in case of criminal imprisonment for life, eighteen years. The *Cour d'assises* or trial court may nevertheless by a special decision either extend this period up to two-thirds of the prison sentence or up to twenty-two years in the case of imprisonment for life, or may decide to reduce these periods.

¹⁶ French writers shrink from the conclusion that this article provides a potential defence from those who are intoxicated voluntarily: Desportes and Gunehec §649.

¹⁷ J. Pradel, *Droit pénal général*, 14th ed (2002), p.421.

In all the other cases, where it imposes a non-suspended custodial sentence exceeding five years, the court may determine a safety-period during which the convicted person may not be granted the benefit of any one of the modes of execution of penalties referred to under the first paragraph. The length of this safety period may not exceed two-thirds of the penalty imposed, or twenty-two years in the event of life imprisonment.

Reductions of sentences granted during the safety period will be deducted only from the portion of the penalty exceeding this period.

ARTICLE 221-1

The wilful causing of the death of another person is murder. It is punished with thirty years' *réclusion criminelle*.

ARTICLE 221-2

A murder which precedes, accompanies or follows another *crime* is punished by *réclusion criminelle* for life.

A murder which is intended either to prepare or to facilitate a *délit*, or to assist an escape or to ensure the impunity of the author or accomplice, is punished by *réclusion criminelle* for life.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences under the present article.

ARTICLE 221-3

Murder committed with premeditation is assassination. Assassination is punished by a *réclusion criminelle* for life.

The first two paragraphs of article 132-23 governing the safety period apply to the offence under the present article. Nevertheless, where the victim is a minor who is under fifteen years of age and the assassination is preceded by or accompanied by rape, torture or acts of barbarity, the Cour d'assises may by a special decision either increase the safety period to thirty years, or, where it imposes *réclusion criminelle* for life, decide that none of the measures enumerated under Article 132-23 shall be granted to the convicted person. Where the sentence is commuted, and unless the decree of pardon otherwise provides, the safety period is equal to the length of the sentence resulting from the pardon.

ARTICLE 221-4

Murder is punished by *réclusion criminelle* for life where it is committed:

1° against a minor under fifteen years of age;

2° against a natural or legitimate ascendant or the adoptive father or mother;

3° against a person whose particular vulnerability, due to age, sickness or disability, or to any psychic or psychical deficiency or to a state of pregnancy, is apparent or known to the perpetrator;

4° against a judge or prosecutor, a juror, an advocate, a legal professional officer or a public officer, a member of the Gendarmerie, a civil servant belonging to the national police, the customs, the penitentiary administration or on any other person holding public authority, a fireman (whether professional or volunteer), the accredited warden of a building or group of buildings or an agent carrying out on behalf of the tenant the duty of caring for or watching an inhabited building in pursuance of article L. 127.1 of the Code of Construction and Habitation, in the exercise or at the occasion of the exercise of his functions or mission, when the capacity of the victim is known or apparent to the perpetrator;

4bis Against the partner, direct ascendants or descendants of the persons mentioned in paragraph 4 above, or on any other person habitually living with them, by reason of the duties that they carry out;

4ter Against the agent of an public transport organisation or any other person entrusted with a public service mission, such as a health professional, in the exercise of his functions, when the capacity of the victim is known to the perpetrator;

5° Against a witness, a victim or civil party, either to prevent him from denouncing the action, filing a complaint or making a statement before a court, or because of his denunciation, complaint or statement.

6. By reason of the victim's belonging, or not belonging (real or supposed) to a particular ethnic group, nation, race or religion.

7. By reason of the victim's sexual orientation.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offences set out under the present article. Nevertheless, where the victim is a minor under of fifteen years of age and the murder is preceded by or accompanied by rape, torture or acts of barbarity, the Cour d'assises may by a special decision either increase the safety period to thirty years, or, where it orders life imprisonment, decide that none of the measures enumerated under article 132-23 shall be granted to the convicted person; where the penalty is commuted, and unless the decree of pardon otherwise provides, the safety period is then equal to the length of the sentence resulting from the pardon.

ARTICLE 222-1

The subjection of a person to torture or to acts of barbarity is punished by fifteen years' *réclusion criminelle*.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the present article.

ARTICLE 222-6

The offence defined under article 222-1 is punished by *réclusion criminelle* for life where it brought about the death of the victim without intent to cause it.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the present article.

ARTICLE 222-7

Acts of violence causing an unintended death are punished by fifteen years' *réclusion criminelle*.

ARTICLE 222-23

Any act of sexual penetration, whatever its nature, committed against another person by violence, constraint, threat or surprise, is rape.

Rape is punished by fifteen years' *réclusion criminelle*.

ARTICLE 222-25

Rape is punished by thirty years' *réclusion criminelle* where it caused the death of the victim.

The first two paragraphs of article 132-23 governing the safety period are applicable to the offence set out under the present article.

INTENTIONAL KILLINGS: THE GERMAN LAW

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I. INTRODUCTION

This exposition covers the German law relating to misbehaviour which under English law would be classified as “murder” or “voluntary manslaughter”.¹ The term “intentional killings” is used throughout to designate killings which are performed with an intention to cause death or grievous bodily harm (GBH); the term “intended killings” is reserved for killings performed with an intention to kill, the latter being used synonymously with an intention to cause death.

The first point to make in this context is that this task involves looking at a much broader range of provisions of the German Penal Code (*Strafgesetzbuch*, StGB) than merely the homicide offences which are the terminological equivalents of murder and voluntary manslaughter in German law (these are § 211, *Mord*; § 212, *Totschlag* and two less grave variants of the manslaughter offence; § 213, *Minder schwerer Fall des Totschlags* and § 216, *Tötung auf Verlangen*).² Since German law insists on an “intention to kill”³ as the necessary *mens rea* state for any voluntary homicide offence, the lesser offence which covers instances where death results from injuries caused with an intention to cause bodily harm (§ 227, *Körperverletzung mit Todesfolge*)⁴ has to be drawn into the fold of the comparison.

¹ Unless indicated in either text of footnotes, what is presented is the ‘standard’ position taken by the courts and shared by almost all writers on the subject. The main commentaries which have been drawn on are: K. Lackner & K. Kühl, *Strafgesetzbuch mit Erläuterungen* (24th ed. München 2001), H. Tröndle & Th. Fischer, *Strafgesetzbuch und Nebengesetze: Kommentar* (51th ed. München 2003), B. Jähnke, H.W. Laufhütte & W. Odersky (eds), *Strafgesetzbuch: Leipziger Kommentar, Vol. 1: Einleitung; §§ 1 bis 31* (11th ed. Berlin 2003); H.H. Jescheck, W. Rick & G. Willms (eds), *Strafgesetzbuch: Leipziger Kommentar, Vol. 5: §§ 185 bis 262* (10th ed. Berlin 1989).

² §§ 214, 215 and 217 have been abolished through legislative reform at different points in time.

³ This might suggest that German law would not treat as a voluntary homicide any set of facts which English law would classify as “murder committed by causing death with an intention to cause GBH”. However, since German law recognises *dolus eventualis* as a form of intent, in many such cases it would find that an “intention to kill” was present. See H.H. Jescheck & Th. Weigend, *Lehrbuch des Strafrechts. Allgemeiner Teil* (5th ed. Berlin 1996) for the definition of intention.

⁴ There are other provisions which also create an aggravated version of a basic offence by reason of the fact that death ensued from the commission of the basic offence. Some of these provisions may well be applicable to fact situations where English law would find that an intention to cause GBH was present, and hence arrive at a murder conviction. The provisions in question are: § 176 b (sexual abuse of a child resulting in death), § 178 (rape or sexual assault resulting in death), § 251 (robbery resulting in death) and § 306 c (arson resulting in death). Conviction under these offences requires in respect of the death that the specific risk of death inherent in the commission of the basic offence materialised (*Zurechnung*) and that the agent was capable of foreseeing that death might result (*Fahrlässigkeit*). On the structure of these intention-recklessness-combinations see further J.R.

It is also important to note that in addition to the classical justificatory defences of self-defence (*Notwehr*, § 32) and justifying necessity (*Rechtfertigender Notstand*, § 34), German law recognises two general “excusatory” defences of excessive self-defence (§ 33, *Überschreitung der Notwehr*) and of exculpatory necessity (§ 35, *Entschuldigender Notstand*), both of which lead to a full acquittal. The rationale behind these exculpatory defences is that a criminal conviction would be inappropriate in view of the pressure with which the agent was confronted (§ 33) or the serious conflict of interest in which he was caught up (§ 35). Procedurally, all these defences are part of what the court investigates “ex officio” when hearing the evidence led by the prosecution on the charge; the defence neither has to raise the point, nor put forward facts (no evidential burden), nor does it carry any legal burden of proof.

Furthermore, German law contains a general provision of diminished responsibility which can lead to the mitigation of sentence for any offence (§ 21, *Verminderte Schuldfähigkeit*).⁵ The mitigation is optional in the sense that the judge can refuse to grant it when the mitigating factors are outbalanced by aggravating ones. The reduced punishment scales applicable are set out in § 49 (*Besondere gesetzliche Milderungsgründe*). Most interestingly in the context of murder (which carries a life sentence under German law), where § 21 applies, life means “a custodial sentence of no less than three years imprisonment”, § 49 (1) No. 1. Procedurally, facts which matter in regard to mitigation of sentence are investigated along with facts on which conviction for the offence is based. There is no separation between the conviction and the sentencing stage at a German criminal trial. In practice, this may well mean that some mitigating aspects which could only be put before the court by the defendant himself may not be investigated if the defendant denies the crime altogether, because the court is simply not aware of them.

The German text and an unofficial translation of the provisions of German law presented in this paper are set out in the Appendix.

Spencer & A. Pedain, ‘Approaches to Strict and Constructive Liability in Continental Criminal Law’, in A.P. Simester (ed), *Appraising Strict Liability* (Oxford: OUP 2005) 237 ff.

⁵ There is also *Schuldunfähigkeit*, § 20, which is in substance comparable to the insanity defence under English law, though not in relation to special procedural requirements and implications of the insanity defence.

II. VOLUNTARY HOMICIDE IN GERMAN LAW

1. The basic legislative scheme

As for the legislative scheme concerning homicide offences,⁶ the basic homicide offence in German criminal law is *Totschlag* (voluntary homicide which does not amount to murder; the practical equivalent of “voluntary manslaughter”). From there, an intended killing can variously be “upgraded” to murder,⁷ or be “downgraded” to a “less serious case of voluntary homicide”, of which the “killing on request” is a special case.

2. The basic homicide offence of voluntary homicide

Voluntary homicide or *Totschlag* is defined in § 212 as any killing of a human being carried out with an intention to kill which is not murder. It carries a sentence of no less than 5 years imprisonment. In especially serious cases the court is entitled to impose a life sentence.

3. The German murder offence

a) Definition of murder: § 211

Murder (§ 211) is defined very narrowly as an intended killing which the perpetrator committed:

*“out of a lust for killing, [or] in order to satisfy his sexual desires, [or] motivated by greed or by other despicable reasons,
[or] deviously or cruelly or with means capable of causing widespread mayhem, or in order to enable or to cover up the commission of another crime”.*

⁶ I will only cover the provisions applicable to intended killings of a born human being. Besides, there are provisions which criminalise abortion unless certain exceptions apply, and reckless/negligent manslaughter.

⁷ I use this expression descriptively only. There is significant debate among German criminal lawyers about whether murder is technically speaking a freestanding offence or one that is to be conceptualised as aggravated manslaughter; in German law, this technical classification has repercussions on the liability of secondary

An intended killing is classified as “devious” (*heimtückisch*) if the perpetrator relies on the trusting attitude and the helplessness of the victim resulting therefrom to perform the deed.⁸ Thus, what makes an intended killing murder is a particularly appalling or antisocial motive, a particularly base mode of attack on the victim or an extra “gratuitous” danger to the public resulting from the means used. What underlies this catalogue of qualifying aggravating conditions is the idea that a murderer evinces a qualitatively higher anti-social personal disposition than other offenders who kill, and that this disposition is evinced by the motives for which or the way in which he acts.⁹ He and/or his actions are simply “more evil” than those of the “ordinary killer”.

b) Punishment for murder

Murder carries a mandatory life sentence. Unless the general provision on diminished responsibility in § 21 applies (an aspect I will go into later), the court has no general authority to impose a lesser sentence in cases of murder which it views as somewhat less grave.

This has led to challenges to the fairness of a life sentence in cases where an “upgrading element” (which makes the deed murder) is present concurrently with a “downgrading element” (which would make the deed a less serious case of voluntary homicide, if only one were not forced to “upgrade” it to murder by reason of the presence of a qualifying condition from the catalogue in § 211). For instance, if an abused wife kills her husband in his sleep after drugging him with liquor, this counts as a “devious” killing. If her mental state was not sufficiently deranged to draw her into the fold of diminished responsibility, she would have been given a life sentence for murder, despite the fact that she also (as an abused wife) responded to provocation, and, were it not for the *manner* (deviously) in which she killed her husband, would have fallen under § 213 and faced a maximum sentence of 10 (and a minimum sentence of 1) year of imprisonment.

In response to these cases where – because of the presence of an otherwise mitigating factor – a life sentence seems disproportionate, academic writers have suggested that one should read into § 211 an implied restriction that the provision only applies to the most appalling types of killings, which would enable the courts to avoid classifying the deed as

participants which it would go too far to set out in detail. For discussion, see the commentaries on § 211 in the works cited in footnote 1 above.

⁸ See Tröndle/Fischer (note 1 above), commentary § 211 note 16 with further references.

⁹ Tröndle/Fischer (note 1 above), commentary § 211 note 2.

murder in cases where a “downgrading element” is present concurrently with an “upgrading” one.¹⁰

The courts, however, have gone down a different route. Their response to the situation has been to view themselves as “constitutionally authorized” to impose a lesser sentence than life, contrary to the letter of the statute, in cases where the imposition of the mandatory life sentence results in disproportionate punishment. This extraordinary “constitutional competence to disregard the mandatory life sentence” is used very rarely and is seen as troubling, both from the perspective of legal doctrine and from the perspective of legal policy.¹¹

This might be taken to show that even in a legal system where an effort has been made to define murder so narrowly as to only bring within its scope the most serious cases of voluntary homicides, the mandatory life sentence is still capable of causing grave injustice in “untypical” cases. Judicial responses aimed at avoiding injustice in particular cases come at the expense of wrecking havoc over legal doctrine, and of claiming an authority for disregarding the law on an ad hoc basis for which there is no support whatsoever in constitutional law or doctrine.¹² Arguably the cure is not worse than the ill it is meant to address, but it does come at considerable expense.

c) Murder committed in a state of diminished responsibility

Murder, like any other crime, can be committed by the perpetrator in a state of diminished responsibility as defined in § 21. This provision applies to perpetrators who suffered, at the time of the commission of the offence, from

“a pathological emotional disorder, a severe mental disturbance, severe mental retardation or other severe mental abnormality”

¹⁰ Corrective readings (“positive” or “negative Typenkorrektur“) are supported by many academic writers. As an open attempt to read into § 211 an evaluative discretion which is manifestly not there, these suggestions are rejected by the courts as an indefensible interpretation of the provision as it stands. See Tröndle/Fischer (note 1 above), commentary § 211 note 3.

¹¹ BGHSt 30, 105 (Großer Senat), see also BVerfGE 45, 187, 259 ff.

¹² Only the constitutional court has the power to “disapply” and declare invalid legislation whose application leads to an unconstitutional result. Other courts are called upon to interpret laws in ways that avoid violations of the constitution, but where the language of the statute does not allow for the constitutionally required reading as one possible reading of it, the only route left open to the ordinary court is to draw the Constitutional Court’s attention to the situation, and ask it to declare that the offending law is invalid (“Richtervorlage” Art. 100 GG).

which substantially reduced their ability to appreciate the wrongfulness of their conduct or their ability to act in accordance with such appreciation.

This includes all the mental states which, in English law, establish a defendant's diminished responsibility under sec. 2 Homicide Act 1957. In addition, the German provision extends to abnormal mental states which are transient and self-induced, even culpably so, if they were present at the time of the commission of the offence. Thus, severe intoxication may lead to an abnormal mental state which qualifies for the application of § 21; the courts will have to investigate this possibility if the level of intoxication of the offender at the time of the commission of the offence exceeded a blood alcohol level of 2 o/oo.

d) Punishment for murder committed in a state of diminished responsibility

Where § 21 applies to a person who committed murder, the punishment will be a discretionary sentence of no less than 3 years' imprisonment.

4. Less serious cases of voluntary homicides which are not murder

At the other end of the scale of intended killings, there are the ones which German law defines as "a less serious case of homicide" (§ 213), a "killing on request" (§ 216) or an intended killing "in mitigating circumstances by reason of diminished responsibility" (§§ 212, 21, 49 I).

a) Provoked killings and other less serious cases of voluntary homicide (§ 213)

§ 213 applies to provoked killings and to other "less serious cases" of voluntary homicides which are not murder. The definition of provocation is strict. The victim must have directed physical or verbal abuse against the perpetrator or against one of his close relatives. The perpetrator must have lost his temper and must thereby have been carried away to commit the deed. There must be no grounds for blaming the perpetrator for his loss of temper. Such grounds exist (and exclude the application of § 213) where the perpetrator gave the victim reason to act as provocatively as he or she did, for instance by insulting or abusing the victim himself before the victim responded in kind. This requires a moral evaluation of the interaction between victim and perpetrator immediately prior to the deed. Only if the

perpetrator was – morally speaking – the “wronged party” up to the deed will he be able to rely on provocation.

Other less serious cases need not be comparable to provocation in the sense that the defendant must have acted for an understandable reason. Rather, they are characterised by features which mean that the defendant acted in distress, or in a state of significantly affected ability to master his violent impulses and to maintain control over his reactions. As less serious have been recognised: Intended killings motivated by fear, intended killings motivated by compassion with a suffering victim, and intended killings “on the borderline to self-defense”.¹³ The courts have also been prepared to accept that intended killings performed by defendants who were disinhibited and prone to use violence as a result of the prior consumption of drink or drugs can be less serious, but it depends on an evaluation of the deed as a whole whether they are. There is no fixed rule either way.¹⁴

If a killing as accepted as “less serious” under § 213, the punishment is imprisonment between 1 year and 10 years.

b) Voluntary homicide in mitigating circumstances by reason of diminished responsibility (§§ 212, 21, 49 I)

Since the provision concerning diminished responsibility applies to all offences, the basic homicide offence (§ 212 – *Totschlag* -, which has been translated as voluntary homicide) can also be committed in mitigating circumstances by reason of the fact that the defendant suffered from

“a pathological emotional disorder, a severe mental disturbance, severe mental retardation or other severe mental abnormality”

which substantially reduced his ability to appreciate the wrongfulness of his conduct or his ability to act in accordance with such appreciation at the time of the commission of the

¹³ Tröndle/Fischer (note 1 above), commentary § 213 note 13.

¹⁴ German criminal law has, generally speaking, a tolerant attitude towards intoxicated offenders. Intoxication counts as one of those abnormal mental states in which responsibility can be lacking or diminished (§§ 20, 21). Blood alcohol levels of more than 3 o/oo suggest that the defendant lacked responsibility for the crime, blood alcohol levels of more than 2 o/oo suggest that it may be diminished. A separate offence of “committing an offence while willfully drunk”, which can lead to the punishment of offenders who cannot be convicted for the offence they actually did commit in their intoxicated state by reason of lack of responsibility due to intoxication, carries a maximum penalty of five years imprisonment.

offence; § 21 (see above). Defendants like Doughty¹⁵ or Smith¹⁶ would be likely to be slotted in here.

Where §§ 21, 49 I apply, the sentence will be one of imprisonment for no less than three years (§ 49 I No. 1).

c) Double mitigation of sentence in less serious cases of voluntary manslaughter

Where § 213 and §§ 21, 49 I apply concurrently (this is possible wherever § 213 applies for a reason other than the abnormal mental state which founds the application of § 21), the defendant ultimately looks at a sentence between 3 months and 7.5 years imprisonment (§ 49 I No. 2 and 3).

d) Killing on request, § 216

§ 216 is a special case of a “mitigated homicide offence” where the killing was performed at the express and earnest request of the victim. The punishment is low (6 months to 5 years imprisonment), and if the defendant acted in an abnormal state of mind which diminished his responsibility as well as at the express and earnest request of the person killed, “double mitigation” results in a reduced punishment scale of 1 month to 3 years and 9 months imprisonment. This would be the punishment a defendant like Cocker (Times 27 May 1989) would be looking at under German law.

III. KILLINGS COMMITTED WITH AN INTENTION TO CAUSE BODILY INJURY

This exposition would not be complete without mention of the provision applicable in cases where the defendant intended to cause the victim bodily injury and did cause such injuries, which recklessly resulted in the victim’s death: § 227 StGB (*Körperverletzung mit Todesfolge*). Many (though not all) situations in which English law convicts the offender or murder based on a finding that he caused the victim’s death with an intention to cause bodily

¹⁵ [1986] 83 CrAppR 319. He would not be able to rely on provocation (§ 213), but his fractured nerves in result of the baby’s persistent crying may well qualify as an abnormal state of mind within the meaning of § 21.

¹⁶ [2001] 1 AC 146. On the facts, it is unlikely that Smith would be able to rely on provocation concurrently with diminished responsibility, since the victim’s denial that he stole Smith’s tools of trade (whether false or true) is unlikely to qualify as “physical or verbal abuse” within the meaning of § 213.

harm will lead to convictions under § 227 in German law (a defendant like Woollin, for instance, would have looked at a conviction under this provision in German law).¹⁷

§ 227 carries a sentence of no less than 3 years' imprisonment. In less serious cases a sentence of between 1 and 10 years' imprisonment may be imposed.

It must be borne in mind that mitigation by reason of diminished responsibility (§§ 21, 49 I) or a general defence may well apply in such cases. In case of a defence, the defendant would go without punishment. In case of mitigation of sentence by reason of diminished responsibility the minimum term of imprisonment is reduced from 3 years to 6 months.

IV. GENERAL EXCULPATORY DEFENCES AND HOMICIDE CASES

Many culpable homicides are committed in circumstances where the defendant can avail himself of one of the two recognised statutory exculpatory defences in German law, § 33 (*Überschreitung der Notwehr*) and § 35 (*Entschuldigender Notstand*). § 33 applies where a defendant commits an offence against the victim in response to a perceived attack by the victim but uses excessive force due to confusion, fear or panic. § 35 applies where the defendant commits an offence in order to protect himself or a close relative from an imminent danger to life, limb or freedom which could not otherwise be averted.¹⁸ Both defences lead to acquittal. A defendant like Martin would be likely to be acquitted under § 33.

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¹⁷ [1999] 1 AC 82. In some cases, German law might convict for a homicide offence based on a finding that the defendant caused death while appreciating the possibility that he might do so and willingly accepting this risk (*dolus eventualis*, a recognised form of intention in German law) – for instance in a case like Hyam [1975] AC 55. By contrast, in other cases German law would convict the defendant merely for an offence of intentionally causing physical injury, when it could not be established that he was at least reckless as to whether his actions would also cause death (for instance on the facts of Hayward (1908) 21 Cox 692). Note, finally, that for the application of § 227 an intention for cause any, even minor, bodily injury suffices provided that the defendant was at least reckless as to whether his actions would cause death.

¹⁸ Qualifications apply where the perpetrator is responsible for the danger or where he acts under mistake of fact.

APPENDIX

The relevant provisions of the German Penal Code (*Strafgesetzbuch; StGB*)

§ 211 Mord

(i) *Der Mörder wird mit lebenslanger Freiheitsstrafe bestraft.*

(ii) *Mörder ist, wer*

aus Mordlust, zur Befriedigung des Geschlechtstriebes, aus Habgier oder sonst aus niedrigen Beweggründen,

heimtückisch oder grausam oder mit gemeingefährlichen Mitteln oder um eine andere Straftat zu ermöglichen oder zu verdecken, einen Menschen tötet.

§ 211 Murder

(i) A person who commits murder shall be punished with imprisonment for life.

(ii) A person commits murder when he kills another human being

out of a lust for killing, [or] in order to satisfy his sexual desires, [or] motivated by greed or by other despicable reasons,

[or] deviously or cruelly or with means capable of causing widespread mayhem, or in order to enable or to cover up the commission of another crime.

§ 212 Totschlag

(i) *Wer einen Menschen tötet, ohne Mörder zu sein, wird als Totschläger mit Freiheitsstrafe nicht unter fünf Jahren bestraft.*

(ii) *In besonders schweren Fällen ist auf lebenslange Freiheitsstrafe zu erkennen.*

§ 212 [Voluntary] Manslaughter

(i) A person who kills another human being without being a murderer shall be punished for manslaughter with imprisonment for no less than five years.

(ii) In especially serious cases a sentence of imprisonment for life shall be imposed.

§ 213 Minder schwerer Fall des Totschlags

War der Totschläger ohne eigene Schuld durch eine ihm oder einem Angehörigen zugefügte Misshandlung oder schwere Beleidigung von dem getöteten Menschen zum Zorn gereizt und hierdurch auf der Stelle zur Tat hingerissen worden oder liegt sonst ein minder schwere Fall vor, so ist die Strafe Freiheitsstrafe von einem Jahr bis zu 10 Jahren.

§ 213 Less serious case of [voluntary] manslaughter

If the person committing manslaughter was through no fault of his own provoked to lose his temper by physical or verbal abuse from the person killed directed at himself or at a close relative and was thereby immediately carried away to commit the act, or in the event of an otherwise less serious case, the punishment shall be imprisonment between one year and ten years.

§ 216 Tötung auf Verlangen

(i) Ist jemand durch das ausdrückliche und ernstliche Verlangen des Getöteten zur Tötung bestimmt worden, so ist auf Freiheitsstrafe von sechs Monaten bis zu fünf Jahren zu erkennen.

(ii) Der Versuch ist strafbar.

§ 216 Killing on request

(i) Where the person who killed another was induced to kill by an express and earnest request of the person killed, the punishment shall be imprisonment between 6 months and 5 years.

(ii) An attempt is punishable.

§ 227 Körperverletzung mit Todesfolge

(i) Verursacht der Täter durch die Körperverletzung (§§ 223 bis 226) den Tod der verletzten Person, so ist die Strafe Freiheitsstrafe nicht unter drei Jahren.

(ii) In minder schweren Fällen ist auf Freiheitsstrafe von einem Jahr bis zu zehn Jahren zu erkennen.

§ 227 Bodily injury resulting in death

(i) If the perpetrator causes the death of the injured person through the infliction of bodily injury, the punishment shall be imprisonment for no less than three years.

(ii) In less serious cases a custodial sentence between one year and ten years imprisonment shall be imposed.

(Note: *Körperverletzung*, § 223, is the intended causation of bodily injury)

§ 21 Verminderte Schuldfähigkeit

Ist die Fähigkeit des Täters, das Unrecht der Tat einzusehen oder nach dieser Einsicht zu handeln, aus einem der in § 20 bezeichneten Gründe bei Begehung der Tat erheblich vermindert, so kann die Strafe nach § 49 Abs. 1 gemildert werden.

§ 21 Diminished responsibility

If, at the time of the commission of the offence, the perpetrator's ability to appreciate the wrongfulness of his conduct or his ability to act in accordance with such appreciation is substantially diminished because of one of the reasons indicated in § 20, the punishment may be mitigated pursuant to § 49 (1).

(Note: § 20 (*Schuldunfähigkeit wegen seelischer Störungen*) exempts perpetrators from criminal liability who, at the time of the commission of the offence, are unable to appreciate the wrongfulness of their conduct or are unable to act in accordance with such appreciation by reason of a pathological emotional disorder, severe mental disturbance, severe mental retardation or some other severe mental abnormality (*wegen einer krankhaften seelischen Störung, wegen einer tiefgreifenden Bewußtseinsstörung oder wegen Schwachsinnis oder einer schweren anderen seelischen Abartigkeit*).

§ 49 Besondere gesetzliche Milderungsgründe

(i) Ist eine Milderung nach dieser Vorschrift vorgeschrieben oder zugelassen, so gilt für die Milderung folgendes:

- 1. An die Stelle von lebenslanger Freiheitsstrafe tritt Freiheitsstrafe nicht unter drei Jahren.*
- 2. Bei zeitiger Freiheitsstrafe darf höchstens auf drei Viertel des angedrohten Höchstmaßes erkannt werden. Bei Geldstrafe gilt dasselbe für die Höchstzahl der Tagessätze.*
- 3. Das erhöhte Mindestmaß einer Freiheitsstrafe ermäßigt sich im Falle eines Mindestmaßes von zehn oder fünf Jahren auf zwei Jahre, im Falle eines Mindestmaßes von drei oder zwei Jahren auf sechs Monate, im Falle eines Mindestmaßes von einem Jahr auf drei Monate, im übrigen auf das gesetzliche Mindestmaß.*

(ii) [omitted]

§ 49 Special Statutory Mitigating Circumstances

(i) If mitigation of sentence is prescribed or permitted according to this provision, the following shall apply for such mitigation:

1. Imprisonment for no less than three years takes the place of imprisonment for life.
2. In cases of imprisonment for a fixed term, at most three quarters of the maximum term provided for may be imposed. In the case of a fine the same shall apply to the maximum number of daily rates.
3. An increased minimum term of imprisonment shall be reduced:
in the case of a minimum term of ten or five years, to three years,
in the case of a minimum term of three or two years, to six months,
in the case of a minimum term of one year, to three months,
in other cases to the statutory minimum.

(Note: the statutory minimum for the length of a custodial sentence is one month, § 38 (2)).

Further explanatory notes:

1. Whenever a provision in the German Penal Code does not specify a lesser *mens rea* state than intention, intention is required with regard to all the elements of the *actus reus*. This follows from § 15.
2. Whenever a provision sets out a heavier penalty for an offence by virtue of it having led to a particularly serious result (as § 227 does), the defendant has to have been at least reckless as to whether his act would cause the serious result (§ 18).
3. Whenever a provision sets out a minimum penalty of at least one year imprisonment (“Verbrechen”), an attempt is punishable (§§ 12, 23). Whenever a provision sets out a lesser minimum penalty (“Vergehen”), attempts are only punishable if the provision in question explicitly provides for it. Hence, in § 216, there was a need to state that the attempt is punishable, whereas in §§ 211, 212 and 213 an attempt is punishable under the general rule.

THE SCOTS LAW OF MURDER

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Setting the Context

Structurally, at least, the Scots law of homicide resembles the law of England and Wales. In common with the law of England and Wales, there are two central homicide offences in Scots law. The offences of murder and culpable homicide in Scotland are close equivalents of the offences of murder and manslaughter in England and Wales. Just as in England and Wales there are different kinds of manslaughter, so in Scotland there are different kinds of culpable homicide. Culpable homicide might arise as a consequence of another criminal act, normally an assault, or as a result of reckless killing,² or if a charge of murder is ‘reduced’ to a conviction of culpable homicide through the use of a partial defence. As in England and Wales, there are two partial defences: provocation and diminished responsibility. As in England and Wales, the offence of murder carries with it a mandatory life sentence, whereas there is complete discretion regarding the sentence of culpable homicide. There is no Scots equivalent of the offence of infanticide. If a conviction of murder is to be avoided where a mother kills her small child, diminished responsibility may, in the appropriate case, provide a defence.

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² Whilst many Scots lawyers have supposed Scots law to adopt an objective definition of recklessness, now see the contrast between the Scots approach and the English test for gross negligence in *Transco PLC v HMA* 2004 SCCR 1 at 35.

Hume, however, recognised a further distinction in the law of murder between murder and aggravated murder. If the latter was proved it would result in ‘a more rigorous mode of execution, or some indignity and suffering, beside the loss of life.’³ Cases that Hume considers include those involving the administration of poison, those involving a close relationship between the killer and the victim such as parricide or child murder. The distinction between murder and aggravated murder appears no longer to be significant in the law of Scotland. There is now a single offence of murder.

Subject to qualifications noted below, self-defence, insanity and automatism are complete defences to murder. Provocation and diminished responsibility are partial defences which result in a conviction of culpable homicide rather than murder.

Actus Reus

The *actus reus* of murder involves the destruction of a human life. Any act that shortens life constitutes the destruction of life, although the law has tended to turn a blind eye to the shortening of life through the provision of drugs for pain relief. If the victim dies more than a year and a day after the initial attack a murder charge may nevertheless be competent.⁴ A conviction for a homicide offence is competent in cases where the victim’s death came about through the voluntary ingestion of proscribed, or even possibly non-proscribed, drugs,⁵ and if the accused had the *mens*

³ Hume i. 191.

⁴ Hume i. 186. It may be that if the victim dies several years after the assault, it will be regarded as oppressive to try the accused. See *Tees v HMA* 1994 SCCR 451.

⁵ See *Lord Advocate’s Reference (No.1 of 1994)*, 1995 SLT 248. Scots law draws no distinction in this context between proscribed and non-proscribed drugs, as can be seen from cases involving non-fatal offences against the person such as *Khaliq v HMA* 1984 JC 23 and *Ulhaq v HMA* 1991 SLT 614.

rea, a conviction of murder would presumably be possible, although culpable homicide is the more likely offence to be charged.

Mens Rea

The *mens rea* of murder in Scots law is in a somewhat chaotic state. There is no longer any equivalent of the term ‘malice aforethought’ that is used in English law.⁶ Until recently, the definition of murder most commonly used derived from the fifth edition of Macdonald’s *Criminal Law*:

Murder is constituted by any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences.⁷

Recently, however, this definition has been qualified by *Drury v HMA*⁸ in which it was suggested that it is not a mere intention to kill, but rather a ‘wicked intent’ to kill that is required to fulfil the *mens rea* of murder. Neither the concept of wicked intent, nor the meaning of the phrase ‘displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences’ have been carefully developed in the law.

Wicked Intent

⁶ The historic Scots equivalent, ‘forethocht felony,’ is no longer used. See D Sellar ‘Forethocht Felony, Malice Aforethought and the Classification of Homicide’ in W M Gordon and T D Fergus *Legal History in the Making: Proceedings of the Ninth British Legal History Conference Glasgow 1989* (London: Hambledon Press, 1991).

⁷ 5th ed. (Edinburgh: Greens) 89. Cited, for example, in all three judgements in *Cawthorne v HMA*, 1968 JC 32.

The jurisprudence on the nature of intention is much less developed than it is in English law, partly as a consequence of the alternative *mens rea* of wicked recklessness. Much of the analysis that exists is in the context of fire-raising, for the reason that there are separate offences of wilful fire-raising and culpable and reckless fire-raising in Scots law. However, the analysis of intention in that context does not provide a clear indication of the scope of intent.⁹ Hence, it is not clear whether intent to kill, for these purposes, includes foresight of virtual certainty of death or foresight of a high probability of death.

In *Drury* the accused was charged with murder and attempted to use the defence of provocation. The defence is available in Scots law only if the accused was provoked either by violence or by the discovery of infidelity on the part of a person from whom he could legitimately expect fidelity. A condition of the use of the defence where the accused suffers violent provocation is that his response must not have been grossly disproportionate to the provocation. The trial judge had directed the jury that a similar principle applied where the provocation arose from infidelity. The accused was convicted and appealed. It was decided that proportionality was not a requirement for the use of the defence in such circumstances. However, the High Court took the opportunity to ‘clarify’ the definition of murder.

The central passage is in the judgement of Lord Justice-General Rodger, whose account was more or less followed by the other judgements in the case. He refers to the direction of the trial judge, which follows closely the standard direction from Macdonald quoted above. He then makes the following comments:

⁸ 2001 SCCR 583.

The definition of murder in the direction is somewhat elliptical because it does not describe the relevant intention. In truth, just as the recklessness has to be wicked so also must the intention be wicked. Therefore, perhaps the most obvious way of completing the definition is by saying that murder is constituted by any wilful act causing the destruction of life, by which the perpetrator either wickedly intends to kill or displays wicked recklessness as to whether the victim lives or dies.¹⁰

This was motivated by the fact that a person who kills intentionally in self-defence is not guilty of murder.

Effectively, murder is redefined in a way such that the definition of the offence itself excludes cases in which the accused would be entitled to a defence.¹¹ The High Court, in redefining murder, supposes that if a defence is available to the defendant, he ought not to fall within the definition of the offence. This requirement is obviously contrary to almost much modern criminal law scholarship, which regards the separation between offence and defence as being fundamental in principle, albeit that there is disagreement as to exactly why.¹² It is also contrary to an earlier decision on the *mens rea* of murder, *Scott v HMA*,¹³ which was not referred to in *Drury*

A starting point for analysing the consequences of this decision is whether a) the 'clarification' in *Drury* only alters the structure of the law by incorporating extant

⁹ *Byrne v HMA* 2000 SCCR 77.

¹⁰ At 588-9.

¹¹ See also Lord Rodger's rejection of the idea that murder is reduced to culpable homicide at 591. He objects on the grounds that if there is sufficient provocation the accused has not completed the offence of murder at all.

¹² See K Campbell 'Offence and Defence', J Gardner 'Justifications and Reasons', G Fletcher *Rethinking* and V Tadros *Criminal Responsibility* ch.4. For a similar argument in the context of *Drury*, see J Chalmers 'Collapsing the Structure of Criminal Law' 2001 SLT (News) 241 and M Christie 'The Coherence of Scots Criminal Law: Some Aspects of *Drury v H.M. Advocate*' 2002 *Juridical Review* 273.

¹³ 1996 SLT 519.

defence definitions negatively into the definition of the offence (so, for example, ‘wicked intent’ can be redefined as ‘intent to kill in the absence of self-defence, provocation or diminished responsibility’);¹⁴ or b) *Drury* introduces the possibility that the accused killed the victim intentionally, did not fall within any extant defence definition, but nevertheless is properly to be acquitted of murder.

There is some good reason to think that it is b) that is intended. Lord Rodger claims that provocation is effectively evidence as to whether the accused had wicked intent or was wickedly reckless as to death.¹⁵ Furthermore, the proper procedure in provocation cases following *Drury* is to consider whether the defence was available to the accused, and if the defence fails, consider whether the accused had wicked intent or was wickedly reckless on the basis of the remaining evidence. However, there appears to be nothing in *Drury* which explicitly restricts the accused from raising ‘quasi-provocation’ evidence as a way of showing a lack of wicked intent or wicked recklessness.¹⁶

For example, in Scots law, the defence of provocation is available only if the accused responded immediately to the provoking incident. This requirement appears to exclude the possibility of cumulative provocation.¹⁷ But, following *Drury*, there appears to be nothing to prevent the accused raising evidence of cumulative provocation as a way of showing lack of wicked intent.¹⁸ Similarly, although it has

¹⁴ ¹⁴ Sir Gerald Gordon, in his commentary to the case, suggests that in practice it may well be that the jury will be obliged to convict if they indicate to the trial judge that they think that the accused does not fall within an extant defence to murder but that his intention to kill was not wicked.

¹⁵ At 591.

¹⁶ See also M Christie ‘The Coherence of Scots Criminal Law.’

¹⁷ See *Thomson v HMA* 1986 SLT 281.

¹⁸ It should be noted that in *Parr v HMA* 1991 SCCR 180 the defence attempted to use quasi-provocation evidence in order to establish that the jury should have been invited to consider a verdict of culpable homicide in a case where the accused struck the victim several times with a hammer. It was held that the nature of the acts themselves were such that the judge was correct to withdraw the issue of culpable homicide from the jury. Perhaps that approach is questionable given *Drury*.

been suggested that coercion is not a defence to murder,¹⁹ there now seems little possibility of excluding evidence of coercion in murder cases. For such evidence is surely a way of showing that the accused lacked wicked intent even if he killed intentionally in response to the coercion. That is not to say that such a change in the law is undesirable in substance, but surely to allow the jury to consider such evidence in a way unconstrained by any set of rules or principles is unlikely to produce consistent or otherwise just results. Finally, it may be that although there is a rule in Scots law that, in cases of mistaken self-defence, the defence will only be available if the accused makes a reasonable mistake as to the necessity of defending himself.²⁰ But, unless it can be shown that such an accused was wickedly reckless in defending himself in that way, it may be that a conviction of murder is no longer competent where the defendant honestly but unreasonably believes that he is being attacked.²¹

Wicked Recklessness

As noted above, the *mens rea* of murder may be complete even if the accused did not intend to kill, if he displayed ‘such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences.’ This phrase is hardly crystal clear, although it is regarded by some Scots lawyers as satisfactory.²² Subsequent case law has hardly clarified matters.

¹⁹ This was suggested by the trial judge in *Collins v HMA* 1993 SLT 101, although the comments may be regarded as obiter as coercion was not raised as a defence in the case. The issue was not commented on by the High Court in the appeal despite the defence being mentioned, which seems to imply that the possibility of coercion in a murder case was not being ruled out.

²⁰ *Owens v HMA* 1946 JC 119. For further discussion, see F Leverick ‘Mistake in Defence after *Drury*’ (2002) *Juridical Review* 35.

²¹ See also J Chalmers ‘Collapsing the Structure of Criminal Law’ 242-3.

²² See *Report of the House of Lords Select Committee on Murder and Life Imprisonment* (London: HMSO, 1989). The Draft Criminal Code for Scotland suggests the alternative ‘callous recklessness’ in s.37. It is not entirely clear that this has the advantages of clarification that are suggested in the commentary.

i) *Objectivity.*

It is often commented that wicked recklessness is to be interpreted objectively. That is, it is suggested that one looks at the acts of the accused rather than attempting to discover what is in his mind. This is so, it has been suggested, because one cannot assess what was in the mind of the accused, so one must infer that from his acts. However, that explanation is problematic. First, the definition of wicked recklessness itself implicitly refers to a state of mind, for states of mind are surely central to establishing the ‘depraved disposition’ of the accused. Secondly, the inference of such a disposition is to be made from the violent acts of the accused, but those violent acts must themselves be intentional. So, for example, Lord Cameron, in *Cawthorne* suggests that ‘such reckless conduct, *intentionally* perpetrated, is in law the equivalent of a deliberate intent to kill.’²³ It is not so much that the *mens rea* of murder is defined objectively, then. Perhaps there is a constructive element to the *mens rea* of murder, where the *mens rea* need not correspond precisely with the *actus reus*, although decisions are insufficiently clear to establish whether this is the case.²⁴ Finally, if the explanation of the alternative *mens rea* of murder is that it is difficult to prove an intent to kill, that seems contrary to the spirit of the presumption of innocence.²⁵

Whilst the term ‘objective’ tends to be used by criminal lawyers to denote standards to be applied to the defendant’s behaviour regardless of their state of mind,

²³ 1968 JC 32 at 38, *emphasis added*.

²⁴ See below.

²⁵ How *that* is to be interpreted, of course, is contested. See, for example, P Roberts ‘The Presumption of Innocence Brought Home: *Kebilene* Deconstructed’ (2002) 118 LQR 41 and ‘Drug Dealing and the Presumption of Innocence: the Human Rights Act (Almost) Bites’ (2002) 6 E & P 20, V Tadros and S Tierney ‘The Presumption of Innocence and the Human Rights Act’ (2004) 67 MLR 402-434, R A Duff ‘Strict Liability, Legal Presumptions, and the Presumption of Innocence’ and P Roberts ‘Strict Liability and the Presumption of Innocence: An Exposé of Functionalist Assumptions’ both in A P Simester *Appraising Strict Liability* (Oxford: OUP, 2005).

it is not clear that this captures what the courts intend when they use the term 'objective'. For example in *Broadley v HMA*²⁶ the accused was charged with the murder of his wife by stabbing her several times with a knife. He sought to rely on factors which might have motivated the attack, such as that his wife had left him, as well as factors which might be called 'quasi-excuses', such as that he was a weak man and that he had argued with his father in law, to argue that he did not kill in a wickedly reckless manner. These contextual factors were excluded on the grounds that the *mens rea* of murder is to be determined objectively. But the factors were not raised by the accused to suggest that he lacked the state of mind necessary for murder. Furthermore, as has already been noted, surely it would be central to justify a conviction that the attack with the knife was intentional. An accidental stabbing would not constitute murder.

ii) Murder and the Intention to Assault

The question of objectivity is related to the question of whether an intention seriously to assault the victim is sufficient to constitute the *mens rea* of murder. English law has been criticised by some for adopting such a 'constructive' approach to the offence.²⁷ In Scots law the authorities are not entirely clear whether murder is a constructive crime. Juries have sometimes been directed that an intention to assault the victim is a third alternative to an intent to kill or wicked recklessness outlined by Macdonald.²⁸

²⁶ 1991 SCCR 416.

²⁷ It might be thought to depart from the correspondence principle, if indeed that is a proper principle of criminal law, on which there is a developing literature. See A Ashworth *Principles of Criminal Law* 4th ed (Oxford: OUP, 2003) 88, J Horder 'Questioning the Correspondence Principle – A Reply' [1999] *Criminal Law Review* 206, B Mitchell 'In Defence of the Correspondence Principle' [1999] *Criminal Law Review* (and Horder's reply following) and V Tadros *Criminal Responsibility* (Oxford: OUP, 2005) 90-9.

²⁸ See, for example, the direction of Lord Avonside in *Cawthorne v HMA*, which did not receive criticism on appeal.

However, the status of an intent to assault, in the context of murder, is now probably only that it is a way of establishing wicked recklessness.²⁹ If a third limb of the *mens rea* of murder remains, it only remains in the context of violent robbery.³⁰ However, the relationship between an intent to assault and the relevant disposition of the accused in Scots law is unclear.

The central question is the status of the accused's disposition. The prosecution are required to prove that the accused displayed such wicked recklessness *as to imply* a disposition regardless of the consequences. This might suggest that the prosecution do not need to prove that the accused *had* such a disposition. They need only prove that the accused attacked the victim in a wickedly reckless way, such that the relevant disposition *could* be implied. In other words, a conviction might be competent even if the jury do not think that the relevant disposition has been proved by the prosecution to the criminal standard.

This is important, for if the prosecution are not required to prove the relevant disposition, they are also not required to prove that the defendant had any particular attitude toward the death of the victim. Consider two cases in which the defendant severely beat the victim in an identical manner, but did not hit him in the head, and the victim died of his injuries. A1 claims that he purposefully avoided the head to lessen the risk of death, and that claim is substantiated by some evidence (perhaps, for example, he can show that he had been advised to avoid the head just before the beating to diminish the risk of death). A2 gave no particular thought to the issue. He recognised the risk of death in the assault. If the jury are unsure about whether A1 was telling the truth, is a conviction of murder nevertheless competent? Perhaps one

²⁹ See *Arthur v HMA* 2002 SCCR 796.

³⁰ If, as I will suggest, *Broadley* is to be treated with suspicion in the light *Arthur* and *Halliday*, perhaps the life of authority concerning killing in the course of a robbery discussed in Gordon *Criminal Law* vol.2 3rd ed. (Edinburgh: Greens, 2001) 302-5 should be treated with the same suspicion.

thing that the courts are attempting to convey by using the language of objectivity, for example in *Broadley v HMA*, is that A1 and A2 are to be treated in the same manner. Once the prosecution have proved an intentional violent assault where death is an obvious and serious risk, nothing more need be established.

Perhaps, on the other hand, evidence that the accused lacked the relevant attitude to the consequences of his actions is relevant to determining whether the accused is to be convicted of murder. So, for example, in *Arthur v HMA*³¹ it was suggested that the use of violence, even life threatening violence, is ‘only the basis on which the relevant mental state, namely utter and wicked disregard for the consequences to the victim, could be inferred.’³² In that case, it appears that even the intent to use ‘life-threatening’ violence is insufficient for the *mens rea* of murder if the accused does not disregard the consequences of his victim. This seems to suggest that using very serious violence against the victim, hoping that the victim survives it, is insufficient for a conviction of murder if the victim dies of his injuries. Consequently, the jury ought to acquit in A1’s case.

Probably this is the view most consistent with other authorities. For example, it is consistent with the decision in *Halliday v HMA*³³ in which it was decided that the failure of the two accused to call an ambulance after the attack on the victim could provide evidence that they displayed wicked recklessness in the attack. It was decided that

³¹ 2002 SCCR 796.

³² At 800. Similarly, in *Miller and Denovan v HMA*, High Court, December, 1960 *unreported* (see C H W Gane and C N Stoddart *A Casebook on Scottish Criminal Law* (Edinburgh: Green, 2001) 404-6) it was suggested that ‘it can still be murder if the jury are satisfied that there was a wilful act displaying utter recklessness of the consequences of the blow delivered.’

³³ 1998 SCCR 509.

The evidence that, once the attack was over, the appellants failed to call an ambulance and proceeded instead to see to the washing of their clothes, is again evidence which the jury could properly regard as casting light on the attitude of the appellants at the time of the attack and as tending to show that they had been wickedly indifferent to the consequences of the attack on the deceased.³⁴

If evidence which provides the context of the attack, and which tends to show indifference on the part of the accused, is relevant to establishing wicked recklessness then surely contextual evidence which tends to show lack of indifference must be relevant also. From that, the proper conclusion is that the rule in *Broadley*, even if it is correct in its consequences in that case, was poorly formulated. Finally, if the decision in *Halliday* is accepted, there is obviously no room for the idea that wicked recklessness is to be understood objectively, for in that case the jury were explicitly invited to consider the attitude of the accused, surely a subjective issue.

iii) Withdrawing Culpable Homicide from the Jury

In both *Miller and Denovan* and *Broadley*, as well as *Parr v HMA*,³⁵ appeals arose because the trial judge did not leave open to the jury the possibility of a conviction of culpable homicide. The issues discussed in this section will obviously be relevant in determining when this is properly done. Both appeals were dismissed on the grounds that if the prosecution's case was to be believed regarding the nature of the attack, the only possible offence which the jury could convict of would be murder. This is a

³⁴ At 513.

warranted conclusion in *Broadley*, but less convincing in *Miller and Denovan*, in which the victim was hit over the head with a large piece of wood by one of the accused to facilitate a robbery.

Murder Art and Part

It is worth a brief (and due to constraints of space, incomplete) excursion into the law of art and part in Scotland, as this is perhaps one of the most controversial aspects of the law of murder in Scotland. Art and part is the Scottish auxiliary offence of assisting the principal with committing an offence, akin to the English offence of aiding and abetting. Recent developments in the law of art and part, in the context of homicide, re-establish a broad scope of the offence, and those developments can only be regarded as troubling. The central case is *McKinnon v HMA*.³⁶

McKinnon decided that murder may be perpetrated art and part by the accused if a) the principal killed; and b) the accused, by his words or actions, actively associated himself with a common criminal purpose with the principal which was or included the taking of human life or carried with it the obvious risk that human life would be taken. It is not necessary for the prosecution to prove that the accused was aware that there was any risk that human life would be taken if that risk was obvious.³⁷ If the common criminal purpose involved the carrying of weapons, and the accused knew this, that would be sufficient to establish the *mens rea* of art and part murder, it has been suggested, for if weapons were carried, it would be obvious that they may be used. *McKinnon* seems to suggest that the accused can be convicted of

³⁵ 1991 SCCR 180.

³⁶ 2003 SCCR 224.

murder art and part even if he has no awareness of any risk of death, or even a risk of injury, whatsoever when joining the common purpose, and that is surely unwarranted.

McKinnon also confirms that if the accused associates himself with some lesser common purpose, which does not carry the obvious risk that murder may be committed, it is open for the jury to convict the accused of culpable homicide even if the principal is convicted of murder. For example, if the accused reasonably believes that all that is intended is some minor injury to the victim, a conviction of culpable homicide may be warranted if the principal murders the victim.³⁸ However, the case does not make any provision for a conviction of the lesser offence if the accused dissociates himself from that aspect of the common plan at a later date.

It is not clear whether the decision in *McKinnon* applies in circumstances of spontaneous concert. Scots law has tended to distinguish antecedent concert and spontaneous concert. It may be that the more subjective individualised approach of *Brown v HMA*³⁹ will be used with regard to spontaneous concert. The judgement in *McKinnon* tends to characterise more subjective and individualised approaches to murder art and part that exist in the case law⁴⁰ as applying to spontaneous rather than antecedent concert. However, it is unclear that there is any principled reason to distinguish antecedent concert from spontaneous concert in this way.⁴¹

³⁷ There are, however, some passages that appear to conflict with that. See J Chalmers 'Art and Part Liability in Homicide' (2003) 62 Greens Criminal Law Bulletin 2.

³⁸ At 237, following *Mathieson v HMA* 1996 SCCR 388.

³⁹ 1993 SCCR 382.

⁴⁰ See discussion of *Melvin v HMA* 1984 SCCR 113 in *McKinnon* at 236-7.

⁴¹ It is also now difficult to determine the status of the decision in *Kabalu v HMA* 1999 SCCR 348. In that case, the victim was chased by a group of people and beaten to death. The accused arrived on the scene after significant blows had been delivered to the victim. It was decided that he could not be convicted of murder as he had not seen the extent of the earlier violence. But it is not clear that a conviction would be ruled out by the objective approach of *McKinnon*. It is also unclear whether to call this attack an example of spontaneous concert at all. It may be that the appropriate distinction has to do

Diminished Responsibility

The creation of the defence of diminished responsibility was almost certainly motivated at least in part by the desire to avoid imposing the death penalty. Consequently, the defence was historically fairly broad.⁴² Until the recent case of *HMA v Galbraith*⁴³ the defence had gradually narrowed, primarily to prevent it being used by those suffering from psychopathic personality disorder or equivalents. The burden of proof in establishing the defence of diminished responsibility is on the party seeking to establish it.⁴⁴

Prior to *Galbraith*, the leading case on diminished responsibility was *HMA v Savage*.⁴⁵ In that case the jury were charged that the charge of murder could be reduced to culpable homicide in the following circumstances: that there was an aberration or weakness of mind; some form of mental unsoundness; state of mind which is bordering on, though not amounting to, insanity; and some form of mental disease. However, this was put fairly casually by Lord Alness as ‘the kind of thing that is necessary’ for use of the defence.⁴⁶ In *Connelly v HMA*⁴⁷ it was decided that this test was required to be read together, such that the absence of any element would make the defence unavailable to the accused. A consequence was that the defence was unavailable where the accused did not suffer from a mental disorder, mental illness or disease. That, it appeared, excluded those with personality disorder from the defence. Furthermore, in *Williamson v HMA*,⁴⁸ which followed the judgement in *Connelly*, it

with the adoption of prior injuries rather than future acts of the accused, another distinction which it is difficult to justify in principle. See also *McLaughlan v HMA* 1991 SLT 660.

⁴² See, *Galbraith* at 566 which outlines the different kinds of case which grounded the defence.

⁴³ 2001 SCCR 551.

⁴⁴ *Lindsay v HMA* 1997 JC 19.

⁴⁵ 1923 JC 49.

⁴⁶ At 50.

⁴⁷ 1990 SCCR 504.

⁴⁸ 1994 SCCR 358.

was held that mental disorder, mental illness and mental disease were different ways of referring to the same thing rather than alternatives, hence narrowing the defence further.

These decisions would also have excluded from the defence women who killed their partners after suffering domestic abuse. For, whilst such women have been described as suffering from 'battered woman syndrome',⁴⁹ it is not clear that such a syndrome would amount to a disease of the mind. Such circumstances gave rise to a reconsideration of the defence in *Galbraith*.

In *Galbraith*, *Connelly* was overruled, and as a consequence, the defence was broadened in two ways. First, it was decided that the defence might be made available to a defendant even if he did not suffer from a mental disease. Other psychological disorders might provide a foundation for the use of the defence. The law is to proceed on a case by case basis to determine which disorders have the potential to found a defence of diminished responsibility and which do not. Causes of the disorder that may found the defence include sunstroke, alcoholism, strokes, tumours, disorders of the thyroid or prescribed drugs. If the accused is of low intelligence, suffers from schizophrenia or is depressed, the defence may also be available. Finally, relevant to the facts of *Galbraith*, a recognised mental abnormality that follows from abuse on the accused might also be capable of founding the defence. The mental disorder must be recognised by the 'appropriate science', but that may include psychologists as well as psychiatrists.⁵⁰ It may be questioned whether the legal conception of diminished

⁴⁹ See L Walker *The Battered Woman Syndrome* (New York: Springer, 1984). There is a large body of literature about whether there is such a syndrome and its relationship to criminal defences. See, for example, A M Coughlin 'Excusing Women' (1994) 82 *California Law Review* 1, R Schopp, B Sturgiss and M Sullivan 'Battered Woman Syndrome, Expert Testimony, and the Distinction between Justification and Excuse' (1994) *University of Illinois Law Review* 45, J Dressler 'Battered Women Who Kill Their Sleeping Tormentors: Reflections on Maintaining Respect for Human Life while Killing Moral Monsters' and J Horder 'Killing the Passive Abuser: A Theoretical Defense' both in S Shute and A P Simester *Criminal Law Theory: Doctrines of the General Part* (Oxford: OUP, 2002)

⁵⁰ At 574.

responsibility should be restricted in this way.⁵¹ Personality disorder, on the other hand, is explicitly excluded as a foundation of the defence,⁵² as is voluntary intoxication.⁵³

Secondly, the degree of mental impairment required for use of the defence was clarified and reduced in *Galbraith*. As noted above, in *Savage* it was suggested that the defence would be available only if the accused had a mental state bordering on insanity. In *Galbraith* it was decided that it is normally neither necessary nor appropriate to direct the jury in these terms, and that, as in English criminal law, substantial impairment would be sufficient. It is only in cases where alternative defences of insanity and diminished responsibility are raised that the jury may be directed that the defence is available if the mental state of the accused was on the border of insanity.⁵⁴ However, given that such a degree of impairment is not necessary for use of the defence it is difficult to understand why such a direction could ever be appropriate.

For the defence of diminished responsibility to be available in Scotland, as has been noted, it must be shown that the accused suffered from substantial impairment of his ability to control and determine his actions. There are different kinds of impairment that might ground the defence. In understanding mental disorder defences, one might distinguish cognitive, evaluative and volitional functions of the mind.⁵⁵ *Galbraith* suggests that all three kinds of impairment might ground the defence of

⁵¹ See V Tadros 'The Structure of Defences in Scots Criminal Law' (2003) 7 *Edinburgh Law Review* 60.

⁵² This built on what may, at least, be described as strong scepticism about any plausible distinction to be drawn between those suffering from psychopathic personality disorder and ordinary criminals in *Carraher v HMA* 1946 JC 108.

⁵³ See *Brennan v HMA* 1977 JC 38, although it appears that voluntary intoxication was regarded as potentially available to found the defence in *Savage*.

⁵⁴ *Galbraith* at 571.

⁵⁵ See V Tadros *Criminal Responsibility* ch.12 for discussion.

diminished responsibility.⁵⁶ The Scots law of insanity has tended to recognise irresistible impulse as a possible basis for the insanity defence,⁵⁷ although that may be called into question by *Cardle v Mulrainey*,⁵⁸ and *Galbraith* suggests that there might be a similar basis for the defence of diminished responsibility. There is disagreement in the academic literature as to whether irresistible impulse ought to be accommodated in the defence.⁵⁹ This account of the kinds of abnormality that might be relevant invites an explanation, which is not forthcoming, of why the defence is not available to those suffering from psychopathic personality disorder.⁶⁰ The only explanation that is given is that old fig leaf of ‘policy concerns’.⁶¹

If there is insufficient evidence, when taken at its highest, to found the defence of diminished responsibility, the judge may remove the issue from the jury, inviting them to convict of murder if they are to convict at all. However, it is unclear how this conception of the defence relates to the interpretation of the *mens rea* of murder developed in *Drury*. Perhaps *Galbraith* provides evidence that the proper

⁵⁶ At 572-3.

⁵⁷ This is more or less explicit in *HMA v Kidd*. See V Tadros ‘Insanity and the Capacity for Criminal Responsibility’ (2001) 5 *Edinburgh Law Review* 325.

⁵⁸ 1992 SCCR 658. That case was concerned with involuntary intoxication with amphetamines. It was decided that there was insufficient evidence of a total alienation of reason, which is the standard required for the insanity defence as developed in *Kidd*. However, the judgement considers a very small range of the relevant authorities on irresistible impulse in Scotland, and is consequently probably insufficient to rule it out as within the scope of the defence. Furthermore, it does not overrule *Kidd* which is the leading case on the insanity defence and is explicit that the defence may be available even if the accused understands the nature and quality of the act that it was wrong. Finally, it may be that the case is restricted to the defence of non-insane automatism.

⁵⁹ See, for example, A Ashworth *Principles of Criminal Law* 4th ed. (Oxford: OUP, 2003) 211, S Morse ‘Uncontrollable Urges and Irrational People’ (2002) 88 *Virginia Law Review* 1025, M Smith ‘Irresistible Impulse’ in N Naffine, R J Owens and J Williams (eds) *Intention in Law and Philosophy* (Aldershot: Ashgate, 2001) and V Tadros *Criminal Responsibility* (Oxford: OUP, 2005) ch.12. The Scottish Law Commission, in their *Report on Insanity and Diminished Responsibility*, Scot Law Com No.195 (Edinburgh, the Stationery Office 2004) oddly suggest that all the relevant volitional questions pose difficult practical problems, and when properly framed collapse into cognitive questions properly understood in the context of insanity. But in the context of diminished responsibility they suggest that the phrase ‘ability to determine or control conduct’ is clear and well understood.

⁶⁰ James Chalmers suggests that such a path was open to the High Court as *Carraher* had not explicitly ruled out the use of the defence for cases of psychopathic personality disorder. See J Chalmers ‘Abnormality and Anglicisation: First Thoughts on *Galbraith v H M Advocate* (No 2) (2002) 6 *Edinburgh Law Review* 108.

⁶¹ At 574.

interpretation of *Drury* is that it merely incorporates existing rules of defences into the question of whether the accused had the wicked intent necessary for murder. But as *Drury* is not mentioned in *Galbraith*, the relationship between the two is open to speculation.

September 2005

**Report on Basic Aspects of the
Law of Murder in the United
States**

**The Example of California and
New York**

by

**Claire Finkelstein, Professor of
Law and Philosophy, University
of Pennsylvania**

MEMORANDUM

To: Dr. Jeremy Horder

From: Claire Finkelstein, Professor of Law and Philosophy, University of Pennsylvania

Re: Report on Basic Aspects of the Law of Murder in the United States:
The Example of California and New York

Date: October 24, 2005

1. Introduction

Judicial practice with regard to murder law in the United States displays a fairly consistent use of certain doctrines from one jurisdiction to another. Nearly every state allows conviction for murder based on a defendant's participation in a dangerous felony at the time the killing took place (the so-called "felony murder" doctrine). Nearly every state distinguishes different "degrees" of murder, and treats premeditation as the central defining characteristic of first degree murder. Nearly every state allows a partial defense of provocation or "extreme emotional disturbance." Most states allow capital punishment for either first degree or the separately defined concept of "capital murder." And all states that impose the death penalty require a jury to find that formally identified aggravating factors outweigh mitigating factors.

Despite these commonalities, there are significant differences in the structure of U.S. murder law from state to state. In many cases these formal differences do not represent an actual difference in practice. For example, most jurisdictions incorporate the felony-murder doctrine, but some do so by including a list of "predicate felonies" in the murder statute itself, whereas other statutes make no mention of the felony-murder doctrine and leave the parameters of the doctrine to the implementing judges. In such states, however, the judicially-defined list of "predicate" felonies is largely the same as those that define such felonies by statute. This Report will focus on the formal aspects of U.S. murder law. It will investigate the patterns of criminalization that different murder statutes display. It will proceed by focusing on two jurisdictions in particular: California and New York. These two jurisdictions are representative of most of the murder statutes in this country. We shall call California a Type I statute and New York a Type II statute. While other jurisdictions will not be discussed, at the end of this report is provided a list of states according to whether they are Type I, Type II, a mix of elements from both models, or "other."

2. Type I Statutes – California

a. *Basic Definition*

California retains the old common law definition of murder. Section 187 of the California Penal Code defines murder as “the unlawful killing of a human being, or a fetus, with malice aforethought.” The majority of states have moved away from this type of murder law. In particular, as discussed below, the mental state element in this type of statute has created great uncertainty due to the imprecision of the phrase “malice aforethought.” Type II statutes (such as New York’s, discussed below) constitute a significant increase in precision with respect to the mental state element in murder.

b. *Mens Rea*

While the definition of “malice aforethought” is not at all clear under California law, the Penal Code does make some attempt to clarify the term “malice” (§ 188). Malice is divided into two categories: “express” or “implied.” The Code defines “express malice” as “when there is manifested a deliberate intention unlawfully to take away the life of a fellow creature,” i.e. when the defendant had a purpose to kill. Two questions are left unanswered from this definition: What does § 188 do with cases in which the defendant *knows* he will, but has no *intent* to, bring about the victim’s death? And what about cases in which the defendant intends to bring about grievous bodily injury but death results instead?

While these questions are not addressed in the murder laws themselves, California Jury Instructions speak to them. Section 8.11 limits express malice to cases in which “there is manifested an intention unlawfully to kill a human being.” Implied malice is then defined as when:

1. The killing resulted from an intentional act;
2. The natural consequences of the act are dangerous to human life; and
3. The act was deliberately performed with knowledge of the danger to, and with conscious disregard for, human life.

Thus a defendant who blows up a plane to collect the insurance money on the cargo would be guilty of murder if he kills the pilot, despite the fact that he does not intend to kill the pilot, given that he was aware he would kill him.¹ Similarly, a defendant who intends to inflict grievous bodily injury (but not death) would also be covered by the implied malice provision and would satisfy the definition of murder if the victim died. The same would be true of the defendant who

¹The defendant in this kind of case would sometimes be said to “obliquely” intend to kill the pilot. This locution, however, is misleading, as the defendant does not strictly speaking have any kind of intention at all with respect to the pilot. “Intent” or “intention” is usually defined as when the defendant has a “conscious purpose” to bring something about, where purpose implies desiring or aiming at the object in question. Thus if the defendant is aware, but does not aim at or desire the pilot’s death, he does not intend it.

was aware that he was inflicting a serious risk of bodily injury, even if he did not intend to impose such injuries.

Thus far we have been discussing whether intent to kill supplies a *necessary* condition for malice aforethought in California, and the answer is clear that it does not. By contrast, matters are less settled on the question of whether an intent to kill provides a *sufficient* condition for “malice aforethought,” or whether more than mere intent is necessary for malice. One argument that has been made in support of the latter position is that if intent is sufficient for malice, there will be no room left over for the category of voluntary manslaughter. As one justice of the California Supreme Court explained, “a defendant who announced his intent to kill, and then took methodical steps to do so, could not pursue the compromise verdict of voluntary manslaughter on the theory that intoxication or other mental condition had clouded his awareness of his duty to act within the law.”² This is arguably problematic, because where the defendant’s intent to kill is itself the product of an impaired mental state, the defendant should be found guilty of voluntary manslaughter. But if intent is sufficient to establish malice, that possibility would be foreclosed.

“Implied malice” is when “the circumstances attending the killing show an abandoned and malignant heart.” (§ 188) This Section is the statutory basis for the felony murder rule in California. While most states that allow felony murder convictions contain explicit statutory provisions authorizing such convictions and providing a list of “predicate” felonies, California’s felony murder rule is entirely case-based. Thus California courts have held, for example, that the predicate felony must be “inherently dangerous,” as well as that it must not be too close in nature to the homicide. As the famous case of *People v. Ireland* held, a felony that forms an “integral part of the homicide” should be thought to “merge” with the homicide, and thus fail to supply an independent basis for a felony-murder conviction.³ Other states also have “inherently dangerous” and “merger” restrictions on the felony murder doctrine, but elsewhere they are often articulated by statute rather than by case law.

Section 188 also provides that the definition of malice does not include knowledge of the obligation to obey the law, meaning that mistake of law is not a defense.

Finally, § 189 of the California Penal Code establishes the different degrees of murder by defining first degree murder as follows:

All murder which is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition designed primarily to penetrate metal or armor, poison, lying in wait, torture, or by any other kind of willful, deliberate, and premeditated killing, or which is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking . . . or any murder which is perpetrated by means of discharging a firearm from

²People v. Wright, 28 Cal. Rptr. 3d 708 (2005), Brown, J., concurring.

³70 Cal. 2d 522 (1969).

a motor vehicle, intentionally at another person outside of the vehicle with the intent to inflict death, is murder of the first degree.

The statute then holds that “all other kinds of murders are of the second degree.”

The above provision has the effect of raising a killing which has already met the requirements for murder (by satisfying the condition of either express or implied malice in § 188) to first degree murder if the killing was done in any of the specific ways mentioned, with premeditation, in the course of committing arson, rape carjacking, etc. Thus suppose a person accidentally kills his victim in the course of committing armed robbery. Such a defendant would satisfy the requirement of “implied malice” under § 188, and thus be guilty of murder. He would be guilty of first degree murder in virtue of the fact that “robbery” is on the list of the degree raising provision in § 189. Finally, that the killing took place in the course of a robbery would count again as an aggravating factor for purposes of considering the defendant’s eligibility for the death penalty (Cal. Pen. Code § 190.2). The defendant may be put to death if one or more of the listed aggravating factors obtains.

c. *Actus Reus*

i. Time period for causing death

The old rule was that an act of the defendant’s resulting in death only counts as a killing if death occurs within three years and a day after the cause of death is administered. Section 194, however, now holds that if death occurs beyond three years and a day after the act of the defendant’s that caused it, “there shall be a rebuttable presumption that the killing was not criminal.” Thus the prosecution must overcome this presumption if the defendant is to be prosecuted for murder under these circumstances. The Code does not say how the presumption is to be overcome.

ii. Special Victims

Fetuses. The words “or a fetus” were added in 1970 after the famous case of Keeler v. Superior Court, in which the defendant kicked a pregnant woman in the stomach, thus killing the fetus.⁴ The provision contains an exception for legal abortions, situations in which the continued life of the fetus would result in the death of the mother, and situations where the act killing the fetus was consented to by the mother. (Cal. Penal Code § 187(b)(1) - (3)).

Peace Officers: Section 190 sets forth enhanced penalties for the killing of various kinds of “peace officers.” Subsection (b) authorizes a sentence of 25 years to life if the victim was a peace officer killed while engaged in the performance of his or her duties, as long as the defendant knew or should have known that this was the case. Subsection (c) establishes a sentence of life without the possibility of parole under the conditions listed in (b) when the defendant intended to kill or intended to inflict great bodily injury on a peace officer, when the

⁴470 P.2d 617 (1970).

defendant personally used a dangerous weapon, or when the defendant personally used a firearm in the commission of the offense.

Transportation Personnel: California Penal Code § 190.25 sets forth a mandatory term of life without the possibility of parole for the murder of “the operator of a bus, taxicab, streetcar, cable car, trackless trolley, or other motor vehicle operated on land.”

Special Circumstances. Section 190.2 then provides a list of “special circumstances” in which murder in the first degree would establish a mandatory sentence of either life sentence without the possibility of parole or death. The list includes conditions such as: the murder was intentional and carried out for financial gain, the defendant was previously convicted of murder, the murder was committed by means of explosive device, the murder was committed for the purpose of avoiding lawful arrest or escaping from custody, the victim was a peace officer killed in the course of his duties or killed in retaliation for the performance of his duties, the victim was a federal law enforcement officer, a firefighter, a witness to a crime, a prosecutor, judge, or elected official, or the murder was especially heinous, atrocious or cruel, the defendant intentionally killed the victim by means of lying in wait, the victim was intentionally killed because of race, color, religion, etc., or the murder was committed in the course of committing another felony, as provided by a list in subsection (17), and so on.

Section 190.03 establishes a minimum penalty of life in prison without the possibility of parole for any “hate crime murder,” meaning a killing motivated by animus on the basis of race or religion.

d. *Defenses to Murder*

The defendant has the burden under California law of establishing any defenses he may wish to assert to a charge of homicide (§ 189.5). The following are defenses specific to homicide.

Excusable Homicide (§ 195) is an act “committed by accident and misfortune . . . with usual and ordinary caution, and without any unlawful intent.” It also includes acts performed “in the heat of passion, upon any sudden and sufficient provocation or combat,” provided that no “undue advantage” is taken, no dangerous weapon is used, and the killing is not performed “in a cruel or unusual manner.” In the case of the latter, heat of passion killing, however, the defendant may be convicted for voluntary manslaughter, under § 192 (see below).

Justifiable Homicide (§ 197) includes acts to defend oneself or another person against murder, great bodily injury, or some felony performed against one. It also contains a broad privilege relating to defense of property and habitation, allowing deadly force committed “in defense of habitation, property, or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony, or against one who manifestly intends and endeavors, in a violent, riotous or tumultuous manner, to enter the habitation of another for the purpose of offering violence to any person therein.” Thus the thief who intends to use force to steal my wallet subjects himself to the permissible use of lethal force by the victim. In addition, under this provision, a bare fear that another is about to commit a felony against one is insufficient to

justify the use of lethal force against him. Instead, the belief must be a reasonable one. (§ 198).

e. *Lesser Offenses*

Manslaughter (§ 192). The definition of manslaughter in California is the same as murder, but without the element of malice aforethought. There are three types of manslaughter: Voluntary, involuntary, and *vehicular*. Voluntary manslaughter is defined as killing “upon a sudden quarrel or heat of passion.” Involuntary manslaughter is defined as killing “in the commission of an unlawful act, not amounting to felony; or in the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.” Vehicular manslaughter is itself divided into two types: (1) Gross vehicular manslaughter while intoxicated, defined as “the unlawful killing of a human being without malice aforethought, in the driving of a vehicle . . . and the killing was either the proximate result of the commission of an unlawful act, not amounting to a felony, and with gross negligence, or the proximate result of the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.” (§ 191.5); and (2) Vehicular manslaughter, defined as “operating a vessel in the commission of an unlawful act, not amounting to felony, and with gross negligence; or operating a vessel in the commission of a lawful act which might produce death, in an unlawful manner, and with gross negligence.” (§192.5). A lesser offense of this same provision punishes the same conduct without gross negligence.

3. Type II Statutes – New York

New York’s Penal Code was entirely revised in the 1960s, fashioned largely after the American Law Institute’s Model Penal Code (MPC). Since that time, the majority of murder statutes in the United States has been revised to follow this model. One of the central innovations of the MPC is the approach to mens rea, and New York has largely followed suit, as discussed below. The change to Type II statutes was a significant advance in clarity on this topic, as on several other aspects of murder law.

a. *Basic Definition*

Like the MPC, New York offers a basic definition of homicide first (§ 125.00) and then distinguishes murder and manslaughter from homicide largely in terms of their different mental states. It bears mention that clearly distinguishing homicide from murder is one of the biggest advances the MPC treatment of murder makes over preceding law, along with the clarification in the definitions of mental states. In this respect, New York law can be fruitfully compared to the laws of other jurisdictions, such as those listed in Part 4(d) of this Report, which do not contain this distinction for the most part.

Section 125.00 of the New York Penal Code defines homicide as:

conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks under circumstances constituting murder, manslaughter in the first degree, manslaughter in the second degree, criminally negligent

homicide, abortion in the first degree or self-abortion in the first degree.

The definition of murder in the second degree (§ 125.25) then adds various mental states or circumstances: (1) intent; (2) depraved indifference; and (3) the killing takes place during the commission of one of the enumerated felonies. The definition of murder in the first degree (§ 125.27) adds a series of additional special circumstances (see details below).

b. *Mens Rea*

Unlike the California type statutes, which have one blanket mental state for murder (“malice aforethought”), New York defines four different mental states, following the MPC subdivisions: intent, knowledge, recklessness, and criminal negligence (§ 15.00(6)). Section 15.05 defines these mental states as follows:

- i. Intentionally: A person acts intentionally with respect to a result or to conduct . . . when his conscious objective is to cause such result or to engage in such conduct.
- ii. Knowingly: A person acts knowingly with respect to conduct or to a circumstance described by a statute defining an offense when he is aware that his conduct is of such nature or that such circumstance exists.
- iii. Recklessly: A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offense when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. . . .
- iv. Criminal Negligence: A person acts with criminal negligence with respect to a result or to a circumstance described by a statute defining an offense when he fails to perceive a substantial and unjustifiable risk that such result will occur or that such circumstance exists. . . .

The first category of second degree murder is when “with intent to cause the death of another person, [the defendant] causes the death of such person or of a third person . . .” (§125.25(1)). Notice that this provision allows for what is sometimes called “transferred intent,” where the victim is a person other than the one whose death was intended. This would apply whether or not the defendant was aware of the risk to the third party. Despite this expansive approach to transferred intent, there is a category conspicuously missing from this definition, namely killings that are knowing but not intentional. This was in all likelihood an oversight, in view of the fact that the comparable provision in the MPC, after which the New York Code is modeled, defines murder as criminal homicide committed “purposely or knowingly” (MPC § 210.2). Nevertheless, the omission of “knowingly” is probably harmless error, since knowing killings would probably be covered by the second kind of second degree murder, as set out in §125.25(2).

Section 125.25(2) says that a person is guilty of murder when “under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person, and thereby causes the death of another person . . .” Thus this section is more than mere recklessness. It is a kind of heightened recklessness, suggesting “depraved indifference” on the part of the defendant. Arguably this would be satisfied by a defendant who knew that death would certainly result from his conduct, even if it was not his “conscious object” to produce that death.

Finally, § 125.25(3) sets out the felony murder provision, with a list of predicate felonies. That list includes robbery, burglary, kidnapping, arson, rape in the first degree, among others. This provision is also a departure from the comparable MPC provision, which technically eliminates felony murder. What MPC § 210.2(1)(b) puts in its place is a rebuttable presumption of the required “extreme indifference” if the defendant is engaged in the commission of any of the listed felonies (robbery, rape, deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape). Thus if the defendant can demonstrate that he did not act recklessly when he committed one of the aforementioned felonies, he will not be guilty of murder for the resulting death. This seems preferable to the New York approach, as it firmly makes the enhanced culpability for killing during a felony a matter of mens rea.

It bears note that New York courts have interpreted this provision to set out a complete and fully inclusive list of acceptable predicate felonies for felony murder purposes. Thus the problem of merger that plagues California courts is supposedly unproblematic in this jurisdiction, for New York courts have held that any felony on the list is an acceptable predicate felony, even if it would otherwise merge with the homicide.⁵ New York courts *could* have viewed this matter differently, however. For they might as well have concluded that the statutory list of felonies supplies *potential* predicate felonies, conditioned on whether, under the circumstances, the felony does not merge with the homicide. Thus a burglary where the defendant breaks in to steal the television and ends up killing the owner might not merge, since stealing a television is substantially different from killing. But if the defendant breaks in solely in order to kill the owner, and executes his plan, then the burglary *should* presumably merge with the homicide, since in this case the defendant is only guilty of a burglary on the basis of the plan to commit that same homicide.

c. *Actus Reus*

i. Basic definition

The New York Code defines the actus reus of murder as “causing death,” rather than “killing” as in California. The former seems a preferable formulation, as there are types of murder where arguably the defendant “causes” the victim’s death without killing her, as when the defendant hires someone to do the killing for him, or when the defendant is held liable for manslaughter for the acts of an animal he owns.

⁵People v. Miller, 297 N.E. 2d 85 (1973).

ii. Degrees of murder

Section 125.27 sets out the definition of first degree murder. It is the same as the first type of second degree murder (intentionally causing death), with the addition of one or more of the following factors: the victim was a police or peace officer performing his official duties and the defendant knew or should have known that this was the case, the victim was an employee of a state correctional institution performing official duties and the defendant knew or should have known that this was the case, the defendant was confined in a state correctional facility, the victim was a witness to a crime and the crime was intended to prevent the victim's testimony in a criminal proceeding, the killing was performed for money, the killing was performed in the course of the defendant's committing or attempting to commit a felony from a statutory list of felonies,⁶ the defendant causes the death of an additional person or persons, the defendant had already been convicted of murder, the defendant tortured the victim, or the victim was killed in furtherance of an act of terrorism.⁷ The defendant must have been at least 18 years of age at the time of the killing to be guilty of murder in the first degree. A conviction of murder in the first degree makes a defendant eligible for the death penalty.

d. *Defenses to Murder*

Section 125.25(1) presents two defenses to intentional murder (in the second degree): the defendant acted "under the influence of extreme emotional disturbance for which there was a reasonable explanation or excuse," or the defendant merely assisted another to commit suicide. The first defense—extreme emotional disturbance—is a revised version of the provocation defense, once again taken from the MPC formulation of that defense. Unlike provocation, the EED defense in the New York statute is intended to focus on the defendant's psychological state, rather than the provoking element. The defendant can then be convicted of manslaughter in the first degree under § 125.20, when he intentionally causes the death of another person,

under circumstances which do not constitute murder because he acts under the influence of extreme emotional disturbance The fact that homicide was committed under the influence of extreme emotional disturbance constitutes a mitigating circumstance reducing murder to manslaughter in the first degree and need not be proved in any prosecution initiated under this subdivision.

Section 125.20 is to be distinguished from § 125.15, which contains the basic provision for manslaughter in the second degree, namely causing the death of another with a mental state of recklessness.

4. Other Jurisdictions

⁶The list here is substantially the same as the list presented in part (3) of 125.25 (murder in the second degree).

⁷Two conditions omitted.

What follows is an attempt broadly to classify jurisdictions into the two categories discussed above, which the report has called “Type I” and “Type II.” This list is a rough and ready classification, and some might disagree with the classifications suggested here. Please note that this list includes only the fifty American states, and omits American territories or other American jurisdictions.

- a. The following is a list of jurisdictions that can be classified as “Type I” statutes, meaning that they have retained the common law definition in broad outlines:

California
District of Columbia
Florida
Illinois
Idaho
Iowa
Kansas
Mississippi
Montana
Nevada
New Mexico
Oklahoma
Rhode Island
South Carolina

- b. The following is a list of jurisdictions that can be classified as “Type II” statutes, meaning that they broadly follow the New York or MPC model:

Alabama
Arizona
Arkansas
Colorado
Connecticut
Hawaii
Indiana
Kentucky
Maine
New Hampshire
New Jersey
New York
New York
North Dakota
Oregon
Pennsylvania
Texas
Utah

c. Jurisdictions, containing a mix of elements from the above categories:

Alaska
Delaware
Georgia
Louisiana
Maryland
Massachusetts
Michigan
Minnesota
Nebraska
Ohio
South Dakota
Tennessee

d. Jurisdictions with no discernible pattern:

North Carolina
Missouri
Vermont
Washington
West Virginia
Wisconsin
Wyoming