

## Modernising the Law of Murder and Manslaughter: Part 2

Graham McBain<sup>1,2</sup>

<sup>1</sup> Peterhouse, Cambridge, UK

<sup>2</sup> Harvard Law School, USA

Correspondence: Graham McBain, 21 Millmead Terrace, Guildford, Surrey GU2 4AT, UK. E-mail: gsmcbain@aol.com

Received: October 17, 2015 Accepted: November 2, 2015 Online Published: November 19, 2015

doi:10.5539/jpl.v8n4p98

URL: <http://dx.doi.org/10.5539/jpl.v8n4p98>

*Note: This is Part 2 of this Article, which continues the law from Russell's text in 1819 up until modern times. For Part 1 see [<http://dx.doi.org/10.5539/jpl.v8n4p9>].*

### 36. Russell (1819)

#### (a) Murder

Russell - in the first edition of his *Crimes and Misdemeanors* (1819) - a text which continued until 1964<sup>896</sup> - considered the law on homicide. In respect of murder, he stated:

Murder is the killing of any person under the king's peace, with malice prepense or aforethought, either express or implied by law. Of this description the malice prepense, *malitia praecogitata*, is the chief characteristic, the grand criterion by which murder is to be distinguished from any other species of homicide.<sup>897</sup>

In relation to *malice aforethought*, Russell noted that:

in general any formed design of doing mischief may be called malice; and therefore not such killing only as proceeds from premeditated hatred or revenge against the person killed, but also, in many other cases, such killing as is accompanied with circumstances that show the heart to be perversely wicked, is adjudged to be of *malice prepense*, and consequently murder.<sup>898</sup>

Malice might be *express*<sup>899</sup> or *implied*.<sup>900</sup> Russell also noted:

all homicide is presumed to be malicious, and of course amounting to murder, until the contrary appears, from circumstances of alleviation, excuse or justification.<sup>901</sup>

Russell noted that murder could be committed on any person within the king's peace<sup>902</sup> and that the killing must be by way of physical - not emotional - injury.<sup>903</sup> Also, that the '*probable consequence*' of an act could be murder. Thus,

If a man however does an act, the probable consequence of which may be, and eventually is, death, such killing may be murder; although no stroke be struck by himself, and no killing may have been primarily intended...<sup>904</sup>

#### (b) Murder - Provocation

Russell's text was not well set out. Thus, unhelpfully, he dealt with provocation both under murder and under manslaughter.<sup>905</sup> In respect of *provocation*, Russell stated:

As the indulgence which is shown by law in some cases to the first transport of passion is a condescension to the

<sup>896</sup> The last edition was edited by JWC Turner (see 42).

<sup>897</sup> Russell, n 51, vol 1, p 613. Russell continued: 'It should, however, be observed, that when the law makes use of the term malice aforethought as descriptive of the crime of murder, it is not to be understood merely in the sense of a principle of malevolence to particulars, but as meaning that the fact had been attended with such circumstances as are the ordinary symptoms of a wicked, depraved, and malignant spirit; a heart regardless of social duty, and deliberately bent upon mischief.'

<sup>898</sup> Ibid, pp 614-5.

<sup>899</sup> Ibid, p 614 'Express malice is, when one person kills another with a sedate deliberate mind [cf. Coke, n 661] and formed design: such formed design being evidenced by external circumstances, discovering the inward intention, as lying in wait, antecedent menaces, former grudges, and concerted schemes to do the party some bodily harm.'

<sup>900</sup> Ibid. 'And malice is implied by law from any deliberate cruel act committed by one person against another, however sudden: thus where a man kills another suddenly without any, or without a considerable, provocation, the law implies malice for no person, unless of an abandoned heart, would be guilty of such an act upon a slight or no apparent cause.' Russell continued 'So if a man willfully poisons another; in such a deliberate act the law presumes malice, though no particular enmity can be proved. And where one is killed in consequence of such a willful act as shows the person by whom it is committed to be an enemy to all mankind, the law will infer a general malice from such depraved inclination to mischief.'

<sup>901</sup> Russell, n 51, vol 1, p 615.

<sup>902</sup> Ibid, p 617 'Murder may be committed upon any person within the king's peace. Therefore, to kill an alien enemy within the kingdom, unless it be in the heat and actual exercise of war, or to kill a Jew, an outlaw, one attainted of felony, or one in a *praemunire*, is as much murder as to kill the most regular born Englishman.'

<sup>903</sup> Ibid, p 619 'The killing may be effected by poisoning, striking, starving, drowning, and a thousand other forms of death by which human nature may be overcome. But there must be some external violence, or corporal damage, to the party; and therefore where a person, either by working upon the fancy of another; or by harsh and unkind usage, puts him into such a passion of grief or fear that he dies suddenly, or contracts some disease which causes his death, the killing is not such as the law can notice.'

<sup>904</sup> Russell cited the case of neglect in 1328, see n 432 as well as ones in 1559 and 1628, see **App B(e)**.

<sup>905</sup> Russell, n 51, vol 1, pp 614-5, 631-44, 700-7, 714-22.

frailty of the human frame, to the *furor brevis*, which, while the frenzy lasts, renders a man deaf to the voice of reason, so the provocation which is allowed to extenuate in the case of homicide must be something which a man is conscious of, which he feels and resents at the instant the fact which he would extenuate is committed.

All the circumstances of the case must lead to the conclusion, that the act done, though intentional of death or great bodily harm, was not the result of a cool deliberate judgment and previous malignity of heart, but solely imputable to human infirmity. For there are many trivial, and some considerable, provocations, which are not permitted to extenuate an act of homicide, or rebut the conclusion of malice, to which the other circumstances of the case may lead.<sup>906</sup> (*wording divided for ease of reference*)

In respect of provocation, Russell noted that no words, or gestures, were sufficient to reduce killing from murder to manslaughter.<sup>907</sup> As to an assault, he stated:

Though an assault made with violence or circumstances of indignity upon a man's person, and resented immediately by the party acting in the heat of the blood upon that provocation, and killing the aggressor, will reduce the crime to manslaughter, yet it must by no means be understood that the crime will be so extenuated by any trivial provocation which in point of law may amount to an assault; nor in all cases even by a blow. Violent acts of resentment, bearing no proportion to the provocation or insult, are barbarous, proceeding rather from brutal malignity than human frailty: and barbarity will often make malice.<sup>908</sup>

In particular, Russell noted that:

- the response must be proportionate to the provocation;<sup>909</sup>
- regard was to be had to the instrument used, especially when provocation was slight.<sup>910</sup>

Also, that provocation was no defence if:

- there was express malice;<sup>911</sup>
- sought by the party killing;<sup>912</sup>
- there was cooling time.<sup>913</sup>

### (c) Murder – Implied Malice

Although set out in a rather discordant fashion, it seems clear that Russell also accepted Coke's 7 categories of implied malice including poisoning (although Russell, illogically stated in respect poisoning: '*It is a deliberate act, necessarily implying malice*').<sup>914</sup>

- (a) unprovoked killing<sup>915</sup> (including random killing);<sup>916</sup>
- (b) killing a police officer in the execution of his duty;<sup>917</sup>

<sup>906</sup> Ibid, pp 631-2.

<sup>907</sup> Ibid, p 632 'No breach of a man's word or promise; no trespass, either to land or goods; no affront by bare words or gestures, however false and malicious, and aggravated with the most provoking circumstances, will free the party killing from the guilt of murder. And it is conceived that this rule will govern every case where the party killing upon such provocation makes use of a deadly weapon, or otherwise manifests an intention to kill, or to so some great bodily harm.'

<sup>908</sup> Ibid, pp 633-4.

<sup>909</sup> Ibid, p 635 'An assault, though illegal, will not reduce the crime of the party killing the person assaulting him to manslaughter, where the revenge was disproportionate and barbarous, much less will such personal restraint and coercion as one man may lawfully use towards another form any ground of extenuation.'

<sup>910</sup> Ibid, p 636. 'In cases of provocation of a slighter kind not amounting to an assault, as the ground of extenuation would be that the act of resentment, which has unhappily proved fatal did not proceed from malice, or a spirit of revenge, but was intended merely for correction; so the material inquiry will be, whether malice must be inferred from the sort of punishment inflicted, from the nature of the instrument used, and from the manner of the chastisement.'

<sup>911</sup> Ibid, p 639. Also, p 616. See also *Mason* (1756), **App B(c)**.

<sup>912</sup> Ibid, p 642 'where the provocation is sought by the party killing and induced by his own act, in order to afford him a *pretence* for wrecking his malice, it will in no case be of any avail. Thus where A and B having fallen out, A said he would not strike, but would give B a pot of ale to strike him [an illustration made by Hale] upon which B did strike, and A killed him, it was held to be murder.' (*italics supplied*)

<sup>913</sup> Ibid, 'in every case of homicide upon provocation, how great soever that provocation may have been, if there be sufficient time for passion to subside and reason to interpose, such homicide will be murder.' pp 643-4 'With respect to the interval of time which shall be allowed for passion to subside, it has been observed that it is much more easy to lay down rules for determining what cases are without the limits, than how far those limits extend.'

<sup>914</sup> Russell, n 51, p 625. If the poisoning was deliberate (i.e. intentional) then it is express malice, as Blackstone and others treated it.

<sup>915</sup> See n 900.

<sup>916</sup> Ibid, p 660. 'There are also other cases where no mischief is intended to any particular individual, but where there is a general malice or depraved inclination to mischief, fall where it may; and in these cases the act itself being unlawful, attended with probable serious danger, and done with a mischievous intent to hurt people, the killing will amount to murder. Thus, if a man go deliberately, and with an intent to do mischief, upon a horse used to strike, or coolly discharge a gun amongst a multitude of people, and death be the consequence of such acts, it will be murder. So, if a man resolves to kill the next man he meets, and does kill him, it is murder, although he knew him not; for this is universal malice. And upon the same principle, if a man, knowing that people are passing along the street, throw a stone likely to do injury, or shoot over a house or wall with intent to do hurt to people, and one is thereby slain, it is murder on account of the previous malice, though not directed against any particular individual: for it is no excuse that the party was bent upon mischief generally.'

<sup>917</sup> Ibid, p 650 'Ministers of justice, as bailiffs, constables, watchmen, *etc* while in the execution of their offices, are under the peculiar protection of the law; a protection founded in wisdom, and equity, and in every principle of political justice; for without it the public tranquility cannot possibly be maintained, or private property secured; nor in the ordinary course of things will offenders of any kind be amenable to justice. For these reasons the

- (c) killing arising from an unlawful act;
- (d) killing by a thief (robber);
- (e) killing by transferred malice;<sup>918</sup>
- (f) killing by neglect/cruelty (to the extent not express malice);<sup>919</sup>
- (g) killing by poison.<sup>920</sup>

In respect of unlawful acts, Russell stated:

If an action, unlawful in itself, be done deliberately and with intention of mischief or great bodily harm to particular individuals, or of mischief indiscriminately, fall where it may, and death ensue against or beside the original intention of the party, it will be murder.<sup>921</sup> (*underlining supplied*)

Although Russell cited Foster he did not actually follow him in the above definition, since Foster had restricted murder to unlawful intentional *felonious* acts, whereas Russell did not mention felonies as such. And, although Russell referred to unlawful *felonious acts*, such as shooting at a fowl (with intent to steal),<sup>922</sup> he also stated:

If persons in pursuit of their lawful and common occupations, see danger probably arising to others from their acts, and yet persist, without giving sufficient warning of the danger, the death which ensues will be murder.

Thus, if workmen throwing stones, rubbish, or other things from a house, in the ordinary course of their business, happen to kill a person underneath, the question will be, whether they deliberately saw the danger, or betrayed any consciousness of it. If they did, and yet gave no warning, a general malignity of heart may be inferred, and the act will amount to murder from its gross impropriety.

So if a person driving a cart or other carriage, happen to kill, and it appear that he saw, or had timely notice of the mischief likely to ensue, and yet drove on, it will be murder. The act is wilful and deliberate, and manifests a heart regardless of social duty.<sup>923</sup> (*underlining supplied*)

As to great bodily harm, Russell stated:

where the intent is to do some *great bodily harm* to another, and death ensues, it will be murder; as if A intended only to beat B in anger, or from preconceived malice, and happen to kill him, it will be no excuse that he did not intend all the mischief that followed; for what he did was *malum in se*, and he must be answerable for its consequence. He beat B with an intention of doing him some bodily harm, and is therefore answerable for all the harm he did.

So, if a large stone be thrown at one with a deliberate intent to hurt, though not to kill him, and by accident it kill him, or any other, this is murder. But the nature of the instrument, and the manner of using it, as calculated to produce great bodily harm or not, will vary the offence in all such cases.<sup>924</sup> (*wording divided for ease of reference*)

***In conclusion, it is unclear whether Russell followed Foster in limiting murder, in the case of unlawful acts, to intentional unlawful felonious acts, or he included all intentional unlawful acts.***

#### **(e) Manslaughter - Unlawful Negligent & Accidental Acts**

Russell stated:

In this species of homicide, malice...the main ingredient and characteristic of murder, is considered to be wanting; and though manslaughter is in its degree felonious, yet it is imputed by the benignity of the law to human infirmity; to infirmity which, though in the eye of the law criminal, is considered as incident to the frailty of the human constitution.<sup>925</sup>

As well as treating which would have been murder, being extenuated by virtue of provocation, Russell included in manslaughter, unlawful negligent acts, stating:

It has been shown, that where from an action, unlawful in itself, done deliberately, and with mischievous intention, death ensues, though against or beside the original intention of the party, it will be murder: and it may be here observed, that if such deliberation and mischievous intention does not appear (which is matter of fact, and to be

killing of officers so employed has been deemed murder of malice prepense, as being an outrage willfully committed in defiance of the justice of the kingdom.'

<sup>918</sup> Ibid, pp 721, 658-9.

<sup>919</sup> Ibid, pp 619-20 (referring to cases in 1328 and 1599 as well as to *Anon* (1628)), see **App B(e)**. See also, pp 667-9 (gaoler). Ibid, pp 670-1 'Parents, masters, and other persons having authority *in foro domestico*, may give reasonable correction to those under their care; and if death ensue without their fault, it will be no more than accidental death. But if the correction exceed the bounds of due moderation, either in the measure of it, or in the instrument made use of for that purpose, the death ensuing will be either murder or manslaughter, according to the circumstances of the case.'

<sup>920</sup> Ibid, p 625. Also, p 659. See also n 900.

<sup>921</sup> Ibid, p 658, Russell followed Foster.

<sup>922</sup> Ibid, pp 660-1. See also p 756 which refers to a '*felonious intention*.'

<sup>923</sup> Ibid, p 671. Also, p 759, 'An act, not unlawful in itself, may be performed in a manner so criminal and improper, or by an authority so defective, as to make the party performing it, and in the prosecution of his purpose causing the death of another person, guilty of murder. And as the circumstances of the case may vary, the party so killing another may be guilty only of the extenuated offence of manslaughter.' Russell considered: (a) officers of justice acting improperly; (b) officers of justice acting upon resistance; (c) on the flight of the party arrested; (d) impressment; (e) an officer arresting out of his proper district; (f) gaolers; (g) correction *in foro domestico*.

<sup>924</sup> Ibid, p 661.

<sup>925</sup> Ibid, p 699.

collected from the circumstances) and the act was done heedlessly and incautiously [i.e. negligently], it will be manslaughter.<sup>926</sup> (underlining supplied)

Russell then noted that - where a blow killed another by transferred malice - it was manslaughter if it would otherwise have been reduced to manslaughter.<sup>927</sup> Also, generally, 'incautious' acts leading to death were manslaughter, such as:

- **Breaking a Horse.** If a person breaking an unruly horse, rode in a crowd of people causing death, if shown to have been 'done heedlessly and incautiously only, and not with intent to do mischief, the crime will be manslaughter';<sup>928</sup>
- **Shooting Birds.** A shoots at B's fowl 'wantonly' and kills a person by accident;<sup>929</sup>
- **Throwing Stones.** A man throws a stone at another's horse and kills a person by accident;<sup>930</sup>
- **Emptying a Pistol.** A man, coming to town in a carriage, fires his pistols in the street, to empty them, and kills a person;<sup>931</sup>
- **Sports.** A person kills another by accident in (i) a prize fight; (ii) cock throwing; (iii) throwing stones in play; or (iv) in a sword fight;<sup>932</sup>

The problem with all these cases is that they treated some negligent, but lawful, acts as, *ipso facto*, unlawful. Thus, to throw a stone at a horse (or other animal) is not, *per se*, unlawful. Nor was firing a pistol or throwing stones in play. Further, the central issue was not whether the act was lawful or not - it was whether the person had been incautious (negligent).

#### (f) **Manslaughter - Lawful Negligent Acts**

Russell was one of the first legal writers to use the word 'negligence'. He stated:

Where persons employed about such of their lawful occupations, from whence danger may probably arise to others, neglect the ordinary cautions, it will be manslaughter at least, on account of such *negligence*.<sup>933</sup>

Thus, if workmen throw stones, rubbish, or other things, from a house, in the ordinary course of their business, by which a person underneath happens to be killed, if they did not look out and give timely warning to such as might be below, and there was even a small probability of persons passing by, it will be manslaughter. *It was a lawful act, but done in an improper manner...* [i.e. negligently]<sup>934</sup>

So if a person, driving a cart or other carriage, happen to kill another, and it appears that he might have seen the danger, but did not look before him, it will be manslaughter, for want of due circumspection. [i.e. negligently]<sup>935</sup> (*italics supplied*)

This, in many ways, is the most important part of Russell's writing (the rest is little different to Blackstone). By formulating a specific word 'negligence' and by separating it from 'accident' this allowed the distinct development of what lawful acts were subject to criminal liability, when not accidental. It did not take long for the courts to realise that - to include all negligent acts within criminal liability - was too wide. Thus, from c.1850 adjectives were employed - the negligence had to be 'culpable' or 'criminal' or 'gross' (see **App H**). With this all prior observations of Russell, Blackstone, Hale *etc* on this matter became redundant, since a new, tighter, category had been established. What Russell failed to get with grips with, was that, on his analysis (and that of prior writers) all *lawful* but *negligent* acts could simply be re-categorised as *unlawful negligent acts*, simply by treating as he did, negligent acts, as *ipso facto*, unlawful. Further, given that both were manslaughter, there should have been a new category, indicating that all negligent acts causing death were manslaughter. This would then have led him to analyse in what circumstances unlawful, accidental, acts should be manslaughter.

#### (g) **Accidental Killing**

Russell treated accidental killing pursuant to a lawful act as excusable homicide, which was not a helpful categorisation. As to the cases Russell cited, they are not repeated since they were simply everyday instances of accidents. However, one outstanding feature is that, by treating such as a matter of law, and not of fact (one which should have been left to the jury), complications arose when there was no need for any.<sup>936</sup>

#### (h) **Excusable Killing**

Russell indicated that a person was entitled to kill in self defence and, following Hale:

Under the excuse of self-defence, the principal, civil, and natural relations are comprehended; therefore, master and servant, parent and child, husband and wife, killing an assailant in the necessary defence of each other respectively,

<sup>926</sup> Ibid, p 754.

<sup>927</sup> Ibid, p 755 'if a blow, intended against A, and lighting on B, arose from a sudden transport of passion, which, in case A had died by it, would have reduced the offence to manslaughter, the fact will admit of the same alleviation, if it shall have caused the death of B.'

<sup>928</sup> Ibid.

<sup>929</sup> Ibid, p 756. See also p 758, shooting deer in a park without leave.

<sup>930</sup> Ibid. Also, p 755 'a man, knowing that people are passing along the streets, throw a stone or shoot an arrow over a house or wall, and a person be thereby killed, this will be manslaughter.'

<sup>931</sup> Ibid, p 756. See *Burton* (1721) 1 Stra 431 (93 ER 648).

<sup>932</sup> Ibid, p 758. Russell notes that Hale thought that *Sir John Chichester* (1670) was a hard case since the victim consented to the battery with the sword in the scabbard. However, this means nothing since, while he may have consented to that battery, he did not to the sword out of the scabbard.

<sup>933</sup> Russell, n 51, vol 1, p 768.

<sup>934</sup> Reference was made to *Hull* (1664), see **App C(b)**.

<sup>935</sup> Ibid.

<sup>936</sup> Russell, n 51, pp 776-7. In two cases where a person accidentally shot another with a pistol that he had reason to believe was not loaded the outcome was different. Thus, in *Rampton* (c 1664) Kel 41, it was held to be manslaughter. Yet, in a case tried before Foster, n 77, see p 265 the man was acquitted in a similar instance (since Foster was a judge from 1745-63, the case would likely have been during that time).

are excused; the act of the relation assisting being construed the same as the act of the party himself.<sup>937</sup>

Russell noted the 'back to the wall' principle<sup>938</sup> and that it was not lawful to kill a trespasser.<sup>939</sup>

### (i) Justifiable Killing

In 1769, it was justifiable (at common law) to kill:

(a) pursuant to due legal process; (b) a felon who resisted capture; (c) an enemy in war time; (d) an escaping prisoner; (e) a thief assaulting a person; (f) in a licensed martial game (though this would be treated as an accident);

Further, legislation made it justifiable to kill where the following applied: (i) Act of 1293 (warrens *etc*); (ii) Act of 1532 (attempting to murder, rob or burgle); (iii) Act of 1553 (unlawful assemblies); (iv) Riot Act 1714.

For his part, Russell discussed (a). In the case of (b), Russell considered: (i) officers killing those who assaulted and resisted them;<sup>940</sup> (ii) officers killing those flying from arrest, which he limited (in effect) to felons.<sup>941</sup> In the case of (d), he indicated that gaolers 'might repel force by force'. In the case of (e), he indicated that:

A man may repel force by force in defence of his person, habitation, or property, against one who manifestly intends and endeavours, by violence and surprise, to commit a known *felony* upon either.<sup>942</sup> (*italics supplied*)

Russell also discussed the Acts of 1293,<sup>943</sup> 1532<sup>944</sup> and 1714.<sup>945</sup> As to the Act of 1553, although still in existence, it seems to have been superceded by that 1714, in practice. Thus, the law had become more simplified.

### (j) Conclusion

Russell's analysis of homicide (like that of East) was not at all helpfully set out, unlike that of Blackstone. Further, he was wholly unclear on some issues, which did not help the development of the law since his text became the major work on criminal law in Victorian times (the last edition of Hawkins was in 1824). Areas where Russell was not at all clear were:

- **Murder.** Foster limited this to premeditated acts and unlawful *felonious* acts. Russell cited Foster but then included acts which were not felonious;
- **Manslaughter - Negligence.** Russell seemed not to have noticed that, since he treated all negligent acts (whether lawful or not) as manslaughter, he should have simply stated this. Further, he re-categorised many negligent *lawful* acts as *unlawful* simply by holding that the negligent act was, *ipso facto*, unlawful. In short no separate categorisation was needed in these cases;
- **Manslaughter - Accident.** These covered unlawful acts. However, they produced 'hard cases' such as *Sir John Chichester* (1670) where a servant was accidentally killed in a play swordfight. No social purpose was served in treating it as manslaughter. Nor when a person (say) killed another accidentally when throwing a stone at a horse or cockthrowing (which Foster unilaterally made an illegal sport by regarding it as a 'barbarous unmanly custom' even though Parliament had not).

In short, Russell (like East) and Pulton was something of a jumble of book, with a mass of cases drawn together without any analysis as to whether the law was appropriate. As to the punishment for manslaughter:

- The penalty for manslaughter (a felony with benefit of clergy) was burning in the hand, up a year's imprisonment and forfeiture of goods and chattels.<sup>946</sup> By an Act of 1779<sup>947</sup> the court could substitute 'a moderate pecuniary fine' (s 3) as well as imprisonment up to a year (s 4);
- In 1822, manslaughter was made punishable by transportation for life or for any less term, or by imprisonment (with or without hard labour) for up to 3 years or by a fine.<sup>948</sup>

<sup>937</sup> Ibid, p 782.

<sup>938</sup> Ibid, p 781 'it appears that the law requires, that the person who kills another in his own defence should have retreated as far as he conveniently or safely could, to avoid the violence of the assault, before he turned upon his assailant.'

<sup>939</sup> Ibid, p 782 'If A in defence of his house kill B, a trespasser, who endeavours to make an entry upon it, it is at least common manslaughter; unless indeed, there were a danger to his life.'

<sup>940</sup> Ibid, p 785. He stated that this was 'A rule founded in reason and public utility; for few men would quietly submit to an arrest, if, in every case of resistance, the party empowered to arrest were obliged to desist, and leave the business undone...'

<sup>941</sup> Ibid, p 786 'if a felony be committed and the felon fly from justice, or a dangerous wound be given, it is the duty of every man to use his best endeavours for preventing an escape; and if in the pursuit the party flying be killed, where he cannot be otherwise overtaken, this will be deemed justifiable homicide.' As to one indicted for felony, Ibid, p 787 'the officer may lawfully kill him if he cannot otherwise be taken; though such a person be innocent, and though in truth no felony be committed.' Russell also cited *Handcock v Baker* (1800) 2 Bos & Pul 265 (126 ER 1270) per Chambre J 'It is lawful for a private person to do any thing to prevent the perpetration of a felony.' (A private person may justify breaking, and entering, a person's house to prevent him murdering his wife).

<sup>942</sup> Ibid, p 789.

<sup>943</sup> Ibid, pp 788-9. Russell also mentioned the act against deer stealing, 3 & 4 W & M c 10 (1691, deer stealing, rep 1776), although this appears to have been repealed in 1776 (by 16 Geo 3 c 30). See also 4 & 5 W & M c 23 (1692, rep 1831).

<sup>944</sup> Russell, n 51, p 791, noted that this did not affect the common law position 'so that the killing of one who attempts the wilful burning of an house is free from forfeiture without the aid of this statute.'

<sup>945</sup> Ibid, pp 787-8.

<sup>946</sup> Ibid, p 771. Stephen, n 55, vol 3, pp 78-9 noted the inadequacy of this for aggravated manslaughters (such as where a slight blow was revenged with a deadly stab) and commented 'probably the consciousness of this may have been connected with the harsh constructions which were put by the judges on the phrase 'malice aforethought.'

<sup>947</sup> 19 Geo III c 74 (1779, rep). See also Russell, n 51, vol 1, p 771.

<sup>948</sup> 3 Geo 4 c 38 (1822, rep) 'That any person convicted of manslaughter shall not be burnt in the hand, but shall be liable to be transported for life, or for any term of years as the court shall adjudge, or to be imprisoned only, or imprisoned and kept to hard labour for any term not exceeding three years, or to

*In conclusion, the writing of Russell (and East in 1803) in the area of homicide indicates that the analysis and caselaw had become very convoluted - especially with regard to provocation and where malice was implied. It is also noteworthy the extent to which Russell cited Coke, Blackstone, Hawkins, Foster and East as authority for his propositions. However, Russell rarely considered the law prior to Coke, which hindered the clarity of some of his statements. And, like East, he never sought to analyse whether the propositions of law which he stated were required or could be improved on.*

### 37. From 1819 - 43

Archbold, in the first edition of his *Summary of the Law relative to Pleading and Evidence in Criminal Cases* (1822) dealt with murder<sup>949</sup> and manslaughter.<sup>950</sup> However, since he followed the definition of Coke in respect of murder<sup>951</sup> as well as Hawkins in virtually every respect, he added nothing new.<sup>952</sup> Nor did a text by Gabbett in 1843.<sup>953</sup> It may also be noted that:

- in 1827, benefit of clergy was abolished,<sup>954</sup>
- an Act of 1828, as well as abolishing *petit treason*, provided that no forfeiture or punishment was to be inflicted for homicide that was not felonious.<sup>955</sup> Thus, no pardon or forfeiture was to be imposed for accidental killing or killing in self defence. This was an important advance since it meant that accidental killing or killing in self-defence was not a crime, a change from the Old Testament position that all spilling of blood was a crime.

In this period it was also recognised that the criminal law was in need of reform - something promoted by legal writers (and other interested parties) as well as by various Royal Commissions.<sup>956</sup> The fourth report of the Royal Commission on Criminal Law in 1839<sup>957</sup> is of considerable merit since it recognised (trenchantly) the inadequacy of the law on murder and manslaughter in 3 important areas. Thus, it asserted that:

- **Premeditated Malice.** In respect of premeditated malice, the 'malice' issue was irrelevant. What was relevant was the intention (premeditation). This should be a question of fact for the jury - not a question of law;
- **Provocation.** This also should be a question of fact for the jury - not a question of law;
- **Negligent or Accidental Killing.** For the purpose of manslaughter, whether an act was negligent - or accidental - should be a question of fact for the jury, not a question of law.

These statements of the Commission were, in many ways, ground-breaking and they exposed the problems arising from the rigid categorisation of Bracton (see **13**) which categorisation had continued long past its 'sell by' date. It also opened the way for fact situations to be defined more clearly into whether they were *negligent* or *accidental*. As to these matters:

#### (a) Murder - Premeditation

In respect of murder<sup>958</sup> the Commission adverted to the inadequacy of the concept of 'malice aforethought' stating:

implied malice... is loosely defined, or rather is not defined at all...it is made to depend on a very abstruse and

a pecuniary fine in the discretion of the court; and that the punishment in pursuance of this act shall have the same effects and consequences as burning in the hand.' The term for imprisonment was lowered to 2 years by 24 & 25 Vict c 100 s 5 (1861, rep). See also Stephen, n 55, vol 3, p 79.

<sup>949</sup> Archbold (1822 ed), n 52, p 210 '[X]...not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil...with force of arms...feloniously, wilfully, and of his malice aforethought, did make an assault and that the said [X] with a certain knife...in manner and form aforesaid, feloniously, wilfully, and of his malice aforethought, did kill and murder: against the peace of our lord the king, his crown and dignity.'

<sup>950</sup> Ibid, p 214 'Manslaughter is the unlawful and felonious killing of another, without any malice either express or implied. It is of two kinds: 1. Involuntary manslaughter, where a man, doing an unlawful act not amounting to felony, by accident kills another. 2. Voluntary manslaughter, where upon a sudden quarrel two persons fight, and one of them kills the other; or where a man greatly provokes another by some personal violence etc and the other immediately kills him.'

<sup>951</sup> Ibid.

<sup>952</sup> See also FA Carrington, *A Supplement to all the Modern Treatises on the Criminal Law* (1827).

<sup>953</sup> Gabbett, n 53.

<sup>954</sup> 7 & 8 Geo 4 c 28. 'benefit of clergy, with respect to persons convicted of felony, shall be abolished.' See also JF Archbold, *Peel's Acts with the Forms of Indictments* (1828) and Holdsworth, n 65, vol 3, p 302

<sup>955</sup> 9 Geo 4(1828), c 31. For petty treason, see s 2. For the abolition of forfeiture, see s 10. The Act also dealt with an attempt to murder, see s 11. See also Holdsworth, n 65, vol 13, pp 400-1.

<sup>956</sup> See e.g. *First Report from HM's Commissioner's on Criminal Law* of 24 June 1834 (Irish University Press series of British Parliamentary Papers, 1971 ('IUP')), vol 3, p 16 (Report, p 4) which noted 'The great fluctuations which the criminal law has undergone during the lapse of many centuries, and the adoption, at different periods, of some subtle, refined and useless distinctions. Much of the difficulty and uncertainty attending the reduction of the unwritten law to a written form has arisen from the practice, which obtained during so many centuries, of altering the common law in order to suit the existing state of things. This indirect mode of supplying the defects of our early jurisprudence has rendered some branches of the common law extremely technical and complicated. And as innovations upon the ancient law of crimes, by the means of a constructive enlargement of its definitions, have usually been made in order to reach some case of peculiar aggravation, they have seldom been acted upon with consistency, and their extent has not been accurately defined.' See also Russell, n 51, (1964 ed), vol 1, p 468.

<sup>957</sup> *Fourth Report of HM Commissioners on Criminal Law* of 8<sup>th</sup> March 1839 (IUP), n 956, vol 3, pp 240-1. 'The confusion of rules and principles of the definition of crimes and punishments by the common law, the inconsistencies and contradictions of its provisions, and their frequent inapplicability to the requirement of a civilised nation...The consequence has been an enormous accumulation of particular laws without system or principle, and many of them at variance with each other and the common law.'

<sup>958</sup> Ibid, p 254 (report, p xxii). The report also stated: 'The crime of murder...is in the law of England characterized by its having been committed with premeditation, or what the English law terms malice prepense, or malice aforethought. But as this class comprehends not only those instances where the offender acts from a motive of ill-will against another, and an express intention to injure or destroy him, but also other cases where there is no express malice, but where it is necessary on grounds of policy to punish homicide with the highest degree of severity, the term 'malice aforethought' is often applied to a state of circumstances where malice does not exist in the ordinary sense of the term, but is only malice in a legal sense by construction of law.'

technical doctrine, by which a criminal intention, wholly unconnected with any personal injury, in connection with a purely accidental killing, is in some instances made to constitute the distinction between the higher and lower species of culpable homicide, and in others, to bring an accidental killing within the scope of manslaughter.<sup>959</sup>

Foster's definition<sup>960</sup> - which the Commission believed to accurately reflect the law - the latter opined was vague, indistinct and afforded no certainty.<sup>961</sup> Further, the Commission asserted that the real issue was not '*malice*' as determined by law, but a question of *intention*, as determined by *fact*.<sup>962</sup> Thus,

whether it [the killing] be in truth wilfully and deliberately done is a mere question of fact, - a conclusion to be deduced by the jury, but which the court not sufficiently judge from a mere finding of the minute particulars attending the transaction.<sup>963</sup> (*underlining supplied*)

Therefore, the concept of '*malice*' was superfluous. The sole issue should be one of premeditation (being the same as intention).

#### **(b) Provocation**

The Commission considered that, attempting to define provocation as a question of law, was an impossible task - as could be seen from Foster's own formulations.<sup>964</sup> Instead, the issue should be one of fact:

The law merely ordains that a ferocious excess of violence, far beyond what the occasion called for, and which, therefore, cannot be attributed to mere heat and passion excited by the occasion, shall not be justified, but shall be accounted murder; but the law cannot define or decide generally in what circumstances such excess shall be deemed to consist. This, we think ought to be treated as a matter of fact upon the circumstances of each particular case.<sup>965</sup>

#### **(c) Negligence**

The Commission pointed out the problem of trying to decide whether an act was *negligent* or *accidental* as a proposition of law, as opposed to one of fact.<sup>966</sup> Thus, it stated:

The question whether for want of due caution a party were to be considered guilty of manslaughter or the death was merely accidental, has also been regarded as a question of law under circumstances which seem to make it more properly a question of fact.<sup>967</sup>

#### **(d) Unlawful Act**

The Commission dealt with the principle of law that it was necessary to determine whether an act which led to a killing was lawful or not, since it produced a different consequence as to whether it was murder, manslaughter or an accidental killing. It stated:

We proceed to notice more particularly a feature of the law of England closely connected with the doctrine of implied malice, and founded, as it seems, on supposed grounds of legal policy; that is, that homicide which would otherwise be no more than death by misadventure, is deemed to be culpable by reason of its having happened in the prosecution of some illegal purpose wholly collateral to the event; and that, upon the same principle, homicide which would otherwise be no more than manslaughter shall be deemed to be murder.<sup>968</sup>

The Commission felt that turning accidental - but unlawful - conduct into murder was to enhance the same beyond its '*intrinsic moment*' and that, as a mere technical rule, it was defective and not conducive to the administration of justice.<sup>969</sup> One would agree. This legal fiction had, from its inception, simply provided confusion in the law on homicide.

#### **(e) Justifiable & Excusable Killing**

The Commission treated a killing as *justifiable* (and proposed the same in draft articles) when the killing was:

<sup>959</sup> Ibid, p xxii.

<sup>960</sup> See 34.

<sup>961</sup> Ibid, p 255 (report, p xxiii) 'When an attempt to explain implied malice by so high an authority as [Foster], on a review of all the cases, ends in a description so vague and indistinct as is contained in the above terms, it may, without hesitation, be inferred that the common law afforded no certain test of that malice which was essential to the crime of murder: had the law furnished any more specific definitions on the subject, they would have not escaped the search of so diligent an inquirer.'

<sup>962</sup> Ibid, p xxiii 'Whether such a peril [the killing] be wilfully occasioned is a question not of law but of fact, depending on a consideration of the nature of the act done, the circumstances under which it was done, the probability that the act under those circumstances would be fatal to life, and the consciousness on the part of the offender that such a peril would ensue.'

<sup>963</sup> Ibid, p 257 (report, p xxv).

<sup>964</sup> Ibid, p 258 (report, p xxvi). 'The law may pronounce whether any extenuating occasion of provocation existed, but it is for the jury to decide whether the offender acted solely on that provocation, or was guilty of a malicious excess in respect of the instrument used or the manner of using it.'

<sup>965</sup> Ibid, p 257 (report, p xxv).

<sup>966</sup> Ibid, p 259 (report, p xxvii), note 'A man was driving a cart with four horses in the highway at Whitechapel; he being in the cart, and the horses upon a trot, they threw down a woman who was going the same way, and killed her. Holt CJ, and others, held this to be merely misadventure.' This was treated as a matter of law; but surely it was properly a question for a jury whether, under such circumstances, the conduct of the driver was free from blame: consequently, whether the case was one of manslaughter or of misadventure.' The Commission also referred to *Hazel*, see App B(g). See also Russell, n 51, vol 1, p 769.

<sup>967</sup> Ibid, pp 258-9 (report, p xxvi-ii).

<sup>968</sup> Ibid, p 260 (report, p xxviii).

<sup>969</sup> Ibid, p 261. (report, p xxix) 'The necessary consequence of such a defect is unfavourable to the administration of justice. Where the penalty bears a due proportion to the offence, a popular tribunal is willing to give the law its effect; but it is otherwise where a jury is called upon to pronounce a verdict in a capital case, and where the heinousness of the offence is to be judged of by mere technical rules. It would be hard to convince a jury, in the case put by [Foster], of the expediency of putting a man to death, because in attempting to shoot and steal a fowl, an offence in respect of which an imprisonment of six months would have been thought sufficiently severe, homicide resulting from pure accident.'

- pursuant to due legal process;
- for the apprehension of felons;<sup>970</sup>
- for the advancement of the law;<sup>971</sup>
- to prevent a felony;<sup>972</sup>
- an enemy in war time.<sup>973</sup>

In relation to *excusable* killing, the Commission provided (in draft articles) that this occurred when:

- in self defence;<sup>974</sup>
- in defence of movable property;<sup>975</sup>
- in defence of house and land;<sup>976</sup>
- for self preservation.<sup>977</sup>

While this Royal Commission Report of 1834 indicated the urgent need to review the adequacy of a number of legal principles relating to homicide, unfortunately, this did not flow through into its actual Digest (draft legislation) where it still used the term '*malice aforethought*'.<sup>978</sup> And, indeed, the Commission's weak explanation for this suggests that the concept of malice aforethought - being so long established - various lawyers and judges were reluctant to let it go.<sup>979</sup> Further, the Commission did not deal in sufficient detail as to whether it was still necessary to divide malice into '*express*' and '*implied*' malice,<sup>980</sup> this bifurcation deriving from the concept of '*premeditated malice*'.

***In conclusion, the Royal Commission's report of 1834 pointed out some serious problems with the law on homicide, including: (a) the superfluous nature of 'malice'; (b) that provocation should not be a question of law but of fact; (c) that, whether an act was negligent or accidental, should not be a question of law but of fact.***

### **38. Royal Commissions: 1843-78**

The Commission's Digest of 1834 was reflected in a draft Code in 1843, without these matters being dealt with.<sup>981</sup> However, in

<sup>970</sup> Ibid, p 266 (report, p xxxiv) art 22 'Homicide is also justifiable where an officer of justice or other person duly authorised by writ or warrant, or otherwise, to arrest, detain, or imprison any person for any felony or for any dangerous wound given, and using lawful means for the purpose, cannot, otherwise than by killing, overtake such person in case of flight or prevent his escape from justice; provided that the party flying or attempting to escape knew that he was pursued for such felony or wound given.'

<sup>971</sup> Ibid, pp 266-7, art 23 'Also, where any officer of justice, or other person lawfully executing in a lawful manner any civil or criminal process, or other authority for the advancement of the law, or lawfully interposing in a lawful manner for the prevention or suppression of any breach of the peace or other offence is unlawfully and forcibly resisted, and using no more force than is necessary to overcome such resistance, happens to kill the person so resisting; or being by reason of the violence opposed to him under reasonable fear of death if he proceed to execute his duty, and because he cannot otherwise execute his duty and preserve his life, kills him who so resists.'

<sup>972</sup> Ibid, p 268, art 31 'Homicide is also justifiable whensoever it is necessary for preventing the perpetration of any felony attempted to be committed by violence or surprise against the person, habitation, or property of the party killing, or of any other person.'

<sup>973</sup> Ibid, p 265 (report, p xxxiii). It did this by way of an exception providing in draft art 9 'The law of homicide applies to the killing not only of any subject of the realm, but also of any alien, with the exception of an alien enemy in the heat of war and in the actual exercise thereof.'

<sup>974</sup> Ibid, p 268, art 34 'Homicide is also justifiable whensoever, in defence of his person against unlawful violence, the party assaulted being, from the violence with which the assailant pursues his purpose, under reasonable apprehension of immediate death, and because he cannot otherwise preserve his life, kills the assailant. Provided, nevertheless, that where retreat is practicable with safety to life, the party assaulted shall retreat so far as is practicable with safety to his life.'

<sup>975</sup> Ibid, pp 268-6, art 35 'Also, where one, in defence of movable property in his lawful possession, repels force with force, and using no more violence than is necessary for the defence of such property against wrong, happens to kill the assailant; or being, from the violence with which the assailant pursues his purpose, under reasonable fear of death if he persist in his defence, and, because he cannot otherwise defend his property and preserve his life, kills the assailant.'

<sup>976</sup> Ibid, p 269, art 36 'Also, where one in lawful possession of house or land, after requesting another who has no right to be there to depart, is resisted, and using no more violence than is necessary to remove such wrongdoer and retain his possession, happens to kill such wrongdoer; or being, from the violence with which such wrongdoer endeavours to deprive him of possession, under reasonable fear of death if he persist in his defence, and, because he cannot otherwise maintain possession and preserve his life, kills such wrongdoer.'

<sup>977</sup> Ibid, p 269, art 39 'whensoever a man is involuntarily placed in such a situation that he is under the necessity of killing another in order to save his own life.'

<sup>978</sup> Ibid, p 265, art 10 'Whosoever shall, of malice aforethought, kill any other person, shall be guilty of murder, and shall suffer death'. Also, art 11 'The killing is of malice aforethought whensoever it is voluntary and is not justified, excused, or extenuated as hereinafter mentioned.'

<sup>979</sup> The argument for retaining the expression is pure fudge, see p 265, Report, p xxxiii. 'We retain them because their retention is not purchased, as it seems to us, by any sacrifice in any point of perspicuity, pointing out at the same time the mode of dispensing with these terms, without in the least affecting any matter of substance.'

<sup>980</sup> Ibid, p 265. Thus, art 14 'The killing of another is of express malice where death results from a deliberate intention to kill or do great bodily harm to the person killed.' Art 15 'Any other killing, hereby declared to be murder, is of implied malice.' The examples of implied malice which the Commission stated were: (a) transferred malice (art 16); (b) random killing (art 17); (c) persuading a person to kill himself (art 18); (d) bearing false witness (art 19). As to these, (d) never became law and the death penalty has now been abolished for all offences in 1998, (c) is now a separate crime and (a) and (b) were implied only because of the retention of the concept of premeditated malice, since, otherwise, in the case of (b) there was a clear intention to kill a person; and, in the case of (a), the fact it ended up being the wrong (or an unknown) person did not affect the intent. It may be noted that the Commission also treated as implied malice, the killing of a minister of justice, see Ibid, p 272, art 54 'The killing is also of malice aforethought, whensoever one unlawfully and forcibly resists any officer or other person lawfully executing in a lawful manner any civil or criminal process, or other authority for the advancement of the law, or lawfully interposing in a lawful manner, for the prevention or suppression of any breach of the peace or other offence, and in so resisting happens to kill such officer or other person.'

<sup>981</sup> See IUP, n 897, vol 4. *Seventh Report of HM Commissioners on Criminal Law of 11 March 1843*, pp 235-43 (report, pp 223-31).

a draft Code of 1846, the concept of ‘malice aforethought’ was dispensed with and the relevant article provided:

Homicide is murder whensoever the killing is wilful [intentional], and is neither extenuated within the provisions of section 3 [extenuated homicide], nor justifiable within the provisions of section 5 [justifiable homicide].<sup>982</sup>

This policy, which was a very beneficial step forward, was also adopted in a draft Code of 1848.<sup>983</sup> As to other legislation in this period, the Offences against the Person Act 1861(‘OPA 1861’)<sup>984</sup> did not deal with homicide substantively. Nor did the other consolidating Acts.<sup>985</sup>

- A Draft Criminal Code of 1879 was presented in a Report of the Royal Commission in 1879.<sup>986</sup> It was much influenced by the views of the eminent criminal judge, and jurist, Stephen.<sup>987</sup> While a laudable effort at consolidation (it consolidated offences in a much more succinct manner) this Code did not receive a favourable judicial, or political, acceptance and it was never enacted;
- Certainly, in the area of homicide, the Code of 1879 moved away from the simple provision on murder in the draft Codes of 1846 and 1848 and ended up presenting a rather confused list of what comprised murder<sup>988</sup> together with a further definition of the same.<sup>989</sup> This approach was influenced by Stephen’s list in his text on the criminal law in 1863 (see below), but something which judges (and others) would, likely, have thought would be completely unintelligible to a jury;<sup>990</sup>
- The Code of 1879 is not considered further since it was never enacted. Further, Stephen’s later Digest (of 1883), which was often cited by subsequent legal writers, moved away from such a complex definition.

***In conclusion, there was no substantive revision of the law of homicide in the period 1843-79, despite various Royal Commission reports.***

### **39. Stephen (1883)**

Stephen - in his *General View of the Criminal Law of England* (1863) - considered the law on homicide.<sup>991</sup> So too, in his *Digest of the Criminal* (1883) - which he hoped to become legislation - as well as in his *History of the Criminal Law of England* (1883).

- Stephen sought to consider the *legal history* of the crime of homicide and he deserves praise for his trenchant criticism of aspects of it which were (in hindsight), clearly, defective.<sup>992</sup> However, it is only appropriate to point

<sup>982</sup> Ibid, n 956, vol 5, *Second Report of HM Commissioners for Revising and Consolidating the Criminal Law* (1846), p 192 (report, p 24). The drafters indicated that they were persuaded to adopt a simpler definition being influenced to a considerable extent by Mr Livingstone in his Code of Crimes and Punishments for the US State of Louisiana in which he indicated that he had excluded references to the king’s peace, malice aforethought, express malice and implied malice because the terms had no clear meaning and would simply confuse jurors. See E Livingstone, *A System of Penal Law for the State of Louisiana* (Legal Classics Library, 1983), p 186, in respect of Coke’s definition he stated: ‘There is scarcely a word in it that, to a conscientious man, will not afford matter for serious doubt... who is in the king’s peace? What is malice aforethought? Is there any malice that is after thought? What is express malice? When shall it be implied?’.

<sup>983</sup> Ibid, *Fourth Report of HM Commissioners for Revising and Consolidating the Criminal Law* (1848), p 507 (report, p 161), art 2 ‘Homicide is murder whensoever the killing is wilful...’

<sup>984</sup> 24 & 25 Vict c 100 (1861). The only sections of relevance were: s 1 (punishment of murder), s 2 (sentence for murder), s 3 (burial of murderer’s body), s 4 (conspiracy to murder), s 5 (punishment of manslaughter), s 6 (indictment for murder etc), s 7 (excusable homicide).

<sup>985</sup> See generally, CS Greaves, *The Criminal Law Consolidation and Amendment Acts of the 24 & 25 Vict* (2<sup>nd</sup> ed, 1862).

<sup>986</sup> IUP, n 956, vol 6, p 369 *et seq.* *Report of the Royal Commission appointed to consider the Law relating to Indictable Offences* (1879).

<sup>987</sup> As he noted, Stephen, n 55, vol 3, p 79.

<sup>988</sup> Ibid, p 468 (report, p 100), s 174 ‘Culpable homicide is murder in each of the following cases: (a) if the offender means to cause the death of the person killed; (b) if the offender means to cause to the person killed any bodily injury which is known to the offender to be likely to cause death, and if the offender, whether he does or does not mean to cause death, is reckless whether death ensues or not; (c) if the offender means to cause death or such bodily injury as aforesaid to one person so that if that person be killed the offender would be guilty of murder, and by accident or mistake the offender kills another person, though he does not mean to hurt the person killed; (d) if the offender for any unlawful object does an act which he knows or ought to have known to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting anyone.’ For the ‘clumsy’ drafting of this section (and s 175) see Russell, n 51, (1964 ed), vol 1, pp 471-2. See also KJM Smith, *Lawyers, Legislators and Theorists* (Clarendon, 1998), pp 135-8.

<sup>989</sup> Ibid, s 175 ‘Culpable homicide is also murder in each of the following cases, whether the offender means or not death to ensue, or knows or not that death is likely to ensue. (a) if he means to inflict grievous bodily injury for the purpose of facilitating the commission of any of the offences hereinafter mentioned, or the flight of the offender upon the commission or attempted commission thereof, and death ensues from his violence; (b) if he administers any stupefying thing for either of the purposes aforesaid and death ensues from the effects thereof; (c) if he by any means willfully stops the breath of any person for either of the purposes aforesaid and death ensues from such stopping of the breath. The following are offences hereinbefore in this section referred to: treason and the other offences mentioned in Part V of this Act; piracy, and offences deemed to be piracy; escape or rescue from prison or lawful custody; resisting lawful apprehension; murder; rape; forcible abduction; robbery; burglary; arson.’

<sup>990</sup> The Code of 1879 may also be criticized in that it failed to deal adequately with negligent killing. See also s 167 (culpable homicide).

<sup>991</sup> Holdsworth, n 65, vol 15, p 289, pointed out that, in the period 1833-75, there were no great books on the criminal law and lawyers relied on Coke, Hale, Hawkins and Russell (also Blackstone).

<sup>992</sup> Stephen was critical of the concepts of ‘unlawfulness’ as well as of ‘malice’. For example, Stephen, n 55, (*General View*), pp 119-20 ‘The rule which makes every felonious intent malicious, is open to great objection.’ Also, he noted the inconveniences arising from the distinction between felony and misdemeanour. ‘To kill a man in custody on a charge of felony who cannot otherwise be restrained from escaping is justifiable homicide. If the charge is misdemeanour it is manslaughter. To conspire to commit murder is a misdemeanour; to steal a pennyworth of sweetmeats is felony. It is absurd that a constable might lawfully kill a lad to prevent his escape in the one case, and might be obliged to permit the rescue of a man in the other though he had loaded arms in his hands.’ See also Smith, n 988, pp 143-50.

out that Stephen was subject to difficulties in the absence of decent translations of much early material relevant to the criminal law;<sup>993</sup>

- Further, Stephen had prejudices. For example, not knowing the early history of ‘*premeditated malice*’ (he scarcely considered it prior to Bracton)<sup>994</sup> Stephen thought that ‘*malice*’ was an important concept; one which he preserved in his Digest of 1883. One suspects this derived from his Victorian *moral* sentiments;<sup>995</sup>
- Further, like many Victorians, Stephen had a *mania* for legal rules - a view that setting out legal matters in great detail would cover every eventuality.<sup>996</sup> Also, although Stephen noted the *presumption* of murder - and its likely *rationale*<sup>997</sup> - he did not question whether it would have been better to avoid such a presumption and let the prosecution prove their case.

#### (a) **Murder**

In his *General View* (1863), Stephen was one of the first to recognise that *reckless* killing was as blameworthy as *intentional* killing. Thus, he stated:

A reckless act, likely to cause death, would produce as much disapproval as if there had been a direct intention to kill. For example: if a man wantonly fired a pistol at another person’s head, it would not make much difference morally whether he meant to kill him or no.<sup>998</sup>

Stephen also indicated there was an important difference between intentional (or reckless) killing and negligent killing<sup>999</sup> as well as the fact that accidental killing was not really blameworthy.<sup>1000</sup> In his Digest, Stephen stated:

Murder is unlawful homicide with malice aforethought.<sup>1001</sup>

It is a great pity that Stephen adopted this approach since, in *Welsh* (1869), Keating J had made it clear that premeditated malice and intention were one and the same, stating:

The prisoner is indicted for that he killed the deceased feloniously and with malice aforethought, that is to say intentionally, without such provocation as would have excused, or such cause as might have justified the act. Malice aforethought means the intention to kill. Whenever one person kills another intentionally, he does it with malice aforethought. In point of law, the intention signifies the malice...<sup>1002</sup> (*underlining supplied*)

As to the meaning of ‘*malice aforethought*’, Stephen’s definition was convoluted:

Malice aforethought means any one or more of the following states of mind preceding or co-existing with the act or omission by which death is caused, and it may exist where that act is unpremeditated:

- (a) An intention to cause the death of, or [GBH] to, any person, whether such person is the person actually killed or

<sup>993</sup> Stephen never considered Babylonian law. Nor the Hebrew text of the Old Testament law. Further, better translations of Anglo-Saxon law were before his time (see n 18) as was the first comprehensive (and good) translation of Justinian’s Digest - that of Watson in 1985, see n 182.

<sup>994</sup> The views (and analysis) of Maitland on the concept of premeditated malice (see ns 13 & 81) are to be preferred.

<sup>995</sup> As can be seen from his *General View*, n 55, pp 115-6, Stephen tended to define homicide by reference to a moral perspective. For example, p 116 ‘Malice means wickedness’ (something which the Old Testament would agree with) and pp 117-8 ‘In the main these rules throw the common *moral* sentiment into a form as reasonable as any definite form could be’. The idea of simply looking at a matter from a purely legal (and objective) perspective (something which Maitland was able to do) was not, one suspects, within Stephen’s nature. See *Ibid*, p 82, it was ‘absolutely necessary that legal definitions of crimes should be based upon *moral* distinctions.’ (*italics supplied*) See also AH Manchester, *A Modern Legal History of England and Wales 1750-1950* (1980), p 189 ‘An equally moralistic approach to the classification of crime was adopted by [Stephen].’

<sup>996</sup> See for example, n 55 (*General View*), pp 116-7.

<sup>997</sup> *Ibid*, p 121 ‘The rule that wilful killing is presumed to be malicious, is sanctioned by the moral sentiment of the great value to be set on human life, and is, perhaps, a relic of the old law which affixed forfeitures even to accidental homicide, partly, perhaps, from the notion that blood defiles the land, partly from love of forfeitures.’ (*underlining supplied*). One would agree.

<sup>998</sup> *Ibid*, p 115. Stephen also stated, p 116, as an intent involving murder ‘Wanton indifference to life in the performance of an act likely to cause death, whether lawful or not.’ As an example, p 118, Stephen stated: ‘Suppose, for example, a man were to set a locomotive engine running by itself along a railway out of mere mischief, and a train were to be upset by it and the passengers killed, no more wicked act could be imagined.’

<sup>999</sup> *Ibid*, p 115-6 ‘It is one thing to kill a person by an *intentional* or *reckless* bodily injury...and another to kill by some *negligent* act, lawful or not, having no immediate relation to bodily injury. In point of morality, there is no resemblance between the conduct of a man who, in return for a violent blow, stabs another, and that of a carter who goes to sleep on the shafts, and so allows his horses to run over some one passing along the road.’ (*italics supplied*)

<sup>1000</sup> *Ibid*, p 115 ‘a boy throwing a stone at another in sport unfortunately killed him, the act would be regarded as deserving of hardly any blame at all.’ Stephen also noted the former inadequacy of the law on attempted murder, pp 123-4. ‘It seems hardly credible, but it is, nevertheless, true, that till the year 1861, an attempt to commit murder was as such only a common law misdemeanor, punishable with a maximum of two years’ imprisonment and hard labour. Thus if a man attempted, by cutting a rope of a colliery, to destroy the lives of many persons, he would have been liable to two years’ hard labour at most; yet at the same time, to cut, stab, or wound any person, or cause any bodily injury dangerous to life, to administer any poison, to shoot at any person ‘*by drawing a trigger, or in any other manner attempting to discharge loaded arms at any person*’, attempts to drown, suffocate, or strangle any person, with intent to murder, were capital crimes. This monstrous omission in the law is now supplied in the most characteristic manner. Four sections of the 24 & 25 Vic c 100 [OPA 1861], specify as many as ten or twelve ways of attempting to commit murder, on all of which the same punishment is inflicted [ss 11-5]. The following (the 13th) section allots the same punishment to attempts to commit murder ‘*by any means other than those specified in the previous sections.*’

<sup>1001</sup> Digest, n 55, art 223.

<sup>1002</sup> *Welsh* (1869) 11 Cox CC 336, at pp 337-8. A similar interpretation as to malice was provided in *M’Pherson v Daniels* (1829) 10 B & C 263 (109 ER 448) Littledale J, p 272 ‘malice (which in its legal sense denotes a wrongful act done intentionally without just cause or excuse).’ (*underlining supplied*). See also *Latimer* (1886) 17 QBD 361 Coleridge CJ, p 361 ‘It is common knowledge that a man who has an unlawful and malicious intent against another, and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured.’ (*underlining supplied*). See also Russell, n 51 (last ed 1964), pp 522-3.

not,<sup>1003</sup>

(b) knowledge that the act which causes death will probably cause the death of, or [GBH] to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or [GBH] is caused or not, or by a wish that it may not be caused;

(c) an intent to commit any felony whatever;

(d) an intent to oppose by force any officer of justice on his way to, in, or returning from the execution of the duty of arresting, keeping in custody, or imprisoning any person whom he is lawfully entitled to arrest, keep in custody, or imprison, or the duty of keeping the peace or dispersing an unlawful assembly, provided that the offender has notice that the person killed is such an officer so employed.<sup>1004</sup>

Stephen indicated that his definition in his Digest was subject to provisions relating to:

- the effect (and definition) of provocation,<sup>1005</sup>
- when provocation did not extenuate homicide;<sup>1006</sup>
- provocation to a third person;<sup>1007</sup>

Stephen also dealt with the presumption that killing was murder.<sup>1008</sup>

### **(b) Manslaughter**

Stephen stated:

Manslaughter is unlawful homicide without malice aforethought.<sup>1009</sup>

Stephen then provided further definitions of:

- homicide;<sup>1010</sup>
- killing,<sup>1011</sup>

<sup>1003</sup> Digest, n 55, art 223, in a fn Stephen stated: 'Coke's first case of implied malice is malice implied from the want of provocation. A man who wantonly or on a slight cause intentionally and violently kills another, shows by that act, not indeed the existence of hatred of long standing, but the existence of deadly hatred instantly conceived and executed, which is at least as bad if not worse. This in the strict sense of the words is malice aforethought. As Hobbes well observes: 'it is malice forethought, though not long forethought' (*Dialogue of the Common Laws*, Works, vi 85). And it is not by law necessary that it should be long. If a slight provocation does not reduce murder to manslaughter, *a fortiori*, the total absence of all provocation, and the mere rapidity with which the execution of a cruel and wicked design follows on its conception cannot have that effect.'

<sup>1004</sup> Ibid, art 223 'The expression '*officer of justice*' in this clause includes every person who has a legal right to do any of the acts mentioned, whether he is an officer or a private person. Notice may be given, either by words, by the production of a warrant, or other legal authority by the known official character of the person killed, or by the circumstances of the case.'

<sup>1005</sup> Ibid, art 224 (*Effect and Definition of Provocation*). 'Homicide, which would otherwise be murder, is not murder, but manslaughter, if the act by which death is caused is done in the heat of passion, caused by provocation, as hereinafter defined, unless the provocation was sought or voluntarily provoked by the offender as an excuse for killing or doing bodily harm. The following acts may, subject to the provisions contained in article 225 (see n 1006), amount to provocation: (a) an assault and battery of such a nature as to inflict actual bodily harm, or great insult, is a provocation to the person assaulted; (b) if two persons quarrel and fight upon equal terms, and upon the spot, whether with deadly weapons or otherwise, each gives provocation to the other, whichever is right in the quarrel, and whichever strikes the first blow; (c) an unlawful imprisonment is a provocation to the person imprisoned, but not to the bystanders, though an unlawful imprisonment may amount to such a breach of the peace as to entitle a bystander to prevent it by the use of force sufficient for that purpose. An arrest by officers of justice, whose character as such is known, but who are acting under a warrant so irregular as to make the arrest illegal, is provocation to the person illegally arrested, but not to bystanders; (d) the sight of the act of adultery committed with his wife is provocation to the husband of the adulteress on the part of both the adulterer and of the adulteress; (e) the sight of the act of sodomy committed upon a man's son is provocation to the father on the part of the person committing the offence; (f) neither words, nor gestures, nor injuries to property, nor breaches of contract, amount to provocation within this article, except [perhaps] words expressing an intention to inflict actual bodily injury, accompanied by some act which shews that such injury is intended; but words used at the time of an assault - slight in itself - may be taken into account in estimating the degree of provocation given by a blow; (g) the employment of lawful force against the person of another is not a provocation to the person against whom it is employed.'

<sup>1006</sup> Ibid, art 225 (*When Provocation does not extenuate Homicide*). 'Provocation does not extenuate the guilt of homicide unless the person provoked is at the time when he does the act deprived of the power of self-control by the provocation which he has received, and in deciding the question whether this was or was not the case, regard must be had to the nature of the act by which the offender causes death, to the time which elapsed between the provocation and the act which caused death, to the offender's conduct during that interval, and to all other circumstances tending to shew the state of his mind.' See also art 227 (suicide, abetting suicide), art 228 (manslaughter of oneself), art 229 (accessories before the fact in manslaughter).

<sup>1007</sup> Ibid, art 226 (*Provocation to a third person*). 'Provocation to a person by an actual assault or by a mutual combat, or by a false imprisonment, is in some cases provocation to those who are with that person at the time, and to his friends who, in the case of a mutual combat, take part in the fight for his defence. But it is uncertain how far this principle extends.'

<sup>1008</sup> Ibid, art 230 (*Presumption that killing is murder*). 'Every person who kills another is presumed to have wilfully murdered him unless the circumstances are such as to raise a contrary presumption. The burden of proving circumstances of excuse, justification, or extenuation is upon the person who is shewn to have killed another.'

<sup>1009</sup> Ibid, art 223.

<sup>1010</sup> Ibid, art 218 (*Homicide defined*). 'Homicide is the killing of a human being by a human being.'

<sup>1011</sup> Ibid, art 219 (*Killing defined*). 'Killing is causing the death of a person by an act or omission but for which the person killed would not have died when he did, and which is directly and immediately connected with his death. The question whether a given act or omission is directly and immediately connected with the death of any person is a question of degree dependent upon the circumstances of each particular case. (*Submitted*). But the conduct of one person is not deemed for the purposes of this article to be the cause of the conduct of another, if it affects such conduct only by way of supplying a motive for it, and not so as to make the first person an accessory before the fact to the act of the other. This article is subject to the provisions contained in the next two articles [i.e. arts 220 & 221 below].'

- causation;<sup>1012</sup>
- when causing death did not amount to homicide;<sup>1013</sup>
- when homicide was unlawful.<sup>1014</sup>

Stephen's work was useful, in that he was one of the first (if not the first) to point out that *reckless* killing should be distinguished from *negligent* killing. He also pointed out the inadequacy of the concept of '*unlawfulness*' in the field of homicide, especially with regard to where the unlawful act was accidental. However, unfortunately, Stephen was wedded to the utility of '*malice*' in the term '*malice aforethought*', when there was none. Nor did he challenge the worth of the concept of '*premeditated malice*'. Also, the legal formulations in his Digest were obscure at times. As Turner noted (see 42) and one would agree:

In [Stephen's] Digest [manslaughter] is treated in a confusing manner and no clear principle is enunciated. His definition of '*unlawful*' ... is far too wide. He says it '*includes, I believe, all crimes, all torts, and all acts contrary to public policy or morality, or injurious to the public.*' This doctrine takes us back to the time of Hale and cannot be maintained nowadays, although it still appears in text books.... Nor did he [Stephen] achieve a clear explanation of what he meant by '*culpable negligence*.'<sup>1015</sup>

***In conclusion, Stephen pointed out that reckless killing should be distinguished from negligent killing, something which Kenny did not take up.***

#### **40. Kenny (1902)**

##### **(a) Murder**

Kenny - in the first edition of his *Outlines of Criminal Law* (1902) - noted that the word '*murder*' originally applied to the murder fine; then, to the worst kind of homicide. However, when an Act of 1532 (see 20(d)) took away benefit of clergy from '*malice of aforethought*',<sup>1016</sup> it achieved its third and final sense:

Murder, in this third and final sense, may be defined in antique phraseology which has been classical ever since the time of Lord Coke, as (1) unlawfully (2) killing (3) a reasonable creature, who is (4) in being and (5) under the king's peace, (6) with malice aforethought either express or implied; (7) the death following within a year and a day.<sup>1017</sup>

As to killing, Kenny noted that:

- It could be indirect - such as in cases of neglect;<sup>1018</sup>
- It might occur even though there were subsequent acts (or omissions) by third parties '*unless this conduct of the third parties were either wilful or, at least, unreasonably negligent.*' The rule extended even to similar intervening conduct on the part of the victim.<sup>1019</sup>

<sup>1012</sup> Ibid, art 220 (*When an act is the remote cause of death or one of several causes*). 'A person is deemed to have committed homicide, although his act is not the immediate or not the sole cause of death in the following cases: (a) if he inflicts a bodily injury on another which causes surgical or medical treatment, which causes death. In this case it is immaterial whether the treatment was proper or mistaken, if it was employed in good faith, and with common knowledge and skill, but the person inflicting the injury is not deemed to have caused the death if the treatment which was its immediate cause was not employed in good faith, or was so employed without common knowledge or skill; (b) if he inflicts a bodily injury on another, which would not have caused death if the injured person had submitted to proper surgical or medical treatment, or had observed proper precautions as to his mode of living; (c) if by actual violence or threats of violence he causes a person to do some act which causes his own death, such act being a mode of avoiding such violence or threats, which under the circumstances would appear natural to the person injured; (d) if by any act he hastens the death of a person suffering under any distress or injury which apart from such act would have caused death; (e) if his act or omission would not have caused death unless it had been accompanied by the acts or omissions of the person killed or of other persons.'

<sup>1013</sup> Ibid, art 221 (*When causing death does not amount to homicide*). A person is not deemed to have committed homicide although his conduct may have caused death, in the following cases: (a) when the death takes place more than a year and a day after the injury causing it, in computing the period the day on which the injury is inflicted is to be counted as the first day; (b) it is said when the death is caused without any definite bodily injury to the person killed, but this does not extend to the case of a person whose death is caused not by any one bodily injury, but by repeated acts affecting the body, which collectively cause death, though no one of them by itself would have caused death. (c) [it seems] when death is caused by false testimony given in a court of justice.'

<sup>1014</sup> Art 222 (*When homicide is unlawful*). 'Homicide is unlawful: (a) when death is caused by an act done with the intention to cause death or bodily harm, or which is commonly known to be likely to cause death or bodily harm, and when such act is neither justified nor excused by the provisions contained in chapter III [which related to general exceptions] or chapter XXI [where the infliction of bodily injury was not criminal]; (b) when death is caused by an omission, amounting to culpable negligence, to discharge a duty tending to the preservation of life, whether such omission is or is not accompanied by an intention to cause death or bodily harm; (c) when death is caused accidentally by an unlawful act.'

<sup>1015</sup> Turner, n 58, p 214.

<sup>1016</sup> Kenny, n 57, p 124: 'This phrase '*malice aforethought*' was not new. It had been in use since the thirteenth century (even before the abolition of englishry); for '*malitia excogitata*' (or '*praecogitata*') was familiar under Henry III [1216-72] as one of tests of unpardonable (i.e. capital) homicide. But at the time when the phrase began to be used the word '*malitia*' meant rather the wrongful act intended, than the intention itself; still less had it any particular reference to that special form of evil intention, viz, hatred, which '*malice*' now popularly denotes.' Kenny referred to P & M, n 88, vol 2, p 467.

<sup>1017</sup> Ibid, p 125 (Kenny used Greek letters as opposed to the numbering I have employed). Kenny continued: 'Of these seven constituents, the first, viz. '*unlawfulness*' distinguishes murder from all non-felonious homicides, whether ranked as justifiable or only as excusable; and the sixth '*malice aforethought*', distinguishes it from those unlawful homicides which rank only as manslaughter. The second, third, fourth, fifth and seventh are as necessary in manslaughter as in murder.'

<sup>1018</sup> Ibid. Kenny referred to cases in 1328, see n 432 and 1599, see **App B(e)**. Ibid, p 126, Kenny indicated that neither killing by perjury nor by way of mental shock, was murder.

<sup>1019</sup> Ibid, pp 127-8.

As to the other pre-requisites which Coke had laid down, Kenny noted the following:

- **Reasonable Creature in Being.** This referred to a human being (including a lunatic);<sup>1020</sup>
- **King's Peace.** Kenny stated that: '*The king's majesty is, by his office and dignity royal, the principal conservator of the peace within all his dominions*'.<sup>1021</sup> Kenny noted that an alien enemy was under the king's peace, save in the course of war.<sup>1022</sup>

**(b) Malice Aforethought**

Kenny noted that: '*The preceding elements in the definition of murder are common to all forms of criminal homicide; but [premeditated malice] is the distinctive attribute of those homicides that are murderous*'.<sup>1023</sup> However Kenny also noted that the term '*malice aforethought*' was now superfluous:

The phrase is still retained in the modern law of murder; but both the words in it have lost their original meanings. For the forensic experience of successive generations brought into view many cases of homicide in which there had been no premeditated desire for the death of the person slain, yet which seemed heinous enough to deserve the full penalties of murder. These accordingly, one after the other, were brought within the definition of that offence by a wide judicial construction of its language.

Hence a modern student might fairly regard the phrase '*malice aforethought*' as now a mere arbitrary symbol. It still remains a convenient comprehensive term for including all the various forms of *mens rea* which are so heinous that a homicide produced by any of them will be a murder. But none the less it is now only an arbitrary symbol. For the '*malice*' may have in it nothing really malicious; and need never be really '*aforethought*', except in the sense that every desire must necessarily come before - though perhaps only an instant before - the act which is desired.

The word '*aforethought*', in the definition, has thus become either false or else superfluous. The word '*malice*' is neither; but it is apt to be misleading, for it is not employed in its original (and its popular) meaning. A desire for the death of the individual who was killed - or, as for distinctness' sake it may be termed, '*specific malice*' - is not essential to murder. Blackstone, indeed, in his treatment of this crime, sometimes uses the word malice as if in his narrow sense; but at other times he includes under it, and more correctly, other states of mind far less guilty.<sup>1024</sup> (*wording divided for ease of reference and underlining supplied*).

Kenny then referred to 6 forms of *mens rea* sufficient to constitute '*murderous*' malice, viz. an intention to:

- kill the person who - in fact - was killed (*the 'most frequent' of the 6 forms*);
- kill a person - but not the one who was actually killed (i.e. *transferred malice*);<sup>1025</sup>
- kill - without selecting any particular individual as the victim (i.e. *random killing*);<sup>1026</sup>
- hurt only, but by means of an act intrinsically likely to kill; (*neglect/cruelty*);<sup>1027</sup>
- do an act intrinsically likely to kill, though without any purpose of inflicting any hurt (ie. *an unlawful act*);<sup>1028</sup>
- commit a felonious act even though it was unlikely to kill (*added by the older authorities*).<sup>1029</sup>

As to the last, however, Kenny stated that the older cases were excessively severe and: '*The modern tendency is thus towards*

<sup>1020</sup> Ibid, p 128. Kenny also considered the unborn child. Ibid, pp 126-30.

<sup>1021</sup> Ibid, p 130.

<sup>1022</sup> Ibid, p 131. 'Hence an alien enemy cannot lawfully be killed, except in the actual course of true war. In such, of course, he may; so it appears that if the captured crew, on board a prize brought into British waters, should endeavour to release themselves from their British captors, and in the consequent struggle one of the captives should be killed by one of the captors, the homicide would not be felonious...' Kenny cited *Dyke v Elliott* (1872) LR 4 PC 184, per James LJ.

<sup>1023</sup> Ibid, p 132.

<sup>1024</sup> Ibid, pp 132-3. Kenny cited EC Clark, *Analysis of Criminal Liability* (1880), pp 85-90.

<sup>1025</sup> Ibid, pp 133-4. 'If a man shoots at A with the intention and desire...of killing A, but accidentally hits and kills B instead, this killing of B is treated by the law not as an accident but as a murder.'

<sup>1026</sup> Ibid, p 134. 'This has been conveniently called '*universal malice*'. It is exemplified by the case put by Blackstone [see 32] of a man who resolves to kill the next man he meets and does kill him.'

<sup>1027</sup> Ibid, pp 134-5 cited the cases of *Holloway* and *Grey*, see App B(g). Kenny also mentioned a case at Lewes Assizes in 1885 'a cowboy had tied a child, who annoyed him whilst he was milking, to one of the hind legs of a cow; but the cow took fright at this, and started off, and in its course dashed the child's head against a post.'

<sup>1028</sup> Kenny stated, pp 135-6 'Of this character is the intention of any workman who carelessly throws things off the roof of a house in a town, without looking over the edge to see if anyone is likely to be struck, or giving any warning... To treat this class of intentions as amounting to a murderous malice is perhaps impolitic; as being a more severe treatment than modern public opinion cordially approves. It certainly is felt by juries to be so.' Kenny referred to *Serne* (1887), see App C(a), noting 'The acquittal seems to have been due simply to the jury's dislike of the doctrine of '*constructive*' malice; for when indicted, in the following month, for arson, he was convicted (and sentenced to twenty years penal servitude). Yet, if guilty of arson, he undoubtedly was legally guilty of murder.'

<sup>1029</sup> Ibid, n 57, p 136. At pp 136-7. 'The oldest text books had extended this principle to any *unlawful* act, but [Foster] limited it to *felonious* acts. Since his time, however, the effect of the rule, even as thus limited, has become enlarged, in consequence of various assaults and other acts having by statute been made into felonies. The illustration which Foster gives of this sixth rule is that of a man shooting at a fowl in order to steal it, and thereby accidentally killing a bystander. This, according to his view, would be murder; though if the intent had been merely to kill (and not to steal) the fowl, or if the bird aimed at had been a mere sparrow, the homicide would only have been manslaughter, as the act intended would not be a felony. Similarly, if a thief gives a man a push with intent to steal his watch, and the man falls to the ground and is killed by the fall - or if a man assaults a woman, with intent to ravish her, and she, having a weak heart, dies in the struggle - such a homicide would, according to Foster's rule, be murder.'

a limitation of the rule to such felonies as are likely to cause death.<sup>1030</sup> Kenny also noted an example of *implied malice* which still remained in existence (killing a police officer); stating:

Some books include, amongst the cases of malice that thus give the character of murder to homicide produced by acts that were *not* likely to kill, one form of intention which would not even be felonious. Thus, to the intent to commit a felony, they add the intent knowingly to oppose by force an officer of justice, when engaged in arresting or imprisoning an offender...Stephen, for example, maintains that even if the opposition took no more violent form than merely that of tripping up the officer, yet, should this fall accidentally kill him, the case would be one of murder.<sup>1031</sup>

But he appears to have drawn this severe doctrine merely from general language used in the old authorities; and there is, he admits, no decision, nor even an express *dictum* of any judge, to be cited in support of it. In all the decided cases in which officers were killed, the actual means appear to have been intrinsically dangerous ones. Hence, in view of the modern tendency to narrow even the accepted rules as to constructive malice in murder, it may well be doubted whether the Court of Criminal Appeal would support this less definitely established doctrine.<sup>1032</sup> (*wording divided for ease of reference*)

In conclusion, Kenny stated:

*'The existence of these six various forms of 'murderous malice' shew it to be much wider than mere 'malice' in the popular sense, viz. ill will; though much narrower than malice in the technical legal sense, viz. mens rea. Every intentional homicide is prima facie presumed to have been committed with murderous malice; so that the defendant has the burden of shewing, if he can, that the circumstances were such as to reduce it to a manslaughter or a non-criminal homicide.'*<sup>1033</sup> (*underlining supplied*)

Although Kenny employed his own (rather idiosyncratic) categorisation of implied malice, he covered most of the categories as Coke, *viz.*

- (a) unprovoked killing<sup>1034</sup> (including random killing);<sup>1035</sup>
- (b) killing a police officer in the execution of his duty;<sup>1036</sup>
- (c) killing arising from an unlawful act;<sup>1037</sup>
- (d) killing by a thief (robber);
- (e) killing by transferred malice;<sup>1038</sup>
- (f) killing by neglect/cruelty (to the extent not express malice);<sup>1039</sup>

However, Kenny limited (c) to '*felonies likely to cause death*'. He would appear to have treated poisoning as an example of express, rather than implied, malice.<sup>1040</sup> As to (d), this had become conflated with (c).

***The observations of Kenny on the redundancy of: (a) the expression 'premeditated malice'; (b) treating a killing in the course of felony as murder as still being too wide; and (c) treating the killing of a police officer as murder, even if there was no intention, were prescient. Yet, in 1945, it was left to Turner (see 42) to point out - again - their inadequacy. As it is, if 'premeditated malice' had been abolished, all these 'implied malices' would have gone, save for (e) which applied generally to murder, manslaughter and battery and which was a 'misnomer' since no malice was required.***

### **(c) Manslaughter - Voluntary**

Kenny noted:

This felony consists in killing another person unlawfully, yet under conditions not so heinous as to render the act a murder. It is spoken of by Hale and Blackstone as being committed '*without malice, either express or implied*.'<sup>1041</sup>

Kenny noted that manslaughter was sub-divided into: (a) voluntary; or (b) involuntary. Voluntary manslaughter was: '*that which is committed with the 'voluntas', the intention, of causing to another person some illegal harm - it may be a merely slight or a grave or even a fatal harm.*' If it was a trivial blow, but unlawful, it was manslaughter.<sup>1042</sup> If the blow was likely to cause '*serious bodily harm*' it was murder or manslaughter according to whether there had been provocation. Kenny noted, as to the latter:

<sup>1030</sup> Ibid, p 137. Kenny cited *Serne* (1887, see n 1028), per Stephen J. Also, *Bramwell B in Horsey* (1862), see **App C(a)**. Also, Stephen, n 55, vol 3, p 79.

<sup>1031</sup> Kenny cited Stephen, *Digest*, n 55, art 224, see n 1005.

<sup>1032</sup> Ibid, pp 138-9.

<sup>1033</sup> Ibid, p 139.

<sup>1034</sup> Kenny did not specifically state this. However, it is the effect of his commentary on provocation, see pp 117-8.

<sup>1035</sup> See n 1026.

<sup>1036</sup> See n 1031.

<sup>1037</sup> See n 1029.

<sup>1038</sup> See n 1025.

<sup>1039</sup> See n 1027.

<sup>1040</sup> Kenny does not appear to have expressed an opinion on this, though he noted that the Offences against the Person Act 1861, ss 20 & 24 dealt with feloniously and unlawfully administering poison. Ibid, pp 146, 150.

<sup>1041</sup> Kenny continued, n 57, p 115 'We shall better avoid confusion of language if we say, instead, '*without any of those more guilty forms of malice which amount to murderous malice.*' For malice, in its wide legal sense (that is to say, *mens rea*) is essential to every crime.' This was Kenny's own interpretation. One would assert that malice has never been used to simply refer to *mens rea*.

<sup>1042</sup> Kenny, p 115. He cited *Sullivan* (1836), see **App F(c)**. If the blow was trivial and not unlawful, it would be accidental. Therefore, no crime was committed.

The suddenness of the homicidal act is thus an essential condition of this mitigation of his guilt...The provocation upon which any sudden intent to kill is formed must...be a gross one, if it is to have the result of reducing the killing to manslaughter.<sup>1043</sup>

Kenny indicated that words alone were insufficient.<sup>1044</sup> Even actual assault was insufficient 'unless it be of a very violent or very insulting character.'<sup>1045</sup> He discussed unlawful imprisonment<sup>1046</sup> and a fight where one killed another in the 'heat of the moment.'<sup>1047</sup> Kenny concluded:

The various effects of provocation in cases of 'voluntary' homicide may be summed up thus. A grave provocation reduces to manslaughter the act of killing, even though it be committed with some dangerous instrument, such as was likely to *kill* (e.g. a pestle). But a slight provocation: (a) leaves the act of killing with a dangerous instrument still a murder; though it (b) reduces the act of killing with a slight instrument, such as was likely only to wound (e.g. a cudgel) only to manslaughter; and it (c) reduces the act of killing with a trivial instrument, such as was likely to give only pain and no wound (e.g. a slap from an open hand) to mere misadventure.<sup>1048</sup>

#### (d) **Manslaughter - Involuntary**

Kenny stated this was: 'committed by a person who brings about the death of another by acting in some unlawful manner, but without any intention of killing, or even of hurting, anyone.'<sup>1049</sup> Kenny noted this could happen 3 ways, where:

- (i) a person was doing an unlawful act not amounting to a felony (such as a misdemeanour),<sup>1050</sup> or
- (ii) a person left unperformed an act it was his legal duty to perform,<sup>1051</sup> or
- (iii) the act was lawful, but the person 'may be doing it negligently and therefore unlawfully'.<sup>1052</sup> For example, if death was caused by a workman throwing rubbish from a roof without any idea of hurting anyone, there were 3 alternatives:

- (a) *Misadventure* (accident) if (in a village) a man called out to give warning before throwing the materials down;
- (b) *Manslaughter* if (in a village) a man didn't even call out or (if a town) he called out but didn't take the further precaution of looking over;
- (c) *Murder* if (in a town) he was so grossly negligent as not even to call out.<sup>1053</sup>

These examples indicate the parlous state that the law had reached. In the case of (a), there was no need to preserve such a criterion and, in all the cases the issue was really one of negligence in the instant case - without having to distinguish between villages and towns.

This categorisation of Kenny was also idiosyncratic since prior writers had distinguished between: (a) unlawful act killing; and (b) lawful act killing with (ii) being treated by prior writers as a case of a lawful act performed 'improperly'. Kenny's (iii), unintentionally, shows the whole problem with the categorisation of acts into unlawful and lawful, which goes back to *Herbert* (1588).<sup>1054</sup>

- If you categorise a negligent act as, *ipso facto*, unlawful, there is no point in drawing a distinction between negligent (or grossly negligent) acts and unlawful one's. Examples of this are two cases:
  - *Longbottom* (1849).<sup>1055</sup> Rolfe B stated 'if any one should drive so rapidly along a great thoroughfare leading to a large town, as to be unable to avoid running over any pedestrian who may happen to be in the middle of the road, it is that degree of negligence...which amounts to an illegal [unlawful] act.'

<sup>1043</sup> Ibid, pp 116-7.

<sup>1044</sup> Ibid 'Indeed very few forms of provocation that do not involve some physical assault are regarded as sufficiently gross to produce it'. He discussed adultery and rape.

<sup>1045</sup> Ibid, p 117. Kenny cited *Stedman* (1704), see **App D(a)**. He also stated 'a blow which was given lawfully, e.g. for the purpose of preventing a violent assault on some third person, can never be an adequate provocation.' He cited *Bourne* (1831), see **App E(b)**.

<sup>1046</sup> Ibid, p 118 'An unlawful imprisonment, or an unlawful arrest, may clearly be a sufficient provocation to reduce to manslaughter an act of killing inflicted by an actual person imprisoned or arrested. But it will never have this effect as regards a homicide committed by other persons in their sympathy with him. Hence if bystanders try to rescue him, and kill someone in the attempt to do so, they will be guilty of murder.' Kenny referred to *Stevenson* (1759) 19 ST 846.

<sup>1047</sup> Ibid, pp 118-9. Kenny cited *Kirkham* (1837)(see **App D(a)**), *Brown* (1776)(see **App D(a)**), *Mason* (1756)(see **App B(c)**), *Walters* (1841)(see **App B(e)**) and *Cuddy* (1843), see **App B(a)**.

<sup>1048</sup> Ibid, p 119.

<sup>1049</sup> Ibid.

<sup>1050</sup> Ibid, pp 119-20 'Thus a person commits manslaughter if he accidentally kills some one else by conduct which amounts to a misdemeanor; (as by taking part in an unlawful assembly or in an unlawful game). And this rule has usually been regarded as holding good whenever the unlawful act which accidentally produced the death amounted to a mere civil tort. But there is some modern authority for confining the doctrine to such torts as are likely to cause bodily harm.' Kenny referred to *McNaughten* (1881), see **App C(a)**.

<sup>1051</sup> Ibid, p 120 'Thus if a railway passenger is killed because the pointsman fell asleep and forgot to move the points, this pointsman will be guilty of manslaughter; (if, on the other hand, he had purposely left the points unmoved, it would have been murder)... But the connexion between the omission and the fatal result must not be too remote.' Kenny cited *Hilton* (1838), 2 Lew 214 (168 ER 1132)(a party in charge of a steam engine).

<sup>1052</sup> Ibid, p 123.

<sup>1053</sup> Ibid. Kenny cited *Hull* (1664), see **App C(b)**. For Roman law, see n 729.

<sup>1054</sup> See **24(b)**.

<sup>1055</sup> *Longbottom* (1849) 3 Cox CC 439.

- *Salmon* (1880),<sup>1056</sup> Coleridge CJ ‘If a person will, without taking proper precautions [i.e. is negligent], do an act which is in itself dangerous, even though not an unlawful act in itself, and if in the course of it he kills another person, he does a criminal act which in law constitutes manslaughter.’ Stephen J ‘It is unlawful where caused by the culpable omission to discharge a duty tending to the preservation of life...It is a legal duty of every one who does an act, which without ordinary precautions is or may be dangerous to human life, to employ those precautions in doing it.’
- Categorisation into: (a) unlawful; (b) lawful, masks what is, in reality, the underlying conduct in the case of both (since the lawfulness or not of the act may be wholly irrelevant). Thus, behind the ‘lawful’ or ‘unlawful’ act, the court always considered (in fact) whether the conduct was negligent or not.

Thus, this categorisation of lawful/unlawful was as flawed as that of ‘implying’ malice. What is interesting is that, if one takes all the cases from *Hull* (1664) to *Kenny* (in 1902) (see **App H**) and ignores the categorisation of lawful/unlawful and, instead of ‘negligence’ uses the concept of ‘gross negligence’, the outcome is actually more consonant with common sense. Further, it seems clear that the juries ignored these legal fictions in practice, often finding a person not guilty despite the legal formulation of the judge.

### (e) Justifiable & Excusable Killing

*Kenny* noted that homicides were formerly divided into justifiable and excusable.<sup>1057</sup> As to justifiable homicides, he noted four cases which (he said) the common law had recognised from an early time:<sup>1058</sup>

- **Execution of Public Justice** (death penalty),<sup>1059</sup>
- **Advancement of Public Justice.** *Kenny* stated: ‘life may be innocently taken, if it be necessary for arresting a felon, or suppressing a riot, or preventing some crime of a violent character.’<sup>1060</sup>
- **Self defence** *Kenny* stated: ‘A man is justified in using force against an assailant, in defence of himself<sup>1061</sup> or of his immediate kindred;<sup>1062</sup> (and probably now-a-days of even of anyone else who actually needs his protection).<sup>1063</sup> Hence if he has a reasonable apprehension of danger, and adopts none but reasonable means of warding it off, he will be innocent even though the wrong-doer be killed by the means thus adopted. But reasonable these means must be.’<sup>1064</sup> In the case of simple trespassers, killing was not justifiable.<sup>1065</sup> Further, any resistance must be necessary,<sup>1066</sup>
- **Self Preservation.** *Kenny* noted that there was old authority for ‘maintaining that under some circumstances a man might, for the preservation of his own life, be justified in taking away the life even of a person who was in no way a wrong doer.’;<sup>1067</sup>

*Kenny* also considered excusable homicide<sup>1068</sup> indicating the ‘two’ categories:

<sup>1056</sup> 6 QBD 79.

<sup>1057</sup> *Ibid*, p 102 ‘at one time those forms of homicide which were not criminal were divided into two species; (though the importance of the distinction has now disappeared). For the older lawyers distinguished between the homicides that were justifiable, and those that were only excusable. In the former the act was enjoined or permitted by the law (the slayer thus really acting on behalf of the State); in the latter, the act carried with it some taint, however slight, of blameworthiness.’

<sup>1058</sup> *Ibid*, p 103 ‘The common law, from an early stage in its history, regarded the four following cases of homicide as being strictly justifiable; and therefore involving no legal penalty whatever.’ In the last edition of *Bacon* in 1832, n 37, vol 5, p 732, *Bacon* said there were 3 cases of justifiable homicide (though he actually cited 4) viz (a) where, in defence of a man’s house, he killed a person attempting to burn it or to commit in it murder, robbery or other felony; (b) where in defence of a man’s person he killed one who assaulted him on the highway, with an intent to murder or rob; (c) in the execution of public justice, and where a felon fled from those endeavouring to apprehend him. However, see also pp 773-5, where he mentioned a prisoner seeking to escape from prison, suppressing riots, and the Act of 1293.

<sup>1059</sup> *Ibid*.

<sup>1060</sup> *Kenny* noted, p 103, an early illustration in *Leonin* (1212), see n 368.

<sup>1061</sup> *Kenny* cited *Howel* (1221), see n 368.

<sup>1062</sup> *Kenny* cited *Rose* (1884), see **App E(b)**.

<sup>1063</sup> *Kenny* cited *Foster* and *Russell*.

<sup>1064</sup> *Kenny* continued: ‘Hence a person assaulted is not justified in using firearms against his assailant, unless the assault is so violent as to make him consider his life to be actually in danger.’ *Kenny* cited *Scully* (1824) and *Mawgridge* (1707), see **App B(a)**.

<sup>1065</sup> *Kenny*, n 57, p 104 ‘But where the wrong-doer is not going so far as to assault a human being, but is only interfering unlawfully with property, whether real or personal, the possessor of that property (though he is permitted by the law to use a moderate degree of force in defence of his possession) will usually not be justified in carrying this force to the point of killing the trespasser. For such a justification will not arise unless the trespasser’s interference with the property amounts to a felony, and moreover to a felony of some kind that is violent, such, for example, as robbery, arson, or burglary. The making an attack upon a dwelling, especially if it be made at night, is regarded by the law as equivalent to an assault upon a man’s person; for a man’s house is his castle.’ *Kenny* cited *Cooper* (1639), see **App E(a)** and *Meade* (1823), see **App E(c)**.

<sup>1066</sup> *Ibid*, pp 104-5 ‘even these violent felonies should not be resisted by extreme violence unless it is actually necessary; thus firearms should not be used until there seems to be no other mode available for defeating the intruder and securing his arrest. Hence, *a fortiori*, the actual killing of a person who is engaged in committing any mere misdemeanor, or any felony that is not one of force, cannot be legally justified; any one so killing him will be guilty of a criminal homicide.’

<sup>1067</sup> *Ibid*, p 105 ‘Thus Lord *Bacon*, reviving the ancient problem which *Cicero* had cited from the Rhodian moralist *Hecato*, suggested that where two men, swimming in the sea after a shipwreck, get hold of a plank not large enough to support them both, and one pushes off the other, who consequently is drowned, the survivor will not be guilty of any crime. But...in *Dudley and Stephen* [see **App E(a)**], the five senior judges of the king’s bench division threw doubt upon *Bacon*’s doctrine; and refused to recognize as justifiable the act of some shipwrecked sailors who had killed a boy, in order to feed on his body, when scarcely any other hope of rescue remained. See also *Russell*, n 51, vol 1, p 783 and *Kenny*, n 57, p 105.

- **Chance-medley.** 'Where in any chance-medley (i.e. sudden combat) one of the combatants desisted from fighting, but the other continued his assault, and then the former one, having no other probable means of escape open to him, killed his assailant, the necessity of self-defence prevented the homicide from being a felony. But, as at first he was to blame for his share in the affray, the case was distinguished from the strictly 'justifiable' homicide in which a person, who had been assaulted when entirely passive, slew his assailant in self-defence. On the other hand, if the chance-medley had been continued by both the combatants down to the time when the fatal blow was struck, the homicide would have nothing to excuse it, and would be felonious - a manslaughter or possibly even a murder.'<sup>1069</sup>
- **Misadventure.** 'Where one man killed another by misadventure - i.e. in doing a lawful act, and with no intention of causing harm, and with no culpable negligence in the mode of doing it - his act was held excusable.'<sup>1070</sup>

After considering the right of a parent to punish their child<sup>1071</sup> Kenny discussed those accidentally killed in the course of a game or sport, stating:

**Tournaments.** 'though an armed tournament was unlawful even in medieval times, and a knight who killed another in such an exercise would usually be guilty of criminal homicide, yet it was otherwise if the king had commanded the particular tournament in question. In a struggle thus legalised by the royal order, the death of any of the combatants would be a case of mere innocent misadventure...'<sup>1072</sup> At the present day, all such exercises with naked swords would be illegal however licenced';

**Sports.** 'ordinary fencing, and, similarly, boxing,<sup>1073</sup> wrestling, football,<sup>1074</sup> and the like, are lawful games if carried on with due care. Everyone who takes part in them gives, by so doing, his implied consent to the infliction upon himself of a certain (though a limited) amount of bodily harm. But no one has the right to consent to the infliction upon himself of an excessive degree of bodily harm, such harm as amounts to 'maiming' him; and thus his agreement to play a game under dangerously illegal rules will, if he be killed in the course of the game, afford no legal excuse to the killer. Nor has he even any right to consent to the production of such a state of affairs as will constitute a breach of the peace.<sup>1075</sup> ...Of course even the most lawful game will cease to be lawful as soon as anger is imported into it; and the immunity from criminal liability for those engaged in it will consequently at once disappear.'<sup>1076</sup>

The automatic treating of any act 'in anger' in a sport as unlawful is the re-categorisation of an act which might otherwise be lawful (most people get anger or show aggression in sports). Instead, the issue should have been whether the killing arose from gross negligence (in those days) or 'recklessness' (today).

**In conclusion, Kenny (in 1902) trenchantly criticised the concept of 'premeditated malice'. This was repeated by later authors, including Lord Mustill in 1994. However, the concept lingered on.**

#### 41. Summary: Law up to 1902

Although the law on homicide had become a little more intelligible by 1902, it was still bedeviled with basic problems resulting from inadequate categorisation and legal fictions. Thus, the position (and problems remaining) by 1902 were as follows:

- **Murder.** As in 1769, in 1902, for the killing to be murder, there had to be premeditated malice. For the purposes of determining premeditation, malice was still categorised into: (a) express; and (b) implied. However, 'premeditated malice' was a legal fiction that was wholly artificial. While Stephen (in 1883) was still wedded to the concept, some judges, such as Keating in *Welsh* (1869), made it clear that 'premeditated malice' and 'intention' were one and the same.<sup>1077</sup> Further, Kenny (1902) denounced 'premeditated malice' as a 'mere arbitrary symbol' since 'malice' may have in it nothing really malicious; and need never be really 'aforethought', except in the sense that 'every desire must necessarily come before - though perhaps only an instant before - the act which is desired.' It may also be noted that a major aspect of premeditated malice ended with the ending of duelling (in practice) in England by 1852.

Because murder required *express* 'premeditated malice', by legal fiction, malice was *implied*, to elevate certain acts to murder when there was no express malice. Coke indicated 7 categories. By 1902, Kenny stated 6 categories of 'murderous malice' which were very similar to Coke's. However, in the case of an 'unlawful act', Kenny asserted that such acts should only be murder if the act resulting in the killing was a felony 'likely to cause death'.

**Problems.** 'Premeditated malice' should have been dropped in favour of the word 'intent' - as was used in 1869 by Keating J in *Welsh*. However, unfortunately, this was not followed up by other judges or legal writers, Likely, in part, because Stephen J

<sup>1068</sup> Ibid 'cases which the law regarded as merely excusable i.e. as...not deserving to be made felonies and punished with death, but nevertheless being in some degree blameable.'

<sup>1069</sup> Kenny, n 57, pp 107-8 referred to *Dyson* (1823) R & R 523 (168 ER 930). If a man encourages another to murder himself and is present abetting him while he does so, that person is guilty of murder as a principal. If two encourage each other to murder themselves together, and one does so and the other fails, the latter is principal in the murder of the other. But if it is uncertain whether the deceased really killed himself or whether he came to his death by accident before the moment when he meant to kill himself, it is not murder in either.'

<sup>1070</sup> Kenny, p 108 cited *Bruce* (1847), see **App F(c)** and *Martin* (1827), see **App B(e)**.

<sup>1071</sup> Kenny, pp 108-9. He referred to the Prevention of Cruelty to Children Act 1894.

<sup>1072</sup> Kenny quoted Blackstone, see **32**.

<sup>1073</sup> Kenny cited *Coney* (1882), see **App F(b)**.

<sup>1074</sup> Ibid citing *Bradshaw* (1840), see **App F(a)**.

<sup>1075</sup> Kenny noted that, for both those reasons, prize fighting was illegal.

<sup>1076</sup> Kenny, p 111. He cited *Canniff* (1840), see **App D(a)**.

<sup>1077</sup> See n 1002.

was such a vociferous proponent of the word 'malice' as reflecting moral indignation. If premeditated malice had been dropped as a concept, all the problems with implying malice would have gone.

- **Manslaughter.** This was still divided into: (a) voluntary (i.e. intentional but where it was extenuated due to provocation); and (b) involuntary. The latter, according to Kenny in 1902, covered: (i) unlawful not amounting to a felony likely to cause death (which was murder); (ii) a killing when it arose from leaving unperformed an act when there was a legal duty to perform it; (iii) a killing arise from a lawful act which was negligent.

*Problems.* Kenny's formulation was flawed since most other writers had treated (ii) as an aspect of (iii). Also, he treated negligent lawful acts as unlawful ones. In any case, the need to divide, for the purpose of manslaughter, acts into lawful and unlawful ones was unnecessary – and contained the same problems as this categorisation had with murder. Instead, this should have been dropped and the sole issue should have been whether the act was grossly negligent or not.

- **Accidental.** This was no longer a crime after 1828 (with the abolition of forfeiture) and a person could be acquitted by the court;
- **Justifiable.** In 1769, it was justifiable (at common law) to kill: (a) pursuant to due legal process; (b) a felon who resisted capture (which also covered a burglar (night thief) and a housebreaker); (c) an enemy, in war time; (d) an escaping prisoner; (e) a thief assaulting a person; (f) in a licensed martial game (though this would be treated as an accident). Acts of Parliament also made it justifiable to kill where the following applied: (i) Act of 1293 (warrens etc); (b) Act of 1532 (attempting to murder, rob or burgle); (c) Act of 1553 (unlawful assemblies); (d) Riot Act 1714.

By 1902, Kenny referred to (a), (b) (which included (e)) and (c). Also, to: 'suppressing a riot or preventing some crime of a violent nature.' Kenny also referred to (f) as an accident (it was also long obsolete). The reference to 'suppressing a riot' referred to the Riot Act 1714. The Acts of 1293, 1532 and 1553 had been repealed (in 1828 and 1863);

- **Excusable.** In Bracton's time, it was a defence to kill a person: (a) in self defence; (b) to defend one's family (and servants); (c) to defend one's master (lord);

In 1902, Kenny referred to (a) as well as to 'immediate kindred' (in place of (b)). Also, he included the defence: 'of anyone else who actually needs his [i.e. a person's] protection' (i.e. a stranger). Kenny, however, (incorrectly) treated all these as justifiable homicides, when they were excusable homicides. That said, given that killing in self defence was not, in effect, treated as a crime after 1828 (since no forfeiture) it was reasonable to 'merge' justifiable and excusable killing and treat both as where no crime was committed.

#### 42. **Turner (1945)**

Turner, in a useful article, *The Mental Element in Crimes at Common Law* (1945),<sup>1078</sup> noted that - although criminal liability was no longer avowedly based on a moral standard - echoes of the past were to be found in modern times.<sup>1079</sup> Turner was also critical in respect of where - in the law of murder - 'malice' was implied even though there was none.

##### **(a) Killing Police Officer when resisting Arrest or Imprisonment**

Lambard (in 1581) had 'implied' malice in 6 instances (see 24). One was where a person caused the death of an officer of justice, when resisting arrest or imprisonment, even when the person did not foresee that his resistance would be likely to endanger anyone's life - which may have arisen from a proclamation in 1538. Turner noted that Kenny (see 42) was dubious whether, in practice, the courts would uphold such a view<sup>1080</sup> and he stated: 'There is no modern English case in which this rule in all its ancient severity has been applied.'<sup>1081</sup>

- Turner referred to *Appleby* (1940)<sup>1082</sup> where the court accepted the proposition of Foster that officers of justice, when in the execution of their office, were under the peculiar protection of the law and their killing when so employed was deemed to be murder 'as being an outrage wilfully committed in defiance of the justice of the kingdom.'<sup>1083</sup>

Turner asserted:

is it really in harmony with modern ethical opinion that a person should suffer capital punishment for a death accidentally caused merely because the man he killed happened to be an officer of justice engaged in effecting his arrest? Adequate protection can be given to officers of the law by taking a serious view of assaults upon them or of any other kind of obstruction when they are carrying out their duty, but beyond that it is unnecessary to go, and there seems no adequate reason for retaining in their case an ancient rule which has been modified in all other cases because it was repugnant to the feelings of the community: it is moreover probable that unprejudiced juries will in fact interpret the evidence so far as possible against the rule.<sup>1084</sup>

##### **(b) Unlawful Act**

The ancient doctrine of implied (constructive) malice that - if death was caused by an act that was unlawful - it was murder,

<sup>1078</sup> Turner, n 58.

<sup>1079</sup> Ibid, p 202.

<sup>1080</sup> Ibid, p 242.

<sup>1081</sup> Ibid.

<sup>1082</sup> Ibid, p 244. *Appleby* (1940) 28 Cr App R 1 (A and B were surprised by the police when committing an offence. They sought to escape but were overtaken. A shot was fired by one of the men, killing one of the police officers). See also Cross & Jones, n 59, p 222. Also, *Cobbett* (1940) 28 Cr App R 11 (killed policeman by stabbing him).

<sup>1083</sup> Ibid, p 245 quoted Foster, n 77, p 308 [1776 ed].

<sup>1084</sup> Ibid, p 247.

had been limited by Foster to cases where the unlawful act was a *felony*. However, even this limitation had been described by Stephen as ‘*cruel and indeed monstrous*.’<sup>1085</sup> Turner noted that:

The natural revulsion of juries against being compelled by a legal technicality such as the difference between a felony and a misdemeanour to participate in sending to the scaffold a prisoner who has unwittingly caused another’s death seems to have attracted the sympathy of some of the judges of the nineteenth century, which was indeed an age when humanitarian principles were gaining ground.<sup>1086</sup>

Turner then noted attempts to further limit this doctrine by Stephen in *Serne* (1887),<sup>1087</sup> and Kenny (in 1902, see 42)<sup>1088</sup> which attempts were, then, reversed to a considerable extent by the decision in *Beard* (1919) in which the House of Lords held that it was murder to kill in the commission of a felony (rape in this case), even though there was no intent to kill.<sup>1089</sup> Turner was critical of this decision,<sup>1090</sup> stating:

This is a proposition so out of harmony with the ethical notions of ordinary men that it is difficult to imagine that an unbiased jury would consent to bring in a verdict of guilty, if for example the evidence established that a prisoner had seized a man with the intention of stealing forcibly from his person, but without any intention of hurting him, and had caused his death owing to the fact that he had such a weak heart that the slightest shock would be dangerous to him.<sup>1091</sup>

Turner stated:

This study ends therefore with a plea for the complete abolition of the outworn doctrine of constructive malice aforethought which is useless as a deterrent, evaded so far as possible by juries in practice, and repugnant to the minds of those who think that a system of criminal law should be shaped by reason and justified by a constructive desire to reduce the volume of crime rather than to inflict punishment.<sup>1092</sup>

Finally, it may be noted that a useful decision, *Semini* (1949), effectively abolished the concept of *chance medley*. Goddard CJ noted that

At a time when society was less secure and settled in its habits, when the carrying of swords was as common as the use of a walking stick at the present day, and when duelling was regarded as involving no moral stigma if fairly conducted, it is not surprising that the courts took a view more lenient towards provocation than is taken today when life and property are guarded by an efficient police force and social habits have changed...

The old learning, such as it was, with regard to chance medley has long been obsolete and was finally laid to rest in [1828].<sup>1093</sup> The doctrine has no longer any place in the law of homicide...the cases cited [in Archbold under the heading chance medley] are to be regarded as illustrations of what the courts have accepted as sufficient to reduce a killing from murder to manslaughter and all of them now must be read in the light of [*DPP v Holmes*] and [*Mancini v DPP*].<sup>1094</sup>

It is remarkable abolition took so long since duelling, anyway, had ended by the mid-19<sup>th</sup> century and ‘*chance medley*’ was simply a reference to brawling, the components of which had long before been separated into provocation and self defence. Still it was a welcome advance in helping to modernise the law in the area of homicide.

***In conclusion, Turner made strong criticism of the doctrine of implied (constructive) malice in respect of killing police officers and unlawful acts. These were to be abolished by the Homicide Act 1957.***

#### **43. Royal Commission (1953) & Homicide Act 1957**

##### **(a) Royal Commission 1953**

A report of the *Royal Commission on Capital Punishment* (1949-53)<sup>1095</sup> stated:

Homicide is the killing of a human being by a human being. Unlawful homicide may be murder, manslaughter, suicide or infanticide.<sup>1096</sup>

<sup>1085</sup> Ibid, p 248.

<sup>1086</sup> Ibid, p 248.

<sup>1087</sup> Ibid, pp 251-2 quoting Stephen in *Serne* (1887), see **App C(a)**, p 313 ‘In my opinion the definition of the law which makes it murder to kill by an act done in the commission of a felony might and ought to be narrowed...I think that, instead of saying that any act done with intent to commit a felony and which causes death amounts to murder, it would be reasonable to say that any act known to be dangerous to life, and likely in itself to cause death, done for the purpose of committing a felony which caused death, should be murder.’

<sup>1088</sup> Ibid, pp 253-4 ‘The modern tendency is thus towards a limitation of the rule to such felonies as are likely to cause death...and homicide resulting from any felony which was intrinsically unlikely to cause death would not be murder at all, but only a case of ‘*involuntary*’ manslaughter.’

<sup>1089</sup> Ibid, pp 254-9. For *Beard* (1919), see **App C(a)**.

<sup>1090</sup> Ibid, p 257-8 ‘The rule which the House of Lords adopted is archaic, because it eliminates the mental element of malice aforethought in its modern meaning. The prisoner has only the thought of committing the felony: yet according to the law as laid down in [*Beard*] he is to be sentenced to death although he never intended to kill anyone, or realised that he might kill anyone.’

<sup>1091</sup> Ibid, p 258.

<sup>1092</sup> Ibid, p 261. Also, p 258 ‘A narrow adherence to the strict letter of the law when its doctrines run counter to the inherent sense of fairness which inspires common men, tends to bring the law, and its administration, into ridicule and dislike.’

<sup>1093</sup> Goddard CJ referred to 9 Geo IV c 31 [1828], s 10 which was superceded by the Offences against the Person Act 1861, s 7 ‘no punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence, or in any manner without felony.’ See also Stephen, n 55, vol 3, p 77.

<sup>1094</sup> [1949] 1 KB 405 at p 410.

<sup>1095</sup> Cmnd 8932.

<sup>1096</sup> Ibid, p 25. In respect of the ‘*king’s peace*’ it stated, p 26 ‘the killing of the king’s enemies in the course of military operations is not unlawful.’

After citing Coke's definition of murder, the Commission considered the nature of malice aforethought<sup>1097</sup> and recommended that the doctrine of implied (constructive) malice be abolished,<sup>1098</sup> later achieved by the Homicide Act 1957. In the case of provocation, its proposals for change were twofold:

The first is that, in considering whether there is provocation sufficient to reduce the crime to manslaughter, the sole test should be whether the accused in fact deprived of self-control and that the jury should not be required to consider also whether a 'reasonable man' would have been so deprived.

The second is that provocation by words alone should be recognised equally with other forms of provocation, or at least should have been more freely admitted than the words used by the House of Lords in *Holmes v DPP*[1946] 'in no case...save in circumstances of a most extreme and exceptional character' at present allow.<sup>1099</sup>

The Commission did not recommend a change in the law on the first point.<sup>1100</sup> As to the second they stated:

We...recommend that the law should be amended to provide that where the jury are satisfied that the accused was deprived of his self control by such provocation as might have deprived a reasonable man of his self control, they may return a verdict of manslaughter notwithstanding that the provocation was by words alone.<sup>1101</sup>

#### (b) **Homicide Act 1957**

This Act introduced into the law a new defence to murder, known as 'diminished responsibility' - entitling the accused not to be acquitted altogether, but to be found guilty only of manslaughter.<sup>1102</sup> It also abolished two forms of implied (constructive malice), s 1 stating:

(1) Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence.

(2) For the purposes of the foregoing subsection, a killing done in the course or for the purpose of resisting an officer of justice, or of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody, shall be treated as a killing in the course or furtherance of an offence.

As Smith and Hogan noted, this covered implied malice where the killing:

- arose in the course (or furtherance) of a felony;<sup>1103</sup> and
- was caused in the course of resisting lawful arrest by an officer of justice.<sup>1104</sup>

It was a pity that the Act did not abolish 'premeditated malice' as such, since it was long past its 'sell by' date. The Act also left unclear whether murder arising by way of an act of GBH which resulted in death, was also abolished. As well as dealing with suicide pacts,<sup>1105</sup> the Act specified in relation to provocation:

3. Where on a charge of murder there is evidence on which the jury can find that the person charged was provoked (whether by things done or by things said or by both together) to lose his self-control, the question whether the provocation was enough to make a reasonable man do as he did shall be left to be determined by the jury; and in determining that question the jury shall take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable man.

***In conclusion, the Homicide Act 1957 abolished two forms of implied malice, following the criticism of Turner and other writers. However, by not abolishing the concept of 'premeditated malice', it left the state of law still unsatisfactory.***

<sup>1097</sup> Ibid, p 26 *et seq.* Also, App 7(a) & (b) to the same.

<sup>1098</sup> Ibid, p 41 'we do not consider that a convincing case can be made out for the retention of constructive malice even in a limited form.' It may be noted that the Commission took a narrow view of what constituted 'constructive malice', p 25 'the doctrine has this effect: that if a person, while engaged in committing a felony or resisting an officer of justice, causes the death of another person, he may in certain circumstances be guilty of murder solely by reason of the fact that homicide was committed in the prosecution of the other offence, although it would otherwise amount to no more than manslaughter.'

<sup>1099</sup> Ibid, pp 51-2.

<sup>1100</sup> Ibid, p 53 'We have indeed no doubt that if the criterion of the 'reasonable man' was strictly applied by the courts and the sentence of death was carried out in cases where it was so applied, it would be too harsh in its operation. In practice, however, the courts not infrequently give weight to factors personal to the prisoner in considering a plea of provocation, and where there is a conviction of murder such factors are taken into account by the Home Secretary and may often lead to commutation of the sentence. The application of this test does not therefore lead to any eventual miscarriage of justice. At the same time, as we have seen, there are serious objections of principle to its abrogation. In these circumstances we do not feel justified in recommending any change in the existing law.'

<sup>1101</sup> Ibid, p 56.

<sup>1102</sup> The Act s 2 (1) stated: 'Where a person kills or is a party to the killing of another, he shall not be convicted of murder if he was suffering from such abnormality of mind (whether arising from a condition of arrested or retarded development of mind or any inherent causes or induced by disease or injury) as substantially impaired his mental responsibility for his acts and omissions in doing or being a party to the killing.' Ss (3) 'A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable instead to be convicted of manslaughter.' See also Fitzgerald, n 62, p 35.

<sup>1103</sup> S & H, n 60, pp 194-5 'Where a man caused death in the course or furtherance of committing a felony, that was murder; and the only intention that need be proved was the *mens rea* of the felony... Through the rule in this strict and rigorous form remained the law until 1957, the judges in the present century had applied it leniently in the sense that they had restricted its operation to violent felonies. In cases such as abortion they had confined it to instances where the operation was so conducted that the reasonable man would have foreseen the risk of death or [GBH] - a development, which...bedeviled the cases concerning non-constructive malice. In the case of violent felonies, the rule was strictly applied up to the time of its abolition.' S & H referred to *Beard* (1919), *Jarmain* (1946) and *Betts & Ridley* (1930), see **App C(a)**.

<sup>1104</sup> Ibid, pp 195-6.

<sup>1105</sup> Homicide Act 1957, s 4.

#### 44. Smith & Hogan (1965)

##### (a) Murder

Smith and Hogan, in the first edition of their *Criminal Law* (1965), following Coke's definition of murder,<sup>1106</sup> discussed the meaning of:

- 'a man of sound memory, and of the age of discretion',<sup>1107</sup>
- where murder could be committed;<sup>1108</sup>
- who could be the victim;<sup>1109</sup>
- 'under the Queen's peace'<sup>1110</sup>
- the year and a day rule;
- causation.<sup>1111</sup>

Smith & Hogan then stated: '[t]he *mens rea* of murder is traditionally called 'malice aforethought'.<sup>1112</sup> After citing Kenny (see 40),<sup>1113</sup> they stated:

Thus a parent who kills a suffering child out of motives of compassion is 'malicious' for this purpose; and there is sufficient forethought if an intention to kill is formed only a second before the fatal blow is struck. Neither ill will [malice] nor premeditation is necessary. The meaning of the term is of the utmost importance, for it is the presence or absence of malice aforethought which determines whether an unlawful killing is murder or manslaughter.<sup>1114</sup>

After noting that 'there is still a good deal of uncertainty as to the precise way in which these different mental attitudes should be defined', Smith and Hogan opined that the authorities suggested that 'malice aforethought' included the following, an intention to:

- (a) kill a person;<sup>1115</sup>
- (b) cause GBH to a person;<sup>1116</sup>
- (c) do an act - knowing it would probably cause death (or GBH) to a person (i.e. recklessness);<sup>1117</sup>
- (d) do something unlawful to any person. If death occurred and death (or GBH) was the natural and probable result of what was done then, that according to *DPP v Smith* (1961), was

<sup>1106</sup> S & H, n 60, p 165. The first edition of R Cross & PA Jones, *An Introduction to Criminal Law* (1948) was less comprehensive than Smith and Hogan on the law of homicide. The 2<sup>nd</sup> edition in 1949, see n 59, defined murder, p 218 as 'unlawful homicide with 'malice aforethought'. Malice aforethought may consist of an intention on the part of the accused: 1. To cause death; or 2. To do an act which is intrinsically likely to kill; or 3. To do an 'act of violence' in furtherance of a felony of violence; or 4. To resist an arrest by someone he knows or has means of knowing is a constable within the scope of his duties.'

<sup>1107</sup> Ibid. S & H indicated that it referred to a person who was: (a) not insane or suffering from diminished responsibility pursuant to the Homicide Act 1957, s 2; and (b) was over the age of ten and 'if under fourteen, he has a 'mischievous discretion'.

<sup>1108</sup> Ibid 'If the killing is by a citizen of the [UK] and Colonies, it need no longer take place within 'any county of the realm.' Murder and manslaughter are among the exceptional cases where the English courts have jurisdiction over offences committed abroad. By s 9 of the Offences against the Person Act 1861 and s 3 of the British Nationality Act 1948 a murder committed by a citizen of the [UK] and Colonies on land anywhere out of the [UK] may be tried in any county or place in England as if it had been committed there. Homicides on a British ship or aircraft are also triable here, whether committed by a British subject or not; but not those; but not those on a foreign ship, outside territorial waters.' They note 'Jurisdiction over offences within territorial waters is given by the Territorial Waters Jurisdiction Act 1878, s 2. And see Continental Shelf Act 1964, s 3.'

<sup>1109</sup> Ibid, p 166 'A reasonable creature *in rerum natura*' includes any human being. The only problem that gives any difficulty concerns the unborn child.'

<sup>1110</sup> Ibid, p 167 'All persons appear to be 'under the Queen's peace', for this purpose even an alien enemy, 'unless it be in the heat of war, and in the actual exercise thereof.' S & H cited Hale, see 30. Also, Page [1954] 1 QB 170 (an argument that an Egyptian national murdered in an Egyptian village by a British soldier was not within the Queen's peace, was rejected). Cf. Cross & Jones, n 57, p 212 'the slaying of the king's enemies in the course of military operations is not a matter of which the law will take cognizance. The deliberate and unjustified shooting of prisoners of war would, however, amount to murder.'

<sup>1111</sup> Ibid, pp 168-79. See also killing by perjury, p 179, especially n 13.

<sup>1112</sup> S & H, n 60, p 179.

<sup>1113</sup> They cited Kenny (15<sup>th</sup> ed, 1936), p 153 where he stated that the phrase malice aforethought 'is a mere arbitrary symbol...., for the 'malice' may have in it nothing really malicious; and need never be really 'aforethought.''

<sup>1114</sup> S & H, n 60, p 180. They quoted *Doherty* (1887) per Stephen J, see App D(a). They also quoted the Royal Commission on Capital Punishment (in 1953, see 43), p 27 who said that malice aforethought 'is simply a comprehensive name for a number of different mental attitudes, which have been variously defined at different stages in the development of the law, the presence of any one of which in the accused has been held by the courts to render a homicide particularly heinous and therefore to make it murder.'

<sup>1115</sup> Ibid, p 180 'This is in accordance with the general principle of *mens rea* and presents no difficulty.' See also Fitzgerald, n 62, p 30.

<sup>1116</sup> Ibid, p 181 'there can be no doubt that it is the law today.' S & H cited *Errington and Others* (1838), see App F(c) and *Grey* (1666), see App C(a). They stated 'there are few cases in which the principle is clearly expressed until after 1877 when Stephen formulated the various heads of malice with some degree of precision.' This is not wholly accurate, since the principle goes back at least to 1558, see *Herbert* (1558), App C(a) and n 501. See also Fitzgerald, n 62, p 30.

<sup>1117</sup> Ibid. 'viz. *Walters* (1841), see App B(e) and *Desmond, Barrett* (1868), see App C(a). They also cited Kenny (see 40) who had stated 'To treat this class of intentions as amounting to a murderous malice is perhaps impolitic; as being a more severe treatment than modern public opinion cordially approves.' Kenny's opinion on recklessness (which differed from that of Stephen, see 39) did not prevail.

murder.<sup>1118</sup>

In respect of (c), Smith and Hogan stated:

according to this formulation, no intention to cause either death or [GBH] is necessary, but only recklessness; that is, that neither desire for, nor certainty of, death or [GBH] need be present but only foresight that it is likely to occur.<sup>1119</sup> (*underlining supplied*)

Smith and Hogan stated that the: '*authorities in favour of this proposition are not overwhelming. The Royal Commission relied on two cases*'. They also noted, in respect of (c) above, that Kenny considered that reckless killing should not be treated as murder.<sup>1120</sup> In respect of (d), Viscount Kilmur (with whom the other members of the House agreed) stated in *DPP v Smith* (1961):

the sole question is whether the unlawful and voluntary act was of such a kind that [GBH] was the natural and probable result. The only test available for this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result. That, indeed, has always been the law...<sup>1121</sup> (*underlining supplied*)

Smith and Hogan criticised *DPP v Smith* (1961) on various grounds<sup>1122</sup> which are not necessary to review since the legal position has now changed.<sup>1123</sup> Smith and Hogan also noted that the Homicide Act 1967 abolished implied malice (albeit they were uncertain as to the precise ambit of the same).<sup>1124</sup>

### **(b) Manslaughter**

Smith and Hogan stated that:

Manslaughter is a diverse crime, covering all unlawful homicides which are not murder. A wide variety of types of homicide fall within this category, but it is customary and useful to divide manslaughter into two main groups which are designated '*voluntary*' and '*involuntary*' manslaughter, respectively. The distinction is that in voluntary manslaughter D may have the malice aforethought of murder, but the presence of some defined mitigating circumstance reduces his crime to the less serious grade of criminal homicide.

At common law, voluntary manslaughter occurred in one case only, where the killing was done under provocation. But now, by statute, two further categories must be added. Under the Homicide Act 1957, it is now manslaughter and not murder, notwithstanding the presence of malice aforethought, where (i) D is suffering from diminished responsibility; and (ii) where D kills in pursuance of a suicide pact.<sup>1125</sup> (*wording divided for ease of reference*)

In respect of provocation, Smith and Hogan noted that the common law rule<sup>1126</sup> had been amended by the Homicide Act 1957, section 3.<sup>1127</sup> Smith and Hogan then considered various aspects of provocation<sup>1128</sup> which need not be considered since the modern law is different. In respect of involuntary manslaughter, Smith and Hogan stated:

This category includes all varieties of unlawful homicide which are committed without malice aforethought. It is not surprising, therefore, that the *mens rea* (or lack of it) with which it may be committed, takes several forms. And as the limits of malice aforethought are uncertain, it follows inevitably that there is a corresponding uncertainty as to the boundary of manslaughter. The difficulties do not end there, for there is another vague borderline between manslaughter and accidental death.<sup>1129</sup>

Smith and Hogan indicated that there were 8 varieties of *mens rea* and negligence which were '*candidates for inclusion*

<sup>1118</sup> S & H, n 60, p 180 noted: 'There is no doubt at all about the first two mental states [i.e. (a) and (b) in the text] and these can be shortly disposed of. Authority for the third [i.e. (c)] is less clear and will require more detailed discussion. The fourth, the doctrine of [*DPP v Smith*] is...very controversial.' See also Fitzgerald, n 62, pp 30-3.

<sup>1119</sup> S & H, n 60, p 182.

<sup>1120</sup> Ibid. Kenny had stated 'To treat this class of intentions as amounting to a murderous malice is perhaps impolitic; as being a more severe treatment than modern public opinion cordially approves.' See also Wechsler & Michael, *A Rationale of the Law of Homicide* (1937) 37 Col LR, no 5, pp 701-61 & no 8, pp 1261-1325.

<sup>1121</sup> Ibid, p 184.

<sup>1122</sup> At p 186. '1. It lays down a standard which is uncertain and imprecise and which is difficult for a judge to explain to a jury. 2. It is illogical in allowing an exception for drunkenness. There are many other ways in which evidence of malice aforethought might be rebutted. 3. It is inconsistent with the general principles of English criminal law. 4 It lays down an excessively severe rule. 4. It fails almost completely to recognise that there was a line of authority in favour of a subjective test: and that there was a real choice between the subjective and objective views open to the House.'

<sup>1123</sup> The Criminal Justice Act 1967, s 8 was passed in direct consequence of, and to obliterate the effect of, the decision in *DPP v Smith*. See also Law Commission, *Partial Defences to Murder* ('LC 290'), pp 19-20.

<sup>1124</sup> S & H, n 60, pp 196-7. See also *Vickers* [1957] 2 QB 664 affirmed in *Smith* [1961] AC at p 335. Smith and Hogan also discussed degrees of murder for the purpose of capital punishment, see pp 197-205. The death penalty was abolished for all offences in 1998. Therefore, consideration of the same is unnecessary.

<sup>1125</sup> Ibid, p 205. See also Fitzgerald, n 62, p 33-4.

<sup>1126</sup> *Duffy* (1949) per Devlin J, see **App D(a)**.

<sup>1127</sup> See **43(b)**.

<sup>1128</sup> viz. 1 Some act or series of acts done by the dead man to the accused. 2. The subjective condition. 3. The objective condition. 4. The Homicide Act 1957 and the Reasonable Man. 5. The Relationship between the Provocation and the Mode of Resentment. 6. Criticism of the Objective Test. 7. Provocation arising from a Mistake of Fact.

<sup>1129</sup> S & H, n 60, p 216. They quoted Lord Atkin in *Andrews v DPP* [1937] AC 576, p 581 'of all crimes manslaughter appears to afford most difficulties of definition, for it concerns homicide in so many and so varying conditions...the law...recognises murder on the one hand based mainly, though not exclusively, on an intention to kill, and manslaughter on the other hand, based mainly, though not exclusively, on the absence of an intent to kill, but with the presence of an element of '*unlawfulness*' which is the elusive factor.'

within the 'elusive factor':

- the *mens rea* of any unlawful act (or omission) which causes death;
- the *mens rea* of any felony which causes death;
- the *mens rea* of a felony of violence;
- the *mens rea* of a felony of violence or against the person which causes death;
- an intention violently to resist lawful arrest where the violent resistance causes death;
- an intention to escape from lawful arrest, where the act of escaping causes death;
- an intention unlawfully to cause bodily harm, less than GBH, or to frighten, where the act so done causes death;
- recklessness whether such harm occurs, where death results;
- a grossly negligent act, which causes death.<sup>1130</sup>

However, Smith and Hogan also recognised that these categories overlapped to a considerable extent.<sup>1131</sup> These categories are not discussed in detail, since the modern law is different. However, they demonstrate the extent to which the law had become very uncertain and complicated.

### (c) Defences

Smith and Hogan stated:

It has been traditional in English criminal law books to devote a section to '*lawful homicides*'. Historically, there are good reasons for this, since the common law distinguished two categories of such homicides - '*justifiable*' and '*excusable*'. A merely excusable homicide resulted in the forfeiture of the killer's movable property to the Crown, whereas the justifiable homicide imposed no legal burden whatever upon him. The distinction has been of no importance since forfeiture of goods was abolished in 1828.<sup>1132</sup>

As to defences, Smith and Hogan considered those in which killing resulted from:

- carrying out the sentence of a competent court;
- a person resisting (or fleeing from) lawful arrest;
- preventing a forcible (or atrocious) crime or the suppression of a riot;
- self defence;
- defence of property.<sup>1133</sup>

In the case of the first, this is not considered further since the death penalty no longer applies. As to the others:

#### (i) Resisting or Fleeing from Lawful Arrest

Smith and Hogan stated

It has long been asserted by writers of authority that it is lawful to kill one who resists lawful arrest, provided that this is necessary in order to carry out the arrest. If the arrest could be carried out without killing, then it would be '*at least manslaughter*' to kill.<sup>1134</sup>

Smith and Hogan pointed out that this rule was '*astonishing*'<sup>1135</sup> and no longer appropriate to modern times. They concluded:

The ancient rule of the common law was formulated in an era when there was no proper police force and when felonies were generally punishable with death. The rules of arrest appropriate and indeed, perhaps necessary, in such a society bear no relation to the needs of twentieth-century England; and the courts will surely modify these rules when the matter arises for decision.<sup>1136</sup>

#### (ii) Preventing a 'Forcible or Atrocious Crime' or Suppressing a Riot

Smith and Hogan stated:

According to East [in 1803], peace officers and their assistants, and according to Hawkins [in 1824], private persons as well, are justified in intervening in a riot or riotous assembly and '*in proceeding to the last extremity in*

<sup>1130</sup> Ibid.

<sup>1131</sup> Ibid, p 216 'It is apparent that these categories overlap (1) obviously includes all instances of (2), (3), (4), (5) and (6): (2) includes all instances of (3) and so on. If it were certain that (1) was always a sufficient *mens rea*, discussion of (2)-(6) would be pointless, but it is not certain. If it were certain that (2) were always sufficient, discussion of (3) would be equally unnecessary; but again, there is no certainty. Naturally, the narrower categories more clearly attract liability than the wider; it is about the validity of the wider categories that the greater doubts exist; and a trend towards narrowing liability for homicide would suggest that the wider categories, if not already eliminated might be in the future.

<sup>1132</sup> Ibid, p 229. One would agree. However, it should be noted that there were also issues relating to sanctuary, benefit of clergy and pardon that were involved.

<sup>1133</sup> Ibid, pp 230-6.

<sup>1134</sup> S & H, n 60, p 230 note that: 'This rule was applied whether the crime leading to the arrest was either a felony or a misdemeanour; but where the accused person merely *fled*, as distinct from offering resistance, a distinction was taken between felony and a dangerous wounding, on the one hand, and a misdemeanour on the other. It was said that it was lawful to kill the escaping felon, '*where he cannot be otherwise overtaken*'; but that it would be murder to kill an escaping misdemeanant in like circumstances.' They cited East, n 50, vol 1, pp 298-302.

<sup>1135</sup> Ibid, p 231 'they are astonishing when viewed in the light of modern conditions and attitudes. If D steals my handkerchief and, being fleet of foot than I, is making his escape, may I lawfully shoot him down?' In a fn they note 'East [in 1803] says I may', citing East, n 50, vol 1, p 273.

<sup>1136</sup> Ibid.

*case the riot cannot otherwise be suppressed.*' This was so both under the common law <sup>1137</sup> and under the Riot Act 1714. The ancient writers also held that it was lawful for a householder, or his servants, or even a lodger, to kill one who attempted a burglary with intent to steal or kill, or who attempted arson of the house. It was lawful for a woman to kill one who attempted to rape her. Blackstone said that killing was justifiable to prevent the commission of any '*forcible or atrocious crime*'; but not to prevent a crime, even a felony, which did not involve violence, such as picking pockets. Presumably in all these cases it was a condition of the defence that the minimum of force should have been used. ...

Here too some further qualification seems to be called for. It can hardly be lawful for me to kill P to prevent him from stealing a small sum of money, simply because he is a burglar and I have no other means of preventing him from doing so: again there must be a reasonable relationship between the means and the end. An assault and battery is a '*forcible*' crime but it has never been suggested that it was lawful to kill to prevent it, unless it was of a felonious character. And the mere fact that the attack is also felonious would hardly be a satisfactory ground at the present day for holding a killing to be justified.<sup>1138</sup>

The Riot Act 1714 was repealed in 1973 and the statement of Blackstone, in any case, was too wide.

### (iii) Self-Defence

Smith and Hogan cited *Smith* (1837) that was lawful to kill another in self-defence if it appeared:

that defence was necessary, that he did all he could to avoid it, and that it was necessary to protect his own life or to protect himself from such serious bodily harm as would give rise to a reasonable apprehension that his life was in immediate danger.<sup>1139</sup>

They indicated that, in the past, '*the writers of authority laid down complicated and quite detailed rules about self defence.*'<sup>1140</sup> and that, in general, writers drew a distinction between where:

- D attacked P with malice aforethought or engaged in a duel with him, with the like intent;
- The fight arose on a sudden quarrel and D entered into it, but without malice aforethought at the time - as in a fight with fists;
- D was the innocent victim of a felonious attack.<sup>1141</sup>

However, they also noted that chance medley did not differ now from any other killing in self defence, citing *Semini* (1949).<sup>1142</sup> And, they thought that killing in self defence was only justifiable when necessary.<sup>1143</sup> Also, that the '*back to the wall*' principle was better reflected in the view of Holmes J.<sup>1144</sup>

### (iv) Defence of Others & Property

Smith and Hogan stated:

Just as a man may kill in defence of his own person, so too he may kill in defence of others; a master in defence of his servant, a husband in defence of his wife, a parent in defence of his child, and *vice versa* in each case <sup>1145</sup>....It would seem that, at the present day, no special relationship need be shown. It may be noted that ...Stephen justified a killing necessary to defend himself '*or any other person*'; and Foster and Kenny too thought the defence should be available. This must surely be the law.<sup>1146</sup>

They stated:

It was said that it was lawful to kill if that was necessary to repel a felonious attack upon property: but that killing to repel an unlawful though not felonious attack would be criminal homicide. So to kill a trespasser would be '*at least common manslaughter*' unless the killer's life were in danger.<sup>1147</sup>

While noting that there was modern authority supporting the right to kill in defence of the home,<sup>1148</sup> Smith and Hogan stated:

<sup>1137</sup> The common law position was not clear. It was referred to by Lambard, likely with reference to the *Case of Armes* (1597), see n 545.

<sup>1138</sup> *Ibid*, pp 231-2.

<sup>1139</sup> *Ibid*, p 232.

<sup>1140</sup> *Ibid*, p 233.

<sup>1141</sup> *Ibid*, p 233. This is a bit of a short summary of the many propositions of law laid down by Lambard onwards. However, one would agree with S & H, n 60, p 233 that 'These rules have a somewhat antique ring, having been formulated in an age when men wore swords, and it appears that sudden affrays were liable to break out with fatal results.'

<sup>1142</sup> See n 1094. S & H also stated 'Chance-medley has no place in the modern law.'

<sup>1143</sup> *Ibid*, p 235. This was always the rule from Bracton onwards.

<sup>1144</sup> *Ibid*, in *Brown v United States* (1920) 256 US 335 'Rationally, the failure to retreat is a circumstance to be considered with all the others in order to determine whether the defendant went farther than he was justified in doing; not a categorical proof of guilt.'

<sup>1145</sup> S & H cited *Rose* (1884), see **App E(b)**.

<sup>1146</sup> S & H cited Foster, n 77, p 374 and Kenny, (5<sup>th</sup> ed), p 104. They also noted the stranger's right to kill. 'East also supports the stranger's right to kill, '*because even private persons are bound to prevent a felony being committed by all possible lawful means, without exposing their own lives; though if their zeal carry them thus far, the law will not put them in a worse situation on that account.*' They cited East, n 50, vol 1, p 290.

<sup>1147</sup> *Ibid*, p 236 'In practice this defence seems to have been limited to the defence of the dwelling house against the burglar or housebreaker, arsonist or other felon invading the property. As already noted, it was not lawful to kill a pickpocket, though he was committing a felony against property.'

<sup>1148</sup> S & H cited *Hussey* (1924), see **App E(c)**. This case would appear to wrongly state the law. Prior caselaw would suggest that killing a trespasser was not lawful, but killing a person where he was attacked in his own home, was. Therefore, the issue in *Hussey* should have been: On what basis had H shot and injured others? If it was to prevent unlawful eviction, this would not seem lawful. If it was because H feared that the trespassers were going to attack and injure him (or his family), the issue should have been whether his response was reasonable in the circumstances.

It is astonishing that, in the twentieth century, a man should be permitted to kill to prevent himself being unlawfully evicted. Surely this is a case where he should be required to resort to legal redress and not allowed to go to such lengths in self-help.<sup>1149</sup>

Smith and Hogan also considered: (a) mistake as to the condition of a defence,<sup>1150</sup> and (b) the effect of the defences.<sup>1151</sup>

*In conclusion, Smith and Hogan provided a modern summary of the law on homicide. However, like Stephen and Kenny, they were prepared to criticise some of the more archaic rules. In particular, those relating to justifiable/excusable homicide.<sup>1152</sup> Thus, they challenged the notions that it was appropriate for it to be lawful to kill a person: (a) resisting (or fleeing from) lawful arrest; (b) to suppress a riot or other 'forcible or atrocious' crime; (c) in the case of legal eviction. Smith and Hogan also indicated the inappropriateness, in modern times, of the obligation to flee 'back to the wall', in the case of self-defence.*

In 1964, the last edition of Russell was published<sup>1153</sup> and, in 1966, the last edition of Kenny.<sup>1154</sup> Neither materially added to Smith and Hogan.

#### 45. Criminal Law Revision Committee (1980)

In 1980, the Criminal Law Revision Committee ('CLRC') published a report on 'Offences against the Person.'<sup>1155</sup> It noted various matters in respect of homicide. In particular, it referred to the problems that had arisen with the word 'maliciously' over the course of time<sup>1156</sup> and that the decision in *Cunningham* (1957) had widened it.<sup>1157</sup> The CLRC noted:

We propose that intention or recklessness (sometimes only intention) should be required in relation to the consequence referred to in the definition of the offence, such as death, serious injury or injury. But there is no unanimity as to the ordinary meaning of the words intention and recklessness in the criminal law.<sup>1158</sup>

##### (a) Murder

As to murder, the report stated;

There has never been any doubt that an intention to kill is a sufficient mental element for the crime of murder, and the decision of the House of Lords in *Hyam v DPP*... confirms that an intention to cause serious bodily harm is also enough.<sup>1159</sup>

The CLRC stated that the effect of the decision in *Hyam* (1975) was that it was murder if a person killed by doing an act:

- (i) intending to kill; or
- (ii) intending to cause serious bodily harm; or
- (iii) knowing that death was a [highly] probable result of the act; or
- (iv) knowing that serious bodily harm was a [highly] probable result of the act,<sup>1160</sup>

provided that the act was aimed at someone. The result of this was uncertainty in the law. The CLRC thought that the mental element in murder had been too broadly stated and that (iv) should not apply. As to (ii) and (iii) the CLRC considered that they needed modification and that all reckless killings should not be murder<sup>1161</sup> but that murder should extend 'beyond intentional killing in one respect.' Thus, it stated:

There is one category of reckless killing where we believe there would be general agreement that the stigma of murder is well merited. That is where the killer intended unlawfully to cause serious bodily injury and knew that there was a risk of causing death. The intention to cause serious bodily injury puts this killing into a different class from that of a person who is merely reckless, even gravely reckless.

<sup>1149</sup> Ibid, p 236.

<sup>1150</sup> Ibid, pp 236-7.

<sup>1151</sup> Ibid, pp 237-8.

<sup>1152</sup> Like others, S & H combined what had been aspects of justifiable homicide with those of excusable homicide. However, there was a difference in that, in the case of the former, no crime in law was committed (such as killing a person resisting, or fleeing from, lawful arrest) while in the latter a crime was committed, but there was an adequate defence.

<sup>1153</sup> See n 51. The chapters on murder (chapter 29) and manslaughter (chapter 31) are very heavy reading due to the wodge of cases and reports cited. Turner also edited the last edition of Kenny which is more readable.

<sup>1154</sup> See n 57.

<sup>1155</sup> 14<sup>th</sup> Report. Cmnd 7844.

<sup>1156</sup> The CLRC were considering this term in the context of the Offences against the Person Act 1861. However, it also applied to 'malice' as in premeditated malice.

<sup>1157</sup> Ibid, p 3 'according to *Cunningham*...[1957] 2 QB 396 it means 'either (1) an actual intention to do the particular kind of harm that was done; or (2) recklessness as to whether such harm should occur or not (i.e. the accused has foreseen that the particular kind of harm might be done and yet has gone on to take the risk of it).'

<sup>1158</sup> Ibid, p 3.

<sup>1159</sup> Ibid, p 8. It continued 'Mrs Hyam started a fire in the house for the purpose of frightening another woman in the house into leaving the neighbourhood. The children of that other woman were killed in the fire.'

<sup>1160</sup> Ibid.

<sup>1161</sup> Ibid, p 11 'We considered whether to propose a definition of murder in terms of intentional or reckless killing, but it seemed to us such a wide offence that it could not be called murder. It would include many killings that are now manslaughter and would not be generally thought to be murder... We recognise that a very grave result may follow from taking a risk thought to be merely a slight one, for example where thieves cut railway signalling cable and cause a derailment with much loss of life. Such conduct could be severely punished under our proposals, as under the existing law; but it would not generally be regarded as murder and we do not think it should be the same offence in law as those killings which everyone would instantly recognise as murder.'

The offender has shot, stabbed or otherwise seriously injured the victim, and the circumstances are so grave that the jury can find that he must have realised that there was a risk of causing death. For example, he has shot a pursuer when he is escaping after a robbery, intending only to disable the pursuer but appreciating that there was a risk of wounding him mortally. The line between this and an intentional killing is so fine that both cases are justifiably classified as murder, as they are in the present law. To classify this particular type of risk-taking as murder does not involve the danger of escalation to cases of recklessness in general, since it is tied specifically to circumstances in which the defendant intended to inflict serious injury.<sup>1162</sup> (*wording divided for ease of reference*)

The CLRC, therefore, concluded that it should be murder: (a) if a person, with intent to kill, caused death; and (b) if a person caused death by an unlawful act intended to cause serious injury and known to him to involve a risk of causing death.<sup>1163</sup>

**(b) Murder - Queen's Peace**

The CLRC stated as to this:

At common law for a killing to constitute murder the victim must be '*under the Queen's peace*'. According to Hale this description encompasses all persons, including alien enemies, '*unless it be in the heat of war, and in the actual exercise thereof*.' We would not expect a reference to the Queen's peace to form part of a modern statutory definition of murder. The saving referred to by Hale would be adequately covered by the use of the word '*unlawful*', it not being unlawful to kill an alien enemy '*in the heat of war, and in the actual exercise thereof*.'<sup>1164</sup>

In fact, the CLRC did not consider this case of justifiable homicide in detail (nor the fact that does not ever seem to have been a case in point since 1238).<sup>1165</sup> Since martial law is now obsolete, the justification lies at common law (Bracton) and, thus, it is better to leave it there until, at least: (a) martial law is abolished; (b) the law of high treason is abolished/modernised; (c) the law on declaring war is placed in legislation.

**(c) Provocation**

The CLRC noted that the Homicide Act 1957, s 3 allowed words to be a sufficient provocation. It also recommended that provocation should be re-formulated and that, *inter alia*:

in place of the reasonable man test the test should be that provocation is a defence to a charge of murder if, on the facts as they appeared to the defendant, it can reasonably be regarded as a sufficient ground for the loss of self-control leading the defendant to react against the victim with a murderous intent.<sup>1166</sup>

**(d) Manslaughter**

The CLRC recommended that it should be manslaughter if a person caused death with intent to cause serious injury, or being reckless as to death or serious injury. '*All other forms of the existing offence of involuntary manslaughter, for example manslaughter by gross negligence, should be abolished*.'<sup>1167</sup>

**In conclusion, the CLRC, usefully, pointed out the inadequacy of the term 'malice' as well as indicated that murder should include not just intentional killing but also where there was an intent to cause GBH.**

**46. Williams (1983)**

Glanville Williams produced the second edition of his *Textbook of Criminal Law* in 1983.<sup>1168</sup> He noted that:

Killing a man, whether lawfully or unlawfully, is called '*homicide*', but this is only a literary expression. There is no crime of '*homicide*'. Unlawful homicide at common law comprises the two crimes of murder and manslaughter. Other forms of unlawful homicide have been created by statute: certain new forms of manslaughter (homicide with diminished responsibility, and suicide pacts), infanticide, and causing death by dangerous driving.<sup>1169</sup>

Citing Coke, he noted that '*any reasonable creature*' meant any human being, '*in rerum natura*' (in being) excluded the unborn child. And, that '*under the king's peace*', covered everyone '*except the enemy killed in operations of war*.'<sup>1170</sup>

**(a) Murder**

Williams noted that the requirements for both murder and manslaughter were the same except in respect of the fault element and mitigating circumstances.

Murder requires, positively, the mental element traditionally known as '*malice aforethought*', and, negatively, the

<sup>1162</sup> Ibid, p 13. The report noted that 'A majority of those who commented on our Working Paper...shared the view expressed here that the only sort of recklessness which should lead to liability for murder should be where a person kills another intending to cause serious injury and knowing that there is a risk of causing death.' Cf. Stephen, n 55, vol 3, p 22 'An intention to cause the death of, or [GBH] to, any person, whether such person is the person actually killed or not.' And 'death caused by an act or omission intended to cause bodily injury is murder, if the intention of the offender is to cause the death of, or [GBH] to, any person whatever.'

<sup>1163</sup> Ibid. This was referred to by the Law Commission in LC 290, n 1123, p 25.

<sup>1164</sup> Ibid, p 17.

<sup>1165</sup> See n 1280.

<sup>1166</sup> Ibid, pp 35, 43. The CLRC also recommended that the defendant should be judged with due regard to all the circumstances, including any disability, physical or mental, from which he suffered; the provocation need not be by the victim of the defendant's attack; and the defence of provocation should not depend on the particular mode by which the victim was injured or killed.

<sup>1167</sup> Ibid, p 57.

<sup>1168</sup> A text by Harris, *Criminal Law* (1<sup>st</sup> ed 1881, last (22<sup>nd</sup>) ed, 1973), contained a chapter on homicide in the last edition (ch 30). However, it added nothing substantive.

<sup>1169</sup> Williams, n 69 (2<sup>nd</sup> ed, 1983).

<sup>1170</sup> Ibid, p 245. One would agree.

absence of certain mitigating circumstances that would turn the case into one of manslaughter.<sup>1171</sup>

Williams noted that '*killing by provocation is in fact mitigated murder*'<sup>1172</sup> and that malice aforethought was a term of art - if not of deception - since murder did not require either spite or premeditation.<sup>1173</sup> He indicated that malice aforethought was present whenever there was:

- (i) an intent to kill; or
- (ii) an intent to inflict GBH; or
- (iii) risk taking of a certain (or, rather, uncertain) kind.

Intention bore its natural meaning.<sup>1174</sup> In the case of (ii), Williams noted that its continued existence was reaffirmed by the House of Lords in *Cunningham* (1981)<sup>1175</sup> even though there were problems with this *viz.*

- the mental element should, generally, refer to death,<sup>1176</sup>
- the creation of an inconsistency with attempted murder;<sup>1177</sup>
- it accounts as murder an act unlikely to kill,<sup>1178</sup>
- it leaves so much to prosecutorial discretion.<sup>1179</sup>

Williams noted that - despite these problems - the rule was approved by the CLRC in 1980 (see 45),<sup>1180</sup> with the qualification that it should be confined to cases where the act was known to the D to involve a risk of causing death.<sup>1181</sup> Williams also stated:

There is also the argument that if the law were otherwise a truly intentional killer would be encouraged to run a false defence in the hope of bamboozling the jury. But this is unconvincing, because on a charge of attempted murder the jury must distinguish between false and true defences of lack of intent to kill.<sup>1182</sup>

Williams also dealt with recklessness, which he called '*risk taking*', citing *Hyam* (1975).<sup>1183</sup>

#### **(b) Manslaughter - Involuntary - Reckless**

Williams noted that manslaughter did not require '*malice aforethought*' and that: (a) provocation; (b) DR; and (c) suicide pacts, reduced murder to manslaughter. These were categorised as '*voluntary*' manslaughter.<sup>1184</sup> As to '*involuntary manslaughter*', Williams stated:

Involuntary manslaughter...means the form in which there is (or need be) no intention (*voluntas*) to kill or do [GBH] (a strange meaning of '*involuntary*'). There are two subspecies, both of them, as will be painfully seen in this chapter, exhibiting the common law at its worst.

We cannot even give the first of them an uncontroversial name, since the courts have failed to settle clearly what fault element is involved; in this book it will be called '*reckless manslaughter*', though the word '*reckless*' will give us trouble. The other subspecies is constructive manslaughter.<sup>1185</sup>

Williams then considered *reckless manslaughter*:

The form of manslaughter requires the prosecution to prove that the [D] caused the death in question by an act or omission, amounting in either case to what is called recklessness (in a special sense) in breach of a duty of care.<sup>1186</sup>

Williams noted that, at first, the requirement was one of '*negligence*' which, during the second half of the 19<sup>th</sup> century came

<sup>1171</sup> Ibid.

<sup>1172</sup> Ibid, p 246.

<sup>1173</sup> Ibid, p 249.

<sup>1174</sup> Ibid. Williams noted that 'since the enactment of section 8 of the Criminal Justice Act 1967 the courts have dropped the notion of an entirely 'objective' intention that was expressed in *DPP v Smith*.' He also referred to *Hyam* [1975] AC 55.

<sup>1175</sup> [1981] 3 WLR 223.

<sup>1176</sup> Williams, n 69, p 250 'Murder requires a killing, so the normal principle would be that the mental element in murder should refer to death, not to a harm short of death.'

<sup>1177</sup> Ibid, p 250 'a charge of attempt to murder requires an intention to kill, and cannot be established by proof of an intent to do [GBH]. It may seem remarkable that a person cannot be convicted of attempt to murder when he deliberately inflicts [GBH] upon another, and yet can be convicted of murder if, as a result of the injury, the victim dies.'

<sup>1178</sup> Ibid 'Lord Edmund Davies in *Cunningham* [1982] pointed to another disquieting aspect of the rule in that it accounts a person guilty of murder although the harm he intended to inflict was unlikely to kill 'I find it passing strange that a person can be convicted of murder if death results from, say, his intentional breaking of another's arm, and action which, while undoubtedly involving the infliction of 'really serious harm' and, as such, calling for severe punishment, would in most cases be unlikely to kill.'

<sup>1179</sup> Ibid, p 250.

<sup>1180</sup> See n 1155, para 31.

<sup>1181</sup> Williams, n 69, p 251 'The argument for the rule is that when a person shoots or stabs another, his act is sufficiently grave to justify a conviction of murder if death results, even though his intention was only to disable a person from whom he wished to steal, or to stop a pursuer when he was running away after a robbery, or to mutilate someone by way of revenge, or to stop a person giving an alarm. The human body is fragile, and a person who shows himself willing to inflict really serious injury to another, thus causing his death, is so little less blameable than the intentional killer that the law is right in not making a distinction.'

<sup>1182</sup> Ibid.

<sup>1183</sup> Ibid, pp 251-4.

<sup>1184</sup> Ibid, p 259.

<sup>1185</sup> Ibid.

<sup>1186</sup> Ibid.

to be limited to ‘*gross negligence*’.<sup>1187</sup> Williams also considered homicide by omission, considering the duty<sup>1188</sup> and the fault element as well as noting that the CLRC had recommended that involuntary manslaughter should be confined to cases where a person caused death with intent to cause serious injury, or being subjectively reckless as to death or serious injury.<sup>1189</sup>

### **(c) Manslaughter - Involuntary – Constructive**

In respect of constructive manslaughter, Williams stated:

At one time it was held that a killing, though unintentional, was murder if it occurred in the course of any unlawful act; so an accidental killing while trying to steal a fowl was murder. This doctrine of constructive murder was limited in the course of time by judicial decision and statute; and the area progressively freed from the law of murder was simultaneously and automatically occupied by the doctrine of constructive manslaughter. What had been murder became manslaughter. Hence, for several centuries, it was axiomatic that a killing in the course of an unlawful act was at least manslaughter by construction of law. Just as the judges steadily diminished the law of constructive murder, so they came to whittle down the law of constructive manslaughter.<sup>1190</sup>

Williams then noted that the present law could be summarised as: (a) there must be an act (*query* as to omission); (b) which was unlawful (within certain rules); (c) and dangerous. Also, the death must be a direct consequence of the unlawful act.<sup>1191</sup> After discussing the inadequacies of this,<sup>1192</sup> Williams stated:

It may be that we shall no longer have to put up with this tedious, unnecessary and unjust part of the law for much longer. The CLRC has recommended the abolition of constructive manslaughter, on the ground that ‘*the offender’s fault falls too far short of the unlucky result.*’ All that constructive manslaughter really does is to make liability for manslaughter depend upon negligence as to slight harm, and that it should do so is wrong.<sup>1193</sup>

***In conclusion, Williams noted the continuing undue complexity of the law on homicide. In particular, he noted the parlous state of the law on involuntary manslaughter.***

### **47. Law Commission - Criminal Code (1989)**

In 1989, the Law Commission published a draft criminal code for England and Wales.<sup>1194</sup> This draft Code was never implemented.

- However, in the area of homicide, it was useful in that it finally discarded the concept of ‘*premeditated malice*’ and referred to ‘*intention*.’;
- This can only be described as long overdue since the courts ever since *Welsh* (1869) had recognised that ‘*malice*’ and ‘*premeditated malice*’ meant intention<sup>1195</sup> and legal writers even prior to that had indicated the same. This only proves that legal fictions, invariably, cause more problems than they solve, since a fiction, by its nature is at odds with reality.

The 1989 Code will now be considered, but only in outline, since it was never implemented.

### **(a) Murder**

The 1989 Code, section 54, defined murder as follows:<sup>1196</sup>

A person is guilty of murder if he causes the death of another (a) intending to cause death; or (b) intending to cause serious personal harm and being aware that he may cause death, unless sections 56,<sup>1197</sup> 58,<sup>1198</sup> 59,<sup>1199</sup> 62<sup>1200</sup> or

<sup>1187</sup> Williams, n 69, p 259 cited *Bateman* (1925) 94 LJKB 791 ‘To support an indictment for manslaughter the prosecution must prove...that the negligence or incompetence of the accused went beyond a mere matter of compensation and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.’

<sup>1188</sup> Williams, n 69, p 263 cited *Stone* (1977) [1977] QB 354.

<sup>1189</sup> See n 1155, para 124. See also Williams, n 69, p 268.

<sup>1190</sup> Williams, n 65, p 269. Williams cited his article on *Constructive Manslaughter* in [1957] Crim LR 299-301. Also, HA Snelling, *Manslaughter by Unlawful Act* (1957) 30 Aus LJ 382, 438.

<sup>1191</sup> Williams cited the cases of *Newbury* (1977), see **App F(c)** and *Church* (1966), see **App D(a)**.

<sup>1192</sup> In his article on constructive manslaughter (see n 1190), Williams stated, n 69, p 301 ‘Justice would be done in all these cases if it were recognized that every charge of involuntary manslaughter requires proof of the requisite degree [of] criminal negligence, and that this negligence always means negligence as to the death – not negligence as to a consequence short of death.’

<sup>1193</sup> See n 1155, p 278.

<sup>1194</sup> A Criminal Code for England and Wales, Law Com no 177 (‘**LC 177**’). See also Report to the Law Commission on the Codification of the Criminal Law (Law Com no 143, 1985) (‘**LC 143**’).

<sup>1195</sup> See n 1002.

<sup>1196</sup> This recommendation as to the definition of murder was endorsed by the House of Lords Select Committee on Murder and Life Imprisonment (1989) HL Paper 78-I. In 1996, the Law Commission indicated that the law of murder had been subject to critical scrutiny by expert bodies twice in the last 15 years, referring to the Law Commission’s report in 1980 (Cmnd 7844, see n 1155) and to the HL Paper.

<sup>1197</sup> S 56 (*diminished responsibility*). ‘(1) A person who, but for this section, would be guilty of murder is not guilty of murder if, at the time of the act, he is suffering from such mental abnormality as is a substantial enough reason to reduce his offence to manslaughter. (2) In this section ‘*mental abnormality*’ means mental illness, arrested or incomplete development of mind, psychopathic disorder, and any other disorder or disability of mind, except intoxication.’ See also s 57 (*evidence of mental abnormality*).

<sup>1198</sup> S 58 (*provocation*). ‘A person who, but for this section, would be guilty of murder is not guilty of murder if (a) he acts when provoked (whether by things done or by things said or by both and whether by the deceased person or by another) to lose his self-control; and (b) the provocation is, in all the circumstances (including any of his personal characteristics that affect its gravity), sufficient ground for loss of control.’

<sup>1199</sup> S 59 (*use of excessive force*). ‘A person who, but for this section, would be guilty of murder, is not guilty of murder if, at the time of the act, he believes the use of the force which causes death to be necessary and reasonable to effect a purpose referred to in section 44 (use of force in public or

64<sup>1201</sup> applies.

**(b) Manslaughter**

The 1989 Code, section 55, defined manslaughter as follows:

A person is guilty of manslaughter if -:

- (a) he is not guilty of murder by reason only of the fact that a defence provided by section 56 (*diminished responsibility*), 58 (*provocation*) or 59 (*use of excessive force*) applies; or <sup>1202</sup>
- (b) he is not guilty of murder by reason only of the fact that, because of voluntary intoxication, he is not aware that death may be caused or believes that an exempting circumstance exists; or <sup>1203</sup>
- (c) he causes the death of another (i) intending to cause serious personal harm; or (ii) being reckless whether death or serious personal harm will be caused.

The Code also contained sections on jurisdiction over: murder and manslaughter (s 60),<sup>1204</sup> attempted manslaughter (s 61)<sup>1205</sup> and abortion and child destruction (s 66).

***In conclusion, the draft Criminal Code of 1989 discarded, at last, the concept of premeditated malice and substituted 'intention' something overdue by 120 years (see Welsh (1869)).***

**48. Carter & Harrison (1991)**

Carter and Harrison, in their text on *Offences of Violence* (1991), considered homicide and their text reflects the 'state of play' by that date.

**(a) Murder**

Carter and Harrison cited the classic definition of Coke and noted:

- **Reasonable Creature in Being.** If a child was still in the womb, or in the process of being born, the offence was not murder but abortion or child destruction;<sup>1206</sup>
- **Under the Queen's Peace.** This excluded 'killings in war or possibly rebellion'.<sup>1207</sup>
- **Kills.** The conduct causing the death might be a positive act or an omission;<sup>1208</sup>

In respect of the concept of 'malice aforethought', they noted that it had been criticised as anachronistic, wholly inappropriate and ripe for abolition.<sup>1209</sup>

**(b) Manslaughter**

Carter and Harrison noted that manslaughter was divided into: (a) voluntary; and (b) involuntary. The former occurred when murder was reduced to manslaughter due to: (a) provocation; (b) DR; or (c) where a suicide pact applied.<sup>1210</sup> As to involuntary manslaughter:

Involuntary manslaughter can itself be sub-divided into two, or arguably three categories - constructive (or unlawful act) manslaughter; reckless manslaughter; and, possibly, manslaughter by gross negligence. The relationship between the last two categories is a subject of much debate.<sup>1211</sup>

In respect of provocation, Carter and Harrison indicated that there was uncertainty whether the common law definition of provocation had been superseded by the Homicide Act 1957.<sup>1212</sup> As it was, the continuing poor state of the law of homicide in the 1990's was evidenced by a lack of any comprehensive attempt to remove anomalies, such that Lord Mustill in *A-G's*

private defence), but the force exceeds that which is necessary and reasonable in the circumstances which exist or (where there is a difference) in those which he believes to exist.'

<sup>1200</sup> S 62 (*suicide pact killing*).

<sup>1201</sup> S 64 (*infanticide*).

<sup>1202</sup> This they termed 'voluntary manslaughter.'

<sup>1203</sup> This they termed 'involuntary manslaughter.'

<sup>1204</sup> S 60 (*jurisdiction over murder and manslaughter*).

<sup>1205</sup> S 61 (*attempted manslaughter*) 'A person who attempts to cause the death of another, where section 56, 58 or 59 would apply if death were caused, is not guilty of attempted murder but is guilty of attempted manslaughter.'

<sup>1206</sup> Carter & Harrison, n 63, p 161.

<sup>1207</sup> Ibid, pp 162-3 'It excludes killings in war or possibly rebellion... If an alien enemy kills a British subject, it is murder unless the heat of war rule applies, and if committed in England, it is no defence that the alien did not know English law. Shooting prisoners of war is murder.' They cited *Depardo* (1807) R & R 134 (168 ER 723) (prisoner of war killed British subject on English merchant ship in China. Prisoner discharged); *Esop* (1836) 7 C & P 456 (173 ER 203) (prisoner of war in England sought to recover sum owed by legal action in England. No judgment was given. However, it is likely that Rooke J would have upheld his right, on the basis of his being under Her Majesty's protection) and *Maria v Hall* (1807) 1 Taunt 33 (127 ER 741) (not a defence for a foreigner (from Bagdad) charged with a crime (buggery) in England (on board a ship) that he did not know it was a crime. Case not proceeded with).

<sup>1208</sup> Carter & Harrison cited *Gibbons and Proctor* (1918) 13 Cr App R 134.

<sup>1209</sup> Carter & Harrison cited Hailsham LC in *Cunningham* [1982] AC 566, 575 'The expression 'malice aforethought' in whatever tongue expressed, is unfortunate since neither the word 'malice' nor the word 'aforethought' is construed in the ordinary sense.' See also *Moloney* [1985] AC 905, 920H per Lord Bridge. See also LC 290, n 1123.

<sup>1210</sup> See now 52.

<sup>1211</sup> Carter & Harrison, n 63, p 185.

<sup>1212</sup> For the common law position see *Duffy* (1949), see **App D(a)**. For the Homicide Act 1957 see 43. The Court of Appeal in *Brown* (1972) 56 Cr App R 56 suggested that the Homicide Act 1957, s 3 laid down the precise test for provocation. However, *Whitfield* (1976) 63 Cr App R 39 suggested the contrary. *Camplin* [1978] AC 705 supported *Whitfield*.

Reference (No 3 of 1994) remarked:

Murder is widely thought to be the gravest of crimes. One could expect a developed system to embody a law of murder clear enough to yield an unequivocal result on a given set of facts, a result which conforms with apparent justice and has a sound intellectual base. This is not so in England, where the law of homicide is permeated by anomaly, fiction, misnomer and obsolete reasoning.

One conspicuous anomaly is the rule which identifies the ‘*malice aforethought*’ (a doubly misleading expression) required for the crime of murder not only with a conscious intention to kill but also with an intention to cause [GBH]. It is, therefore, possible to commit a murder not only without wishing the death of the victim but without the least thought that this might be the result of an assault. Many would doubt the justice of this rule, which is not the popular conception of murder and (as I shall suggest) no longer rests on any intellectual foundation. The law of Scotland does very well without it, and England could perhaps do the same. <sup>1213</sup> (*underlining supplied and wording divided*).

In 1996, the LC issued a report on Involuntary Manslaughter<sup>1214</sup> which recommended the creation of a new offence of ‘*reckless killing*’<sup>1215</sup> as well as of ‘*killing by gross carelessness*’.<sup>1216</sup> They also considered corporate manslaughter.

#### 49. Justifiable Killing by 1998

In 1998, the death penalty for all remaining crimes was abolished.<sup>1217</sup> This meant that - in the case of justifiable killing - there remained only one instance where it was justifiable to kill: an alien enemy in the heat of war (first mentioned by Bracton c. 1240). It is possible to list all the circumstances since Bracton in which justifiable killing was permitted and when they became obsolete. Thus, these circumstances were:

- **Pursuant to Due Legal Process.** Capital punishment ended in 1998 in the UK. Thus, this became obsolete;
- **Outlaw/Attainder.** In the Anglo-Saxon times - when law enforcement was rudimentary and there were few law enforcement officers - it was understandable (perhaps) that an outlaw could be summarily killed. This usually occurred when he resisted or fled from a ‘*hue and cry*’ against him (the ‘*hue and cry*’ became obsolete from the 14<sup>th</sup> century);
  - By 1353, the courts made it clear that it was a crime for persons to summarily kill an outlaw. Indeed, Bracton (in 1240) asserted that an outlaw could only be killed if he resisted arrest;<sup>1218</sup>
  - In 1562, legislation provided that executing a person attainted of *praemunire* was not justifiable and there is no evidence that execution of a person attainted (convicted) of treason or felony was justifiable after that date or even before.<sup>1219</sup> Thus, in 1457, Yelverton J indicated it was felony to kill one attainted of felony<sup>1220</sup> and, in 1528, St German asserted: ‘*though a man be outlawed for murder or felony or be abjured or that he be otherwise attainted: yet it is not lawful for no man to murder him or slay him nor to put him in execution [i.e. execute him] but by authority of the king’s laws.*’;
  - *Outlawry* and *praemunire* have been abolished (the last vestiges of outlawry in 1938).<sup>1221</sup> Attainder of felony is no longer possible since, in 1967, the distinction between felonies and misdemeanours was abolished.<sup>1222</sup>
- **Thief with Stolen Goods.** In Anglo-Saxon times, summary execution could be inflicted on a ‘*handhaving*’ or ‘*backbearing*’ thief (i.e. one with the goods on him). That is, in the case of ‘*manifest*’ theft which probably also covered other instances of undoubted guilt. Bracton also asserted this. However, with the decline of the ‘*hue and cry*’ in the 14<sup>th</sup> century, it is likely that this form of justifiable homicide ended, probably, about the same time as the prohibition on killing outlaws.<sup>1223</sup> It also merged into the justifiable killing of felons (see below);
- **Felon - Resisting or Fleeing.** From the time of Bracton, crimes were categorised into felonies and misdemeanours, the former imposing the death penalty (treasons were a type of higher felony). Bracton treated a robber the same as

<sup>1213</sup> [1998] AC 245 at 250. He continued ‘It would, however, be fruitless to debate this here, since the rule has been established beyond doubt by...*Cunningham*...[1982].’

<sup>1214</sup> Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter* (LC no 237). See also Home Officer paper on *Reforming the Law on Involuntary Manslaughter: The Government’s Proposals* (2000).

<sup>1215</sup> *Ibid*, pp 45-6. It was committed if ‘(1) a person by his or her conduct caused the death of another; (2) he or she is aware of a risk that his or her conduct will cause death or serious injury; and (3) it is unreasonable for him or her to take that risk, having regard to the circumstances as he or she knows or believes them to be.’ See also p 3.

<sup>1216</sup> *Ibid*. It was committed if: ‘(1) a person by his or her conduct causes the death of another; (2) a risk that his or her conduct will cause death or serious injury would be obvious to a reasonable person in his or her position; (3) he or she is capable of appreciating that risk at the material; and (4) either (a) his or her conduct falls far below what can reasonably be expected of him or her in the circumstances, or (b) he or she intends by his or her conduct to cause some injury, or is aware of, and unreasonably takes, the risk that it may do so, and the conduct causing (or intended to cause) the injury constitutes an offence.’ See also p 3.

<sup>1217</sup> Crime and Disorder Act 1998, s 36 (high treason and piracy with violence).

<sup>1218</sup> See n 366.

<sup>1219</sup> See ns 546 (Act) & 482 (St German).

<sup>1220</sup> See n 481 (Seipp 1457.022). Yelverton JKB: ‘even if one be attaint of felony, if another kill him, it is felony.’

<sup>1221</sup> Administration of Justice (Miscellaneous Provisions) Act 1938.

<sup>1222</sup> Criminal Law Act 1967, s 1 ‘All distinction between felony and misdemeanor are hereby abolished. It is still possible for a person to be convicted of high treason. However, killing such a person (if convicted or, possibly, indicted) if resisting arrest or fleeing would not merit summary killing, the position, I think, being no different to a person convicted of high treason, escaping from prison, see GS McBain, n 437.

<sup>1223</sup> See n 366 (Green, by the 13<sup>th</sup> century).

a thief and a person who fled the same as one escaping from arrest. A manifest felon who resisted capture (or escaped arrest) could be justifiably killed.

- Cases in 1329 and 1348 confirmed that it was justifiable to kill a thief, robber, burglar or killer who resisted arrest or fled, Thorp CJ in 1348 stating: ‘everyone may lawfully arrest robbers for robbery and felons for felony and if they will not surrender to the peace but stand on their defence [i.e. resist], or flee, he may kill then without blame’.<sup>1224</sup> By the time of Hale (writing in the 1670’s), if not long before, such killing was only permitted only if of ‘necessity’. Otherwise, it would be manslaughter;
- In 1839, the Royal Commission formulated an article to restrict this to where an officer of justice (or other duly authorised officer) when seeking to ‘arrest, detain, or imprison for any felony or for any dangerous wound given...cannot, otherwise than by killing, overtake such person in case of flight or prevent his escape from justice; provided that the party flying or attempting to escape knew that he was pursued for such felony or wound given.’.<sup>1225</sup>
- In 1965, Smith and Hogan described any such right as inappropriate (see **44(c)(i)**) and, in 1967, the distinction between felony and misdemeanour was abolished;
- Today, one would assert that there no right at common law - and no need - for a police officer (and, *a fortiori*, a private individual) to summary kill a person seeking to escape from ‘arrest, detention or imprisonment’ for any crime, even high treason or murder. Further, in any case, the statutory grounds of self defence - and defence of others - cover, to a considerable extent, this position. A person may also take such actions as are reasonable to uphold the ‘king’s peace’ (i.e. the criminal law),<sup>1226</sup>
- **Burglar.** Bracton indicated that a person could only kill a thief (including a night thief or burglar) if he could not ‘otherwise escape danger’.<sup>1227</sup> In 1532, legislation (see **20**) provided that it was justifiable to kill one who: ‘attempted to rob...any person...in their mansion, messuage or dwelling places or that feloniously do attempt to break any dwelling house in the night time.’ This legislation was repealed in 1828. However, it created uncertainty in the interim since it covered only a ‘night thief’ unlike the common law. Also, the not ‘otherwise escape danger’ proviso with respect to the common law did not apply *vis-à-vis* this legislation. Given that a burglar was a felon the statements made above in respect of felons also apply to a burglar resisting arrest or fleeing;
- **Prisoner Escaping.** This needs to be understood against the legislative background.
  - Prior to 1295, a person who broke prison (that is, who escaped using force) committed a felony (even if not yet tried or he was in prison for a civil matter). This draconian provision was ameliorated by *the Statutum de Frangentibus Prisonam* 1295 (repealed in 1948) which provided that it was only a felony to break prison if the person had been committed for felony;
  - In the case of a prison escape, there were severe consequences for the jailer. If negligent, he was fined. If he intentionally (voluntarily) assisted a felon to escape, then, it was a felony in him (and high treason if he intentionally allowed one convicted or, possibly, accused of the same to escape). Given this, it is understandable that jailers would resort to extreme measures to prevent escapes and Thorp CJ in 1348 made it clear that a jailer could kill to prevent an escape (he was likely influenced by the fact that the prisoners in the case he referred to were also trying to kill the jailer),<sup>1228</sup>
  - Lambard, Coke and Blackstone (see **24, 28 & 32**) all limited justifiable killing to where a prisoner attacked the jailer - which was (really) an issue of self defence;
  - Today, the position of a prison officer should be no different to that of a police officer. That is, it is not lawful to kill a person seeking to escape from prison (or actually escaping). And, this applies regardless of the crime for which they have been accused, indicted or convicted. However, this does not prevent a prison officer killing in self defence (or to defend others), where strictly necessary in the circumstances;
- **Housebreaking.** Bracton indicated that it was lawful, where a person entered another’s house in breach of the peace, for the latter to kill ‘if he who killed could defend himself in no other way’.<sup>1229</sup> Where such entry comprised a ‘night time’ burglary, this was also covered by the Act of 1532 (see **20**). Cases in 1532, 1488 and 1505 treated the house as an extension of the individual (likely following Anglo-Saxon law)<sup>1230</sup> with Fineux CJ stating, in 1505, that ‘the house of one is to him his castle and his defence, and where he properly ought to remain, etc.’<sup>1231</sup> This rationale can also be seen in *Hussey* (1924).<sup>1232</sup> The position is now regulated by legislation, the Criminal Justice and Immigration Act 2008, s 51(see **53**).

<sup>1224</sup> See ns 441-2.

<sup>1225</sup> See n 970. This should also be seen in the context of capital punishment. A person, knowing that the death sentence applied to his crime (or who had been convicted of a crime for which death applied) would, obviously, be often tempted to try and escape. And, there were many instances where those on the way to Tyburn sought to do so (often, with the help of friends). Thus, to ensure the due administration of justice (and protection of the officers escorting) the law was suitably severe. This does not apply today.

<sup>1226</sup> See n 941.

<sup>1227</sup> See n 373.

<sup>1228</sup> See n 442.

<sup>1229</sup> See n 370.

<sup>1230</sup> See ns 275-6 and **App E(c)**. A person’s house and palisade were treated as being within their ‘peace’ (*‘mund’*) as much as the individual himself.

<sup>1231</sup> *Ibid.*

<sup>1232</sup> See **App E(c)**.

- **Alien Enemy in Wartime.** This principle was enunciated by Bracton in respect of a ‘just’ war (following the cleric, Raymond of Pennafort).<sup>1233</sup> Coke made it clear that an enemy was not a British subject or one under local protection<sup>1234</sup> and Hale stated the modern formulation ‘*If a man kill an alien enemy, within this kingdom, yet it is felony, unless it be in the heat of war, and in the actual exercise thereof.*’<sup>1235</sup> As to civil wars and major rebellions, one would assert this common law principle does not (and never did) apply. In such cases, subjects were killed pursuant to: (a) martial law; (b) the right to uphold the Queen’s peace (the criminal law); and (c) self defence and defence of another. The modern position in the case of (b) was enunciated in the Report on the Featherstone Riots of 1893 which stated:

By the law of this country everyone is bound to aid in the suppression of riotous assemblages. The degree of force, however, which may lawfully be used in their suppression depends on the nature of each riot, for the force used must always be moderated and proportioned to the circumstances of the case and to the end to be attained...Officers and soldiers are under no special privileges and subject to no special responsibilities as regards the principle of the law.<sup>1236</sup>

Thus, in effect, killing would be permitted as a last resort, if clearly necessary to save life and to suppress the riot.

- **Legislation:**

- **Act of 1293.** This Act (see 17) made it justifiable for a parker to kill after hue and cry: ‘*if any forester, parker, or warrener shall find any trespasser wandering within his liberty, intending to do damage therein, and that will not yield themselves to the foresters, warreners, or parkers, after hue and cry made to stand unto the peace, but do continue their malice, and disobeying the king’s peace, do flee, or defend themselves with force and arms.*’ It was repealed in 1828;
- **Act of 1532.** This Act (see 20(d)) made it justifiable to kill a person who: ‘*attempted to rob or murder any person...in or nigh [near] any common highway, cartway, horseway or footway...*’. It was repealed in 1828;
- **Act of 1553.** This Act (see 22) made it justifiable to kill to suppress an unlawful assembly (after a proclamation to disperse). It was repealed in 1863;
- **Act of 1714.** This Act (see 22) made it justifiable to kill to suppress a riot (after a proclamation to disperse). It was repealed in 1973. Also, at common law, the *Case of Armes* (1597) permitted men to: ‘*suppress riots, rebellions or to resist enemies, and to endeavour themselves [i.e. attempt to] to suppress or resist.*’ This likely reflected the common law going back to Anglo-Saxon times where it was part of the ‘*trinoda necessitas*’.<sup>1237</sup> Today, the law as to killing in the suppression of a riot or rebellion would appear to be doctrine enunciated in the Featherstone Riots of 1893 (see above).
- **Other Cases.** Bracton did not indicate whether it was justifiable to kill a perjurer in a capital case (although Britton did). With capital punishment abolished in 1998, this no longer applies anyway. The justifiable killing of a Turk or Jew (i.e. a non Christian) who was in England without a safe conduct was only the opinion of Mountford, one which Coke rejected. There appears to have been no case. Also, safe conducts no longer exist. In Bracton’s time killing an adulterer *in flagrante* was not, it appears, justifiable. Later, it became an issue of provocation, where it remains today, being covered by the Coroners and Justice Act 2009, s 52.<sup>1238</sup>

In conclusion, all cases where killing is justifiable - bar that of an alien enemy in war - have now ended. This is appropriate since people should not be legally entitled to kill others without exceptionally good reason. Further, many of the situations referred to above also involved excusable homicide, since the killer was acting in self defence or to defend another.

***In conclusion, by 1998, justifiable homicide was reduced to the case of killing an alien enemy in the heat of war. This was a welcome advance. Further, the need to separate justifiable from excusable homicide was no longer necessary.***

## 50. **Law Commission Papers & Blom-Cooper (2004-5)**

### (a) **Report on Partial Defences to Murder**

- In 2004, the Domestic Violence, Crime and Victims Act 2004 created a new homicide offence of causing the non-accidental death of a child or vulnerable adult;<sup>1239</sup>

<sup>1233</sup> See n 372.

<sup>1234</sup> See 28(a).

<sup>1235</sup> See n 738.

<sup>1236</sup> See McBain, n 652, p 46, especially n 250.

<sup>1237</sup> The ‘*threefold necessity*’ required the citizenry (men and boys over the age of 14) to repel internal insurrection, foreign invasion (or the expectation of it) and the construction of military defences, such as fortresses, public works, bridges, highways *etc.* Samuel, n 655, ch 1. See also Robertson, n 18, p 87 (*Laws of Aethelred*), p 87 ‘duties of military service shall always be diligently attended to.’ *Ibid*, p 101 (common need). (*Laws of Canute*), pp 179, 181, 207 (military service). In his time, it appears that king Alfred summoned ‘*land-fryds*’ (armed levies of the kingdom) to drive off the Vikings. G Home, *Medieval London* (1927), p 43

<sup>1238</sup> See 52.

<sup>1239</sup> Domestic Violence, Crime and Victims Act 2004, s 5 (as amended). ‘A person (“D”) is guilty of an offence if - (a) a child or vulnerable adult (“V”) dies or suffers serious physical harm as a result of the unlawful act of a person who - (i) was a member of the same household as V, and (ii) had frequent contact with him, (b) D was such a person at the time of that act, (c) at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and (d) either D was the person whose act caused V’s death or serious physical harm or - (i) D was, or ought to have been, aware of the risk mentioned in paragraph (c), (ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and (iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.’ See also ss (5) (definition of unlawful).

- Also, in 2004, the Law Commission published a report on *Partial Defences to Murder*.<sup>1240</sup> which made recommendations in respect of provocation and DR.<sup>1241</sup> These were later incorporated into the Coroners and Justice Act 2009 (see 52).

### (b) Blom-Cooper & Morris

A treatise by Blom-Cooper & Morris, *With Malice Aforethought* (2004), commenced by citing the opinion of Lord Mustill in 1994 (see 48), and continued:

This is as devastating a comment upon the state of the law in England as it governs the prosecution and punishment of criminal homicide as has been heard in recent years. Yet, for all the notice that has been taken of it in the ensuing years...his trenchant observations might have been little more than a dialogue with the deaf.<sup>1242</sup>

Blom-Cooper & Morris also cited the Law Commission who, in 2004, had called the law of murder a ‘mess.’<sup>1243</sup> (one would agree). Their answer to this was the creation of a single offence of homicide,<sup>1244</sup> something which had also been advocated by Lord Kilbrandon in *Hyam* (1975).<sup>1245</sup> However, this did not achieve acceptance - mainly because ‘murder’ was seen as a crime of unique heinousness by the general public (as well as many lawyers) and there was concern at any watering down of this.

### (c) Consultation Paper – Homicide Act

In 2005, the Law Commission issued a (very) lengthy consultation paper on a Homicide Act for England and Wales.<sup>1246</sup> They noted that the law on homicide was a ‘rickety structure set upon shaky foundations’<sup>1247</sup> and they recommended that it be rationalised by legislation.<sup>1248</sup> The LC defined (incorrectly) murder as follows:

Murder... is committed when someone unlawfully kills another (‘V’) with an intention to kill V or an intention to do V serious harm.<sup>1249</sup>

As for manslaughter:

Manslaughter can be committed in one of four ways: (1) conduct that the defendant knew involved a risk of killing, and did kill, is manslaughter (‘reckless manslaughter’); (2) conduct that was grossly negligent given the risk of killing, and did kill, is manslaughter (‘gross negligence manslaughter’); (3) conduct, taking the form of an unlawful act involving a danger of some harm, that killed, is manslaughter (‘unlawful and dangerous act manslaughter’); (4) killing with the intent for murder but where a partial defence applies.<sup>1250</sup>

However, at this juncture, it may be noted that this fragmentation of the law on involuntary manslaughter into 3 categories is both confusing and unnecessary. ‘Gross negligence’ evolved from ‘negligence’ (and from Hale’s and Bracton’s ‘debitam diligentiam’, see 30(b)). However, gross negligence is, itself, a stage of evolution on the way to ‘recklessness’, such as has occurred in the case of battery where the former expression is no longer used.

The LC’s solution to the problem of a formulation of homicide was a ‘ladder principle’:

- Murder should be divided into *first degree* murder. That is, intentional killing (one with a mandatory life penalty). Also, *second degree* murder (one with a discretionary life maximum penalty);<sup>1251</sup>
- Defences which reduced murder from first to second degree comprised: (a) provocation (gross provocation or fear of serious violence); (b) DR; (c) duress (the threat of death or of life-threatening injury);
- There was also manslaughter.<sup>1252</sup>

<sup>1240</sup> See n 1123.

<sup>1241</sup> Ibid, paras 1.13-18. Unfortunately, the legislative provisions as to provocation which took effect in the 2009 Act (see 52) were very different to those recommended, a matter noted by Judge CJ in *Clinton et al* [2012] 1 Cr App 26.

<sup>1242</sup> Blom-Cooper, n 69, p 1. Ibid, p 171 ‘there is now a substantial body of opinion that considers the present common law offence to murder to be in urgent need of reform.’ Stone, n 64, p 55 ‘It reflects little credit on English criminal law that the definition of two of its most serious offences [murder and manslaughter] is surrounded by such uncertainty.’

<sup>1243</sup> Ibid, p 1, n 1.

<sup>1244</sup> Ibid, p 2 ‘our case is that all the offences presently identified as murder, together with all the various categories of manslaughter, be brought together into a single offence of criminal homicide in a process of amalgamation or consolidation.’

<sup>1245</sup> [1975] AC 55 at 98 ‘There does not appear to be any good reason why the crimes of murder and manslaughter should not both be abolished, and the single crime of unlawful homicide substituted; one case will differ from another in gravity, and that can be taken care of by variation of sentences downwards from life imprisonment.’ See also Law Commission, *A New Homicide Act for England and Wales?* (No 177)(‘LC 177’), pp 29-30, 32-3. See also Blom-Cooper, n 69, p 34.

<sup>1246</sup> See LC 177, n 1245.

<sup>1247</sup> Ibid, p 2 ‘The law governing homicide...is a rickety structure set upon shaky foundations. Some of its rules have been unaltered since the seventeenth century, even though it has long been acknowledged that that they are in dire need of reform. Other rules are of uncertain content or have been constantly changed, so that the law cannot be stated with certainty or clarity. Certain reforms effected by Parliament that were valuable at the time are beginning to show their age or have been overtaken by other legal changes and yet left unreformed.’

<sup>1248</sup> Ibid, p 11 ‘Most lawyers agree that it is time to confine Lord Coke’s definition to the history books. England and Wales need and deserve a modern definition of murder, set down by Parliament.’

<sup>1249</sup> Ibid, p 3. This definition is flawed since (as with transferred malice) the intention and killing need not apply to the same person.

<sup>1250</sup> Ibid. Case (4) was, they noted, voluntary manslaughter. The others comprised involuntary manslaughter.

<sup>1251</sup> Ibid, p 7. This covered (1) killing where the offender did not intend to kill but did intend to do serious harm; (2) recklessly indifferent killing, where the offender realized that his or her conduct involved an unjustified risk of killing, but pressed on with that conduct without caring whether or not death would result. (3) Cases in which there was a partial defence to what would otherwise be ‘*first degree murder*.’

The Law Commission also criticised (as everyone always did) the term ‘*malice aforethought*’.<sup>1253</sup>

***In conclusion, the problem with the Law Commission’s paper was that it tried to cover too much. Further, it made no reference to the need to align the law on battery with that of homicide - something manifestly desirable, since, from the earliest times, the latter had been treated as an aggravated form of the former, and the defences to both were similar.***<sup>1254</sup>

### **51. Criminal Justice and Immigration Act 2008 (‘CJIA 2008’)**

The CJIA made provision on the law relating to self defence. From the time of Bracton (c.1240), this had been remarkably simple:

- It was excusable homicide for a person to kill in self-defence, as well as to protect his kin (family) and household (servants). However, this only applied where killing was unavoidable (see 13(e));
- The only accretion to this were elaborate ‘*back to the wall*’ principles (in order to deal with duelling and brawls) which, as Smith and Hogan pointed out in 1965, were no longer relevant or appropriate in modern times.

The CJIA, 2008 s 76 (*what is reasonable for the purposes of self-defence etc.*) provides:

(1) This section applies where in proceedings for an offence - (a) an issue arises as to whether a person charged with the offence (“D”) is entitled to rely on a defence within [ss (2)], and (b) the question arises whether the degree of force used by D against a person (“V”) was reasonable in the circumstances.

(2) The defences are - (a) the common law defence of self-defence; and (b) the defences provided by [Criminal Law Act 1967, s 3(1)].<sup>1255</sup>

(3) The question whether the degree of force used by D was reasonable in the circumstances is to be decided by reference to the circumstances as D believed them to be, and [ss (4) to (8)] also apply in connection with deciding that question. (*underlining supplied*)

Sub-section 10 provided that a reference to self-defence included acting ‘*in defence of another person.*’

- It is asserted that s 76 encapsulates the common law principle of self defence enunciated since Bracton and that it covers self defence as well as defending others. Thus, as with law on assault and battery,<sup>1256</sup> so also with the law on homicide (which is, at base, an aggravated assault). Thus, s76 should govern the matter and wholly supercede the common law;
- The common law principle of self defence is contained in *Palmer* (1971). As Archbold (2015) states: ‘*The classic pronouncement upon the law relating to self-defence is that of the Privy Council in Palmer v R,*<sup>1257</sup> *approved and followed by the Court of Appeal in R v McInnes*<sup>1258</sup> *...and now effectively reflected in the provisions of the CJIA 2008, s 76.*’ Archbold also notes that:
  - The test of whether force used in self-defence was reasonable is not purely objective;<sup>1259</sup>
  - ‘*the old rule of law that a man must retreat as far as he can has disappeared*’;<sup>1260</sup>
  - ‘*there is no rule of law that a man must wait until he is struck before striking in self-defence.*’<sup>1261</sup> This principle (that a person may act pre-emptively) is as old as the *Laws of Henry I.*<sup>1262</sup>

<sup>1252</sup> Ibid. This covered (1) killing through gross negligence; (2) killing through an intentional act intended to cause injury or involving recklessness as to causing injury.

<sup>1253</sup> Ibid, p 10 ‘the use of the term ‘*malice aforethought*’ to express the culpability element in murder has come in for judicial criticism for more than 300 years.’

<sup>1254</sup> In Anglo-Saxon law, slaying and wounding were both crimes and the only difference related to the tariff payable. So too, in early English law, with mayhem and killing being treated as aggravated batteries (and the defences in excusable homicide applying to both).

<sup>1255</sup> S 3 (*use of force in making arrest etc*) ‘(1) a person may use such force as is reasonable in the circumstances in the prevention of crime, or in effecting or assisting in the lawful arrest of offenders or suspected offenders or of persons unlawfully at large. (2) [ss 1] shall replace the rules of the common law on the question when force used for a purpose mentioned in the subsection is justified by that purpose.’

<sup>1256</sup> See n 215.

<sup>1257</sup> [1971] AC 814, pp 831-2, per Lord Morris ‘It is both good law and good sense that a man who is attacked may defend himself. It is both good law and common sense that he may do, but only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances...It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some act of retaliation which was wholly out of proportion to the necessities of the situation. If an attack is serious so that it puts someone in immediate peril, then immediate defensive action may be necessary. If the moment is one of crisis for someone in imminent danger, he may have to avert the danger by some instant reaction. If the attack is all over and no sort of peril remains then the employment of force may be by way of revenge or punishment or by way of paying off an old score or may be pure aggression. There may no longer be any link with the necessity of defence. Of all these matters the good sense of the jury will be the arbiter.’

<sup>1258</sup> (1971) 55 Cr App R 551. See also Carter & Harrison, n 63, pp 46-9. Also, *Clegg* [1995] 1 AC 482 (where a person used a greater degree of force in self-defence than was necessary in the circumstances and the death of a person resulted, it was murder. That there was no distinction to be drawn between the use of excessive force in self-defence and the use of excessive force in the prevention of crime or in arresting an offender. And, that it made no difference that the person using it was a soldier or a police officer acting in the course of his duty).

<sup>1259</sup> Archbold, n 52, cites *Palmer* (see n 1257), *Shannon* (1980) 71 Cr App R 192 and *Whyte* (1985) 85 Cr App R 283. Archbold also states, para 19-42: ‘in *R v Martin (Anthony)* [2002] 1 Cr App R 27 CA, it was held whilst a court is entitled to take account of the physical characteristics of the defendant in deciding what force was reasonable, it was not appropriate, absent exceptional circumstances which would make the evidence especially probative, to take account of whether the [D] was suffering from some psychiatric condition.’

<sup>1260</sup> Ibid ‘Whether the accused did retreat is only one element for the jury to consider on the question of whether the force was reasonably necessary. Failure to demonstrate unwillingness to fight is merely a factor to be taken into consideration in determining whether a defendant was acting in self-defence, although evidence that he tried to call off a fight is likely to be the best evidence to cast doubt on a suggestion that he was the attacker, retaliator or acting in revenge and thus was not acting in self-defence.’ It cites *Bird (D)* [1985] 81 Cr App 110.

- It was regrettable that s 76 only made a cross reference to the CLA 1967, s 3, instead of incorporating it. And, that it only referred to the common law, instead of incorporating it. Both should have been combined into s 76. The failure to make one, comprehensive, provision simply adds to the confusion.

It may be noted - at this juncture - that s 76 was amended by the Crime and Courts Act 2013 in order to deal with the defence of a person's property.

***In conclusion, the CJIA 2008, s 76 now governs self defence, defence of others and defence of property. It should be amended to supercede common law principles and incorporate the CLA 1967, s 3.***

## **52. Coroners and Justice Act 2009**

### **(a) Provocation**

At common law, the defence of provocation reduced murder to manslaughter. The position at common law was abolished by the Coroners and Justice Act 2009 ('**2009 Act**') which also repealed the Homicide Act 1957, s 3.<sup>1263</sup> The 2009 Act, s 54 (1) provides:

Where a person ('**D**') kills or is a party to the killing of another ('**V**'), D is not to be convicted of murder if –

- (a) D's acts and omission in doing or being a party to the killing resulted from D's loss of self control,
- (b) the loss of self control had a *qualifying trigger*, and
- (c) a person of D's sex, and age, with a normal degree of tolerance and self-restraint and in the circumstances of D, might have reacted in the same or in a similar way to D.<sup>1264</sup> (*italics supplied*)

Section s 55 (1) provides, as to the meaning of '*qualifying trigger*':

- (1) This section applies for the purposes of section 54.
- (2) A loss of self-control had a qualifying trigger if ss (3), (4) or (5) applies.
- (3) This [ss] applies if D's loss of control was attributable to D's fear of serious violence for V against D or another identified person.
- (4) This [ss] applies if D's loss of self-control was attributable to a thing or things done or said (or both) which (a) constituted circumstances of an extremely grave character, and (b) caused D to have a justifiable sense of being seriously wronged.
- (5) This [ss] applies if D's loss of self control was attributable to a combination of the matters mentioned in [ss] (3) and (4).
- (6) In determining whether a loss of self control had a qualifying trigger - (a) D's fear of serious violence is to be disregarded to the extent that it was caused by a thing which D incited to be done or said for the purpose of providing an excuse to use violence; (b) a sense of being seriously wronged by a thing done or said is not justifiable if D incited the thing to be done or said for the purpose of providing an excuse to use violence; (c) the fact that a thing done or said constituted sexual infidelity is to be disregarded.
- (7) In this section references to 'D' and 'V' are to be construed in accordance with section 54.

### **(b) Diminished Responsibility ('DR')**

The 2009 Act, s 52 (1) amended the Homicide Act 1957, s 2 in respect of DR, by substituting a new provision:

- (1) A person ('**D**') who kills or is a party to the killing of another is not to be convicted of murder if D was suffering from an abnormality of functioning which - (a) arose from a recognised medical condition, (b) substantially impaired D's ability to do one or more of the things mentioned in [ss (1A))] and (c) provides an explanation for D's acts and omissions in doing or being a party to the killing.
- (1A) Those things are – (a) to understand the nature of D's conduct; (b) to form a rational judgment; (c) to exercise self control.
- (1B) For the purposes of (1)(c), an abnormality of mental functioning provides an explanation for D's conduct if it causes, or is a significant contributory factor in causing, D to carry out that conduct.<sup>1265</sup>

<sup>1261</sup> 'If another strikes at him he is entitled to get his blow in first if it is reasonably necessary so to do in self-defence. It cites *Deana* [1909] 2 Cr App R 75, CCA. 'And the mere fact that the [D] was the initial aggressor does not of itself render self-defence unavailable as a defence to what he does in any ensuing violence; availability must depend on all the circumstances, and allow for the possibility that the initial aggression may have resulted in a response by the victim which was so out of proportion as to give rise to an honest belief on the part of the defendant that it was necessary for him to defend himself, with the amount of force used for that purpose being reasonable.' Archbold cites *Rashford* [2006] Crim LR 547 & *Keane, McGrath* [2011] Crim LR 393.

<sup>1262</sup> See 10.

<sup>1263</sup> For problems with the wording see *Smith (Morgan)* [2001] 1 AC 146 and LC 290, n 1123, pp 10-1.

<sup>1264</sup> Ss 2 'For the purposes of [(1) a], it does not matter whether or not the loss of control was sudden. (3) [In ss (1)(c)] the reference to '*the circumstances of D*' is a reference to all of D's circumstances other than those whose only relevance to D's conduct is that they bear on D's general capacity for tolerance or self-restraint. (4) [ss 1] does not apply if, in doing or being a party to the killing, D acted in a considered desire for revenge. (5) on a charge of murder, if sufficient evidence is adduced to raise an issue with respect to the defence under [ss 1], the jury must assume that the defence is satisfied unless the prosecution proves beyond reasonable doubt that it is not. (6) For the purposes of [ss 5], sufficient evidence is adduced to raise an issue with respect to the defence if evidence is adduced on which, in the opinion of the trial judge, a jury, properly directed, could reasonably conclude that the defence might apply. (7) A person who, but for this section, would be liable to be convicted of murder is liable instead to be convicted of manslaughter. (8) The fact that one party to a killing is by virtue of this section not liable to be convicted of murder is liable instead to be convicted of manslaughter.

<sup>1265</sup> It continues: '(2) on a charge of murder, it shall be for the defence to prove that the person charged is by virtue of this section not liable to be convicted of murder. (3) A person who but for this section would be liable, whether as principal or as accessory, to be convicted of murder shall be liable

*In conclusion, the 2009 Act made (welcome) statutory changes to modernise the law on provocation and DR, such that regard to the former law was no longer necessary.*

### 53. Archbold (2015)

#### (a) Murder

The modern - and most accurate - statement of the law is contained in Archbold (2015). It cites Coke, 'modified to conform with changes made by statute and decisions of the courts'. It states:

Subject to three exceptions,<sup>1266</sup> the crime of murder is committed where a person of sound mind and discretion unlawfully kills any reasonable creature in being and under the Queen's peace with intent to kill or cause [GBH].<sup>1267</sup>

This may be compared with Coke's original wording:

Murder is when a man of sound memory, and of the age of discretion, unlawfully kills within any country of the realm any reasonable creature in *rerum natura* under the king's peace, with malice forethought, either expressed by the party or implied by law... (see 28) (*spelling modernised and underlining supplied*)

Thus, at long last, 'premeditated malice' has been replaced. On a side-wind (as it were) since no case or legislation, as such, has formerly abolished the legal concept. Archbold notes that the principles applicable to manslaughter are the same as for murder, *apart* from the pre-requisite of an intention to kill or cause GBH. As to the pre-requisites for murder, Archbold notes as follows:

- **Sound Mind & Discretion.** A person must not be: (a) insane; (b) under the age of 10, restrictions not peculiar to homicide;<sup>1268</sup>
- **Unlawfully.** The onus is on the Crown to prove that the killing is unlawful. That is, without legal justification or excuse, such as in the case of self defence or *bona fide* surgical treatment;<sup>1269</sup>
- **Kills.** The person must be killed. The killing may be direct or indirect - such as by neglect.<sup>1270</sup> The act of the accused should sufficiently contribute to the death, but need not be the sole (or principal) cause.<sup>1271</sup> Archbold also considers the killing of a person believed to be dead;<sup>1272</sup>
- **Reasonable creature in Being.** Archbold submits that this relates to the appearance rather than the mental capacity of the victim and is 'apt to exclude monstrous births'.<sup>1273</sup> To kill a child in the womb is not murder (or manslaughter) but a crime under the Infant Life (Preservation) Act 1929.<sup>1274</sup> Where a person attacks a pregnant woman, Archbold refers to the *A-G's Reference (No 3 of 1994)*<sup>1275</sup> and to where the intent was to attack the

---

instead to be convicted of manslaughter. (4)The fact that one party to a killing is by virtue of this section not liable to be convicted of murder shall not affect the question whether the killing amounted to murder in the case of any other party to it.' Archbold, n 52, para 19-66. Archbold notes that the defence of DR is not available on a charge of attempted murder.

<sup>1266</sup> These deal with: (a) provocation (loss of control); (b) DR; (c) suicide pact, see 52. Archbold, n 52, para 19-4 also refers to an exception in respect of perjury. However, this was only relevant when there was capital punishment - something which no longer exists, *post* 1998. This wording, therefore, is otiose.

<sup>1267</sup> Ibid, n 52, para 19-1.

<sup>1268</sup> Ibid. para 19-3. See also Blackstone CP, n 67, B1 'Murder is when a [person] unlawfully kills...any reasonable creature in *rerum natura* under the Queen's peace, with malice aforethought.'

<sup>1269</sup> Archbold also states, n 52, para 19-38 '*Bona fide* medical or surgical treatment is not 'unlawful' and therefore death resulting therefrom does not amount to murder, even though death or serious injury is foreseen as a probable consequence. Nor does it amount to manslaughter, unless the person giving the treatment has been guilty of 'gross negligence.'

<sup>1270</sup> Ibid, para 19-5 'If a man does any act of which the consequence is death, such killing may be murder although no stroke were struck by himself. Archbold cites *Huggins* (1730) and *Bambridge* (1729), see **App B (f)** and *Acton* (1729) 17 ST 462 at 511,526 & 546. Archbold also cites *Walters* (1841), *Pinhorn* (1844), *Michael* (1840) & *Phillpot* (1853), see **Apps B(e) & G**.

<sup>1271</sup> Ibid, para 19-6. Archbold also looks at: (a) *novus actus interveniens*; (b) acceleration of death; (c) absence of body; (d) medical treatment; (e) causation, and (f) alternative acts. Archbold also notes that the position on manslaughter *re* indirect acts is the same as in the case of aggravated assault (see (g) fear of violence; and (h) aggravated assault), which is appropriate, since manslaughter is simply an aggravated battery.

<sup>1272</sup> Ibid, para 19-20.

<sup>1273</sup> Ibid, para 19-14 cites *Re A (Children)(Conjoined Twins: Surgical Separation)* [2001] Fam 147, 212-4. However, there is no suggestion in Coke that, in his using the word 'reasonable,' he was seeking to exclude severely deformed or monstrous children. See also n 649. See also Blackstone CP, n 67, B18 'This [reasonable creature in *rerum natura*] can be safely shortened to 'any human being'. One would agree, save that 'person' is a shorter and better word.

<sup>1274</sup> Ibid, paras 19-15.

<sup>1275</sup> *A-G's Reference (No 3 of 1994)* [1998] AC 245 'Where a person attacks a pregnant woman intending to do her [GBH] and in consequence of that attack, she goes into premature labour with the child being born alive but subsequently dying as a result of being born prematurely, the attacker would be guilty of manslaughter in relation to the death of the child but could not be guilty of murder.'

child.<sup>1276</sup> It must be proved that the entire child has been born into the world in a living state. The fact that it breathes is not conclusive; there must be independent circulation;<sup>1277</sup>

- **Queen's Peace.** This includes everyone save for: (a) killing an alien enemy in the course of war;<sup>1278</sup> (b) possibly, rebellion.<sup>1279</sup> However, (a) is very rare<sup>1280</sup> and it is asserted that (b) is incorrect since killing in civil war, riots and rebellion were governed by different principles of law (see 49).

Thus, the crime of murder is committed when:

- one person kills another
- with the intent to kill or to inflict GBH.<sup>1281</sup>

*The criteria of 'sound mind and discretion' are not particular to murder. Therefore, they need not be included in any definition. Also, since killing an alien enemy in the course of war is a common law defence (justifiable homicide) it does not need to be included in the definition of murder.*

#### **(b) Murder – Provocation (Loss of Control)**

Archbold notes that - at common law - provocation reduced murder to manslaughter.<sup>1282</sup> Since the common law defence of provocation was abolished by the Coroners and Justice Act 2009 ('2009 Act') which also repealed the Homicide Act 1957, s 3 - it is asserted that all the instances of provocation prior to the 2009 Act (many of which are cited in **App B**) should now be treated with circumspection since:

- the Act stipulates new principles (a new regime);
- the loss of control to reduce the killing from murder must have a 'qualifying trigger' - one which has a high threshold in that it refers to 'serious violence', 'circumstances of an extremely grave character' and D having a 'justifiable sense of being seriously wronged'. None of these were specified in such explicit terms in the older caselaw.

In respect of this, in *Clinton et al* (2012), Judge CJ stated:

The ancient common law defence of provocation, reducing murder to manslaughter, was abolished and consigned to legal history books. Just because loss of control was an essential ingredient of the old provocation defence, the name is evocative of it. It therefore needs to be emphasised at the outset that the new statutory defence is self-contained. Its common law heritage is irrelevant. The full ambit of the defence is encompassed within these statutory provisions.<sup>1283</sup> (*underlining supplied*)

In the case of sexual infidelity (including adultery), Archbold states:

The exclusion of sexual infidelity in section 55(6)(c) is entirely new. This provision is likely to attract the Court of Appeal early in the life of the new regime. The provision does, it is submitted, give a clue to just how seriously wronged a person would have to feel to come within subsection (4). Whilst it may have been aimed at men who kill their former partners out of jealousy when they take up with someone new, it would also apply to the case of a spouse (male or female) who comes home to discover his or her wife or husband in the act of making love in the marital bed with their best friend.

If the jury are not allowed to regard that as giving rise to a justifiable feeling of being seriously wronged, it can readily be seen just how serious the wrong is intended to be. Such a factual situation also highlights a potential anomaly to which this provision gives rise. If the returning spouse loses control and kills his adulterous spouse, he will not be able to rely on the defence under section 54; but if he loses control and kills his best friend, it is at least arguable that the defence will be open to him. His best friend has not been killed on grounds of sexual infidelity.<sup>1284</sup> (*wording divided for ease of reference*)

In conclusion, one would assert that this legislation creates a new (and comprehensive) regime to deal with the issue of provocation. One which, clearly, 'tightens' up the circumstances in which a person can seek to reduce murder to

<sup>1276</sup> Ibid. Archbold notes: 'The House of Lords declined to consider the liability of a person whose intent was to kill or do serious harm to the child, rather than to the mother, but the decision of the Court of Appeal ([1996] 1 Cr App R 351), together with the ancient authorities of *Senior* (1832), see **App B(b)**, and *West* (1848), see **App B(b)**, suggest that he would be liable to conviction for murder. In so far as the decision of the Court of Appeal depended on the doctrine of transferred malice, it must, however, be regarded as open to doubt in view of the unwillingness of the House of Lords to apply the doctrine where the attacker's intent was directed against the mother. For further consideration of this aspect of the decision of the Court of Appeal, see the third and fourth supplements to the 1966 edition of this work.'

<sup>1277</sup> Archbold, n 52, para 19-15.

<sup>1278</sup> Ibid, para 19-18 'If the deceased were an alien enemy, and killed in the actual heat and exercise of war, this is a matter of justification, as an alien is not in the Queen's peace'. Archbold cites Hale, see 30 and Coke, see 28. Also: 'The same rule applies where an alien enemy is charged with killing a British subject.' Archbold cites *Depardo* (1807), see n 1207. Archbold also states: 'if the crime is committed in England, it is no defence that the alien did not know English law.' Archbold cites *Esop* (1836), n 1207.

<sup>1279</sup> Archbold cites *Page* (1954), see n 1110. Cf. Offences against the Person Act 1861, ss 9 & 10. See also Blackstone CP, n 67, B1.9.

<sup>1280</sup> The only case I have encountered is H Summerson (ed), *Crown Pleas of the Devon Eyre of 1238*, p 94 'Serlo de Bikebire, charged with homicide in war time, comes, denies all and puts himself on the country. The jurors testify that he killed him in the time of the great war, so he is quit'. A note suggests that this refers to the civil war at the end of king John's reign (1199-1216) and Serlo would, likely, have been on the Crown side.

<sup>1281</sup> 'Inflict' is the correct word since it reflects the early law. See also *Newbury* [1997] AC 500, p 509 per Lord Salmon 'killing with intent to inflict GBH.' (*italics supplied*) Cf. Blackstone CP, n 67, B1.6 'intention to kill or to cause GBH'.

<sup>1282</sup> Archbold, n 52, para 19-54. See also Blackstone CP, n 67, B1.16.

<sup>1283</sup> *Clinton et al* [2012] 1 Cr App 26 at p 364. See also Blackstone CP, n 67, B1.26.

<sup>1284</sup> Archbold, n 52, para 19-60.

manslaughter by virtue of loss of control. It may be noted that killing in a duel would still be murder, being where ‘*D acted in a considered desire for revenge*’ (see s 54(4)).<sup>1285</sup>

### (c) **DR & Suicide Pacts**

In respect of DR, Archbold referred to the 2009 Act (see 52) and considered issues relating to: abnormality of mind, direction to the jury, medical evidence, evidence for the Crown on insanity or DR, plea of guilty to manslaughter and sentence.<sup>1286</sup> In respect of suicide pacts, Archbold referred to the Homicide Act 1957, s 4.<sup>1287</sup>

### (d) **Manslaughter**

Archbold categorises manslaughter into: (a) voluntary; and (b) involuntary - the former comprising murder but where the crime is reduced to manslaughter due to: (a) provocation; (b) DR; (c) a suicide pact, all of which are now statutory.<sup>1288</sup> As to involuntary manslaughter, Archbold states:

Involuntary manslaughter is unlawful killing without intent to kill or cause [GBH].[i.e. it excludes murder]<sup>1289</sup>  
Apart from intent, the elements of the offence are the same as murder. The rules as to causation, self defence *etc* therefore apply...

The difficulty is to identify the elements which may make the killing unlawful.<sup>1290</sup> The law was, however, considerably clarified by the House of Lords in *R v Adomako*<sup>1291</sup>...There are two classes of involuntary manslaughter, namely ‘*unlawful act*’ manslaughter and manslaughter by gross negligence involving breach of duty.<sup>1292</sup>

***If manslaughter was placed in statutory form - there would be no need to distinguish between voluntary and involuntary manslaughter, since provision would be made, instead, for murder to be ‘reduced’ to manslaughter in these circumstances (see App I).***

### (i) **Unlawful Act Manslaughter**

Archbold states that:

In respect of manslaughter arising from an unlawful act of the accused, the following propositions appear to be established:

- (a) the killing must be the result of the accused’s unlawful act (though not his unlawful omission);
- (b) the unlawful act must be one, such as an assault, which all sober and reasonable people would inevitably realise must subject the victim to, at least, the risk of some harm resulting therefrom, albeit not serious harm;
- (c) it is immaterial whether or not the accused knew that the act was unlawful and dangerous, and whether or not he intended harm, the mens rea required is that appropriate to the unlawful act in question;
- (d) ‘harm’ means physical harm.<sup>1293</sup>

As to (a), Archbold refers to a *dictum* in *Larkin* (1943)<sup>1294</sup> also noting that: (a) a lawful act does not become unlawful if it contravenes the criminal law in the manner of its execution, such as careless driving;<sup>1295</sup> (b) if death results from an act of omission, manslaughter will not inevitably follow.<sup>1296</sup> Manslaughter might also arise by way of gross negligence involving a breach of a duty. Archbold cites *Lamb* (1967)<sup>1297</sup> and *Cato* (1975)<sup>1298</sup> and notes the following:

<sup>1285</sup> Ibid. Archbold also considers: the effect of intoxication, the duty of counsel, the judge, directing the jury and the sentence, see paras 60a -65.

<sup>1286</sup> Ibid, paras 19-83 to 97.

<sup>1287</sup> Ibid, para 19-99. See also Blackstone CP, n 67, B1.33.

<sup>1288</sup> Ibid, para 19-110.

<sup>1289</sup> Ibid, para 19-111. Archbold cited *Taylor* (1834) 2 Lew 215 (168 ER 1133) per Taunton J ‘Manslaughter is homicide, not under the influence of malice...’. See also Stephen, n 55 (Digest) (9<sup>th</sup> ed), p 221.

<sup>1290</sup> Archbold cited *Andrews v DPP* (1937), see n 1129.

<sup>1291</sup> *Adomako* [1995] 1 AC 171. See also J Herring & E Palser, *The Duty of Care in Gross Negligence Manslaughter* [2007] Crim LR 24-39.

<sup>1292</sup> Archbold, n 52, para 19-111.

<sup>1293</sup> Ibid, para 19-112. Cf. Blackstone CP, n 67, B1.36 used different wording ‘(a) killing by an unlawful act likely to cause bodily harm – often called ‘*unlawful act manslaughter*’ or by ‘*constructive manslaughter*.’”

<sup>1294</sup> 29 Cr App R 18, at 23 (unreported on this point at [1943] KB 174) per Humphreys J ‘Where the act which a person is engaged in performing is unlawful, then if at the same time it is a dangerous act, that is, an act which is likely to injure another person, and quite inadvertently [i.e. accidentally] the doer of the act causes the death of that other person by that act, then he is guilty of manslaughter.’ This was approved in *Newbury* [1977] AC 500 at 506, 507, per Lord Salmon. However, Humphreys also said that, when it was a lawful act it was not manslaughter ‘unless it shows the accused to have been reckless as to the consequences of the act.’ (*underlining supplied*) Humphreys J never questioned whether the issue for both should have been recklessness - with the fact that the act was lawful or unlawful (or dangerous or not) simply being factors for the jury to consider in light of the overall picture as to how the killing eventuated.

<sup>1295</sup> Archbold cites *DPP v Andrews* (1937), see n 1129.

<sup>1296</sup> Archbold cites *Lowe* (1973), see **App B(e)**.

<sup>1297</sup> Archbold stated ‘the accused had pulled the trigger of a revolver in jest. The court pointed out that this was not an unlawful act and therefore the prosecution could only establish manslaughter by proving gross negligence.’ See also **App F(c)**.

<sup>1298</sup> 62 Cr App R 41. Archbold states: ‘Injecting another person with heroin which the [D] had unlawfully taken into his possession for that purpose, is an unlawful act and if death results the offence is manslaughter notwithstanding that the victim consented and the heroin is only one of the causes of death. i.e. a cause of death outside the *de minimis* range.’

- **Supplying Drugs - Kennedy.** A person was not guilty of unlawful act manslaughter if involved in the supply of a class A drug to a fully informed and responsible adult, which was then freely and voluntarily self-administered by the person to whom it was supplied and which caused his death since the supply (without more) could not harm the person in any way and so could not form the foundation of a charge of unlawful act manslaughter. In any event, the act of supply could not be said to cause death because the informed voluntary choice of the person supplied to take it, broke the chain of causation;<sup>1299</sup>
- **Attempt to Procure Abortion - Buck & Buck.** The death of the mother resulting from an unlawful attempt to procure an abortion is manslaughter, at least;<sup>1300</sup>
- **Playing Around - R v P.** The prosecution case was that the P and another youth (after post exam drinking and as a joke) had thrown X (a 16 year old non swimmer) off a bridge, who drowned. P must have known X did not consent, though he was unaware X was a non swimmer. It was held sufficient for the judge to direct the jury that the prosecution had to prove:
  - P had taken some part in causing the deceased to fall from the bridge;
  - in so doing, P had applied pressure to X without his consent;
  - P had not held a genuine but mistaken belief (whether reasonable or not) that X was consenting;
  - X's falling was not an accident;
  - that all sober and reasonable people would inevitably have realised that what P did, in taking some part in causing X to fall from the bridge, must have subjected X to the risk of harm, albeit not serious harm (whether the D realised it or not);<sup>1301</sup>
- **Affray - Carey.** An offence of affray may constitute the unlawful act;<sup>1302</sup>
- **Act calculated to Harm - Mitchell.** An act calculated to harm A was manslaughter if it killed B. It was immaterial there was no physical contact between the assailant and B;<sup>1303</sup>
- **Direction at Victim - Goodfellow.** The unlawful act did not need to be directed at the victim so long as there was no fresh and intervening cause between the act and death;<sup>1304</sup>
- **Burglary.** In *Bristow* (2014) the court approved a direction to the jury that, if prior to embarking on a burglary, the burglar foresaw the possibility that someone might try to intervene to stop the burglary or his escape and, prior to the burglary taking place, all sober and reasonable people would inevitably have recognised that any such intervention must subject the intervenor to risk of some physical harm as a result, and someone did so intervene and suffered injuries from which he died, the burglar would be guilty of unlawful act manslaughter.<sup>1305</sup>

It may be noted in respect of Archbold's statements on unlawful act manslaughter, that:

- Archbold's reference to 'harm' meaning physical injury, is no different to the pre-requisite in battery (including GBH) that there be physical harm.<sup>1306</sup> Further, since killing is simply an aggravated battery, this is apposite;
- Similarly, battery (including GBH) and killing can operate by transferred malice. Indeed, it is surprising that *Mitchell* (*supra*) was not decided much more simply - on the basis of there being indirect, transferred malice (both of which principles have existed since Bracton);

<sup>1299</sup> Archbold, n 52, para 19-114. *Kennedy (No 2)* [2008] 1 AC 269 (not followed in Scotland, see *Kane v HM Advocate*; *McAngus v HM Advocate*. The Times. Feb 6<sup>th</sup>, 2009).

<sup>1300</sup> *Ibid*, n 52, para 19-115. See also *Buck and Buck* (1960) 44 Cr App R 213. See also *Creamer* [1966] 1 QB 72 (an abortion case) as well as *Gunewardene* [1951] 2 KB 600. However, today abortion is legal in some instances and so these cases are better seen as examples of recklessness (as, indeed, any 'back street' abortion leading to a death would, likely, be treated today).

<sup>1301</sup> Archbold cites *Brown (A)* [1994] 1 AC 212 where Lord Mustill said that, as a matter of public policy, the courts had decided that the criminal law did not concern itself with such activities as 'rough horseplay'.

<sup>1302</sup> [2006] Crim LR 842. Archbold continues, n 52, para 19-115 'but see the commentaries thereto in both the Criminal Law Review and the Criminal Law Week 2006/33/13, especially in relation to the uncertainty as to the manner in which the prosecution put their case. Where the deceased was a victim of the affray (see the definition thereof in section 3(1) of the Public Order Act 1986)...the prudent and straightforward course will be to found an allegation of manslaughter on the assault on the victim.'

<sup>1303</sup> *Mitchell* [1983] QB 741. X, having been assaulted, fell against Y (an elderly person) who fell over and sustained injury which led to her death. Archbold also cites *Pagett* (1983) 79 Cr App R 279. Here, a conviction for manslaughter was upheld when the appellant used the deceased (Y) as a human shield when firing at the police and Y was killed by a retaliatory shot.

<sup>1304</sup> *Goodfellow* (1986) 83 Crim App R 23 (arson at own home committed with view to obtaining re-housing, intention to rescue family, but fire got out of hand).

<sup>1305</sup> Archbold, n 52, para 19-115.

<sup>1306</sup> Archbold notes that, in *Dawson* (1985) 81 Cr App R 150, the court expressed the *obiter* view that - while harm meant physical harm - in the context of manslaughter, this included injury to the person through the operation of shock emanating from fright. Such was consistent with *Watson* (1989) 89 Cr App R 211 (during the course of a burglary the accused was confronted by the sole occupant (87 year old man) who died of heart failure within 90 minutes of entry. The unlawful act comprised the whole of the burglarous intrusion, during which the accused must have become aware of the victim's approximate age and frailty. Cf. *Perman* [1996] 1 Cr App R 24 where the court said that robbery with an unloaded gun, used for the purpose of causing fright or hysteria, would not found a conviction for manslaughter; *aliter*, if the intention were the same but the gun, being loaded, went off accidentally. Archbold states 'It should be noted, however, that *Perman* was actually concerned with the liability of the accessory where the principal went outside the scope of a joint enterprise by intentionally shooting the victim.'

- Archbold also notes that *mens rea* is essential to manslaughter, it is limited to the *mens rea* appropriate to the unlawful act.<sup>1307</sup> Thus, it is unnecessary to prove the accused *knew* the act was unlawful or dangerous.<sup>1308</sup> (this is also the position *re* battery). The test was stated in *Church* (1966):

*an unlawful act causing the death of another cannot, simply because it is an unlawful act, render a manslaughter verdict inevitable. For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm.*<sup>1309</sup>

***As will be seen (see 57), it is asserted there is no need for this category (which, originally derived from Bracton's observations on what was 'licit', see 13). Whether the act is unlawful or not should simply be a factor to be taken into account by the jury when considering whether the killer was reckless or not.***

### **(ii) Gross Negligence**

Archbold notes that the ordinary principles relating to negligence apply to determine whether it has occurred and that it is only a crime if there is 'gross negligence' - a matter for the jury. Also, that this was confirmed in *Adomako* (1995).<sup>1310</sup> In this case, Archbold noted that Mackay LC indicated that a judge was free to use the word 'reckless' in its ordinary meaning as part of his exposition of the law and he approved the definition given in *Stone and Dobinson* (1977) where Lane LJ stated (after quoting Lord Atkin):<sup>1311</sup>

It is clear from that passage that indifference to an obvious risk and appreciation of such risk, coupled with a determination nevertheless to run it, are both examples of *recklessness*... What the prosecution have to prove is a breach of ... duty in circumstances that the jury feel convinced that the [D's] conduct can properly be described as *reckless*. That is to say a *reckless* disregard of danger to the health and welfare of the infirm person. Mere inadvertence is not enough. The [D] must have been proved to have been indifferent to an obvious risk of injury to health, or actually to have foreseen the risk but to have determined to run it.<sup>1312</sup> (*italics supplied*)

As to the existence of a 'duty of care' (negligence), Archbold notes:

- this is a question of law for the judge;
- a person may become liable for manslaughter by neglect of a positive duty arising from the nature of his occupation.<sup>1313</sup> However, this is not confined to the same;<sup>1314</sup>
- it was no defence that the D was also guilty of negligence which contributed to his death.<sup>1315</sup>

***As later indicated (see 57), it is asserted that 'gross negligence' should be one and the same as 'recklessness' - not least since battery only refers to the latter and manslaughter is simply an aggravated battery.***

### **(iii) Correcting Children & Sports**

- **Children**. Archbold notes that - at common law - the lawful correction of a child by a person *in loco parentis* was not unlawful but that the effect of the Children Act 2004 'would seem' to be that the battery of a child causing ABH (or worse) would not constitute reasonable chastisement.<sup>1316</sup>
- **Sports**. Archbold notes that all struggles in anger are unlawful<sup>1317</sup> and that death occasioned by them is manslaughter, at least.<sup>1318</sup> However, that contact sports are not unlawful when fairly conducted.<sup>1319</sup>

<sup>1307</sup> Archbold cites *Lamb* (1967), see **App F(c)** and *Lowe* (1973), see **App B(e)**.

<sup>1308</sup> *Newbury* (1977), see **App F(c)**.

<sup>1309</sup> *Church* [1966] 1 QB 59, see **App D(a)**. Archbold also notes: 'In assessing the risk of harm, the jury are entitled to ascribe to the hypothetical bystander knowledge which the accused would have gained during the commission of the offence.' It cites *Watson*, see n 1306.

<sup>1310</sup> [1995] 1 AC 171. Archbold, n 52, p 19-122 also notes that, in *Misra and Srivastava* [2005] 1 Cr App R 21, it was held that the ingredients of the offence were sufficiently clearly defined in *Adomako* and involved no incompatibility with the certainty requirements of the EHCR, art 7 as to the suggested circularity of the definition (*viz.* it was for the jury to decide whether the [D's] conduct was so bad in all the circumstances as to amount to a crime), the question for the jury was not whether the D's negligence was gross and whether, additionally, it was a crime, but whether his behaviour was grossly negligent and, consequently, criminal. The direction to the jury should refer to the fact that there was a risk of death, not merely of serious injury that is relevant.'

<sup>1311</sup> [1977] QB 354, see n 1129 for Lord Atkin. In *Adomako*, n 1291, p 187 'I consider it perfectly appropriate that the word 'reckless' should be used in cases of involuntary manslaughter.'

<sup>1312</sup> *Ibid.*, pp 363, 193. In *West London Coroner, ex p Gray*, [1988] 1 QB 467, 477, Watkins LJ stated: 'It should be explained that to act recklessly means that there was an obvious and serious risk to the health and welfare of M to which that police officer, having regard to his duty, was indifferent or that, recognizing the risk to be present, he deliberately chose to run the risk by doing nothing about it. It should be emphasized, however, that a failure to appreciate that there was such a risk would not by itself be sufficient to amount to recklessness.' Archbold also cited *Lidar* [2004] 4 Archbold News 3 'it was said that in a case of conscious risk taking, it is appropriate to direct the jury by reference to recklessness; and that what has to be proved is an obvious risk of serious harm from the [D's] conduct, objectively assessed, and an indifference to that risk on the part of the [D], or foresight thereof plus a determination nevertheless to run it. It was further said that self defence and defence of another may be an issue to be left to the jury where the case is put on the basis of recklessness, whereas if it is put on the basis of gross negligence such issues are inevitably wrapped up in the issue of negligence itself.'

<sup>1313</sup> Archbold, n 52, para 19-125 cited *Lowe* (1850), see **App B(e)** and *Markuss* (1864), see **App H**. Also, *Curtis* (1885) (local authority officer).

<sup>1314</sup> Archbold states 'where a person creates, or contributes to the creation of, a state of affairs that he knows (or ought reasonably to know) has become life threatening, a consequent duty on him to act by taking reasonable steps to save the other's life will normally arise.' Archbold cites *Evans (Gemma)* [2009] 2 Cr App R 10 (overdose of heroin) and *Ruffell* [2003] 2 Cr App R (S) 53.

<sup>1315</sup> Archbold refers to *Swindall & Osbourne* (1846) 2 C & K 230 (175 ER 95).

<sup>1316</sup> Archbold refers to *Griffin* (1869), see **App B(g)**, *Woods* (1921), see **App B(g)** and *Mackie* (1973), see **App B(g)**.

<sup>1317</sup> This is a legal fiction which is unnecessary and, clearly, militates against reality.

In the past, both the chastisement of children and the playing of sports (apart from licensed tournaments which died out by the 16th century) never permitted the *killing* of a person - nor, indeed, the infliction of GBH. This is also the position today. Given this, legislation should reflect it (see **App I**).

#### (e) Defences

This is dealt with in **51**. Archbold refers to the CIJA 2008, s 76 and to the case of *Palmer* (1971) which is 'now effectively reflected' in the Act.<sup>1320</sup>

- **Defence of Another.** Archbold notes: 'Much of what was said in *Palmer* may be easily adapted to this situation (e.g. as to a person not being able to weigh to nicety the exact measure of force needed)'.<sup>1321</sup>
- **Defence of Property.** Archbold notes: 'Reasonable force used for such purposes is lawful and it is submitted that the same principles apply as to self-defence'.<sup>1322</sup>

One would agree. However, as noted in **51**, it was tragedy that s 76 was not formulated to incorporate the common law position - as well as that under the CLA 1967, s 3.

**In conclusion, Archbold sets out the law on homicide. However, it does this in a way that makes it difficult to compare homicide with battery - and to see that the sub-categories of manslaughter are unnecessary as well as causing a mis-match with battery. Since manslaughter is simply an aggravated battery this should not be so, see 55.**

#### 54. Summary: Law to 2015

As indicated at the outset of this article, the history of the law of murder and manslaughter is clear evidence that: (a) unduly restrictive categorisation; and (b) the employment of legal fictions, have severely impeded the development of this area of law. This was especially so with the concept of 'premeditated malice'. Likely, a simple means in Babylonian, Old Testament and Anglo-Saxon times, to save brawlers from death, it became a 'via crucis' (in legal terms) when it was utilised as the pre-requisite for murder. As it is, by 2015, the law on murder and manslaughter has simplified in some areas. However, in others, it is still problematic. The position would appear to be as follows:

- **Murder.** Since Bracton, the intentional killing of a person has incurred the highest penalty. Today, by legal fiction (also called, constructive interpretation), murder also includes a killing resulting from an intent to commit GBH. The latter was clearly reached on policy grounds and it is for Parliament to approve/remove it;<sup>1323</sup>
- **Manslaughter.** The history of English law shows that a person can be 'battered' (including GBH) in 4 ways: (a) intentionally; (b) recklessly; (c) negligently; (d) accidentally. Since manslaughter and murder are *aggravated* batteries, this should also apply to them;
  - In the case of battery, (c) and (d) are not crimes (though (c) provides a civil remedy). This should apply to manslaughter. Thus, it should also be committed (b) recklessly - with murder, where intentionally;
  - At present, manslaughter is categorised into *voluntary* and *involuntary* manslaughter. This is unnecessary. If manslaughter was placed into legislation, this categorisation would be obviated;
  - At present, *involuntary manslaughter* is sub-categorised into: (a) gross negligence; (b) unlawful manslaughter. Both these derive from Bracton (his references to 'due care' and 'licit' respectively). However, they were only required *before*: (i) negligent and (ii) reckless, killing became separate categories of killing. Thus, it is unnecessary to retain them - not least since it adds an additional layer of complexity and it creates a mis-match with battery;
  - As a result, manslaughter should be where a person kills another 'recklessly' - whether or not in the context of a lawful or unlawful situation.<sup>1324</sup> This is a matter of fact which should be left to the jury, with the precise nature of the unlawful act (say an affray, illegal abortion, burglary) being a factor for the jury to take into account when assessing, overall, whether the killing was reckless or not.
- **Murder to Manslaughter.** Murder can be reduced to manslaughter in the case of: (a) provocation; (b) DR; and (c) a suicide pact. This is now contained in the 2009 Act;
- **Defences.** These are now greatly simplified and self-defence, defence of another and defence of property are contained in the CIJA 2008, s 76 (although the drafting could be much improved). In the case of justifiable homicide, it only now covers the killing of an enemy alien in the heat of war. This is very rare and it is asserted that it should not be placed in legislative form at present.<sup>1325</sup>

As can be seen, at present, only some of the law on murder and manslaughter is in statutory form. This is unsatisfactory. What is impeding this is that:

<sup>1318</sup> It cites *Canniff* (1840), see **App D(a)**.

<sup>1319</sup> Archbold, n 52, para 19-104.

<sup>1320</sup> *Ibid*, para 19-46.

<sup>1321</sup> *Ibid*, para 19-49.

<sup>1322</sup> *Ibid*, para 19-50.

<sup>1323</sup> Cf. Blom-Cooper, n 69, p 131 'Since a high percentage, perhaps as great as 80%, of those convicted of murder do not exhibit any intention to kill, presumably those whose intention was no greater than to cause serious harm will, at a stroke of the penological pen, have departed from whatever starting point judicially chosen.'

<sup>1324</sup> Obviously, where unlawful, there is a higher chance of recklessness arising and a judge could point this out to the jury. For example, if a person steals, burgles or is involved in an affray, there is a good chance that someone will try and stop him, with death often resulting. However, this is only a *factor* in the instant case. It should not be elevated to a *proposition of law*.

<sup>1325</sup> It is better to deal with it once: (a) martial law is abolished; (b) the Treason Act 1351 is abolished or modernized; (c) the common law concepts of declaring war and peace are placed in legislation; (d) the concept of the 'Queen's peace' is modernized to refer to the 'criminal law.'

- The crime of battery should be placed *first* in statutory form, since murder and manslaughter are aggravated forms of it and they have (and should have) the same pre-requisites (components) in most instances;
- Placing battery in statutory form will enable matters relating to: (a) chastisement of a child; (b) sports; (c) surgery; and (d) minor batteries in ordinary day life, to be dealt with.

***In conclusion, before murder and manslaughter are placed in statutory form, the law on battery should be placed in statutory form. This will make things much easier.***

### 55. Homicide & Battery

In Anglo-Saxon times ‘*slaying*’ (killing) was treated as an aggravated aspect of ‘*wounding*’ (battery), with the compensation payable being higher. So too, in early English times, with the punishment being greater. This is logical and should prevail today. A previous article on assault and battery<sup>1326</sup> has noted the following:

- **Intentionally & Recklessly.** Battery (including GBH) can be committed intentionally or recklessly. This should also apply to murder (intentionally) and manslaughter (recklessly);
- **Transferred Malice.** Battery (including GBH), murder and manslaughter can all be committed by way of transferred malice (see **App G**). The words ‘*transferred malice*’ are a mis-nomer since it has never been the law of battery (or homicide), that the crime is to batter (or kill) a *specific* person. Further, there need be no ‘*malice*’, for example, in the case of random killing.<sup>1327</sup> It may also be noted that the law on this subject has always been scant and uncontroversial;
- **Direct & Indirect.** Battery (including GBH), murder and manslaughter can be *direct* or *indirect*. For example, a person can batter (or kill) a person using the fist (or body) of a third party;<sup>1328</sup>
- **Immediate not Future.** Battery (including GBH) requires the immediate (that is, imminent, present) infliction of physical injury - not that in the future. So too, murder and manslaughter. It involves ‘*killing*’ - not threatening to kill;
- **Hostility/Malice.** Battery (including GBH) does not need to be done in a hostile, angry, revengeful, rude or insolent manner. Nor does homicide, albeit, this has been a long time coming with the retention in the case of murder of the word ‘*malice*’ in ‘*premeditated malice*’ - such word (almost certainly) stemming from the Old Testament and reflecting theological outrage against any form of killing;
- **Physical Injury.** From Anglo-Saxon times, the *actus reus* of the crime of battery has comprised the infliction of physical injury.<sup>1329</sup> And from Anglo-Saxon times, homicide has involved the infliction of physical injury resulting in death, that is, killing.<sup>1330</sup>

Obviously, therefore, these consistent principles should be reflected in legislation. There are some differences between battery, murder and manslaughter, however, *viz.*

- **Omission.** Since battery comprises the infliction of physical injury, it cannot be committed by *omission*. However, murder and manslaughter can be committed by omission - such as by neglect. That said, most of the cases of murder are where the *neglect* resulted from intentional, positive, conduct, as opposed to omission.<sup>1331</sup> Further, GBH (such as starving a person, but not to death) should be possible to be committed by way of omission;
- **Lawful.** Some batteries are lawful. These cover (a) sports; (b) surgery; (c) chastisement of a child; (d) minor batteries in ordinary day life. However, these do not apply to murder or manslaughter (it is not the law that a person can intentionally or recklessly kill another in the case of (a)-(d)). Given this, in battery, reference needs to be made to ‘*lawful*’. However, in the case of murder (except killing a foreign enemy in war time) and manslaughter, it does not.

In a prior article it has been asserted that a statutory formulation of battery (including GBH) should be that it now be called ‘*violent assault*’. And, it should be a violent assault to:

- intentionally or recklessly
- inflict
- unlawful
- physical injury
- on a person.

Further, that GBH should be called ‘*serious bodily harm*’ (SBH). And, that the above criteria should apply (with a greater

<sup>1326</sup> See McBain, n 215.

<sup>1327</sup> In this case of random killing, by way of justification, some writers such as Russell posited that the malice was ‘*universal*’. That is, against all mankind in general.

<sup>1328</sup> The case of *Mitchell* is an example, see n 1303.

<sup>1329</sup> McBain, n 215, p 116, n 718. Battery to the person includes clothing on the person when the intent is to injure the person, but not otherwise.

<sup>1330</sup> Bracton (c. 1240) ‘*homicide is the slaying [killing] of man by man*’, see n 344. **Fleta** (c.1290), ‘slaying of man’, see n 410, **Lambard** (1581), ‘killed’, see n 507, **Pulton** (1609), ‘one man...do kill another man’, n 556, **Dalton** (1619) ‘killing of one man by another’, n 592, **Hale** (c. 1670) ‘killing of a man’, n 698, **Hawkins** (1716-21) ‘killing’, n 760, **Blackstone** (1769) ‘killing’, n 811, **East** (1803) ‘killing’, n 885, **Russell** (1819) ‘killing’, n 897, **Draft Code of 1846**, ‘killing’, n 982, **Stephen** (in his Digest, 1883) ‘killing’, n 1011 (art 219), **Stephen** (in 1883), n 55, p 2 ‘Homicide obviously means the killing of a human being by a human being.’ *Ibid*, p 11 ‘Homicide may be regarded as the highest form of bodily injury which can, in the nature of things, be inflicted.’ **Kenny** (1902) ‘killing’, n 1017, **Smith & Hogan** (1965) ‘killing’, n 1106, **Williams** (1983), ‘killing’ n 1118.

<sup>1331</sup> See **App B(e)**. **Stephen**, n 55, p 3 ‘A man may be killed either by an act or by an omission.’ *Ibid*, pp 10-1.

punishment). Also, that all other statutory aggravated assaults should be abolished.<sup>1332</sup> In the case of murder and manslaughter then:

- (a) and (e) will apply, with (b) and (d) changed to refer to ‘kill’ and (c) not being required;
- statute should make it clear that all of violent assault, SBH, murder and manslaughter can be by way of: (i) transferred malice; (ii) direct or indirect. Also, that murder and manslaughter can be by way of (iii) omission as well as by commission.

Such consistency, and simplification, will clarify the otherwise chaotic state of the law in this area.

***In conclusion, if battery (and assault) are placed in statutory form it will be much easier to deal with manslaughter and murder.***

### **56. A Statutory Definition of Murder**

Today, murder is defined as killing with an intention to kill or to inflict GBH. As to these:

#### **(a) Intention to Kill**

There never seems to have been any doubt in English law from the time of Bracton (c.1240) that murder, being a category of homicide, occurs where one man kills another intentionally. In their proposed draft Criminal Code of 1989, clause 54(1) the Law Commission stated:

A person is guilty of murder if he causes the death of another - (a) intending to cause death; or (b) intending to cause serious personal harm and being aware that he may cause death.<sup>1333</sup>

This formulation is more clumsy: viz.

- The word ‘guilty’ adds nothing;
- Bracton, Coke, Blackstone and (it seems) almost all other legal writers used the word ‘kill’. Further, this is legally correct since murder is a category of homicide [*homo caedes*], and the English word ‘kill’ is a translation of the latin ‘caedere.’<sup>1334</sup> For their part, the Law Commission used the words ‘causes the death of’ which wording is designed to include indirect killing. However, it is asserted that such wording is more confusing for a jury. Also, often, indirect killing does not apply in the instant case. Thus, it is better, elsewhere in legislation, to indicate that murder can cover indirect killing – not least, since it also applies to battery and SBH.

In conclusion, the word ‘kill’ is simpler, clearer and shorter. The two standard texts on criminal law presently define murder to arise when a:

- Archbold: ‘person...kills...any reasonable creature in being [i.e. another person]...with intent to kill or cause [GBH]’<sup>1335</sup>
- Blackstone: [person]...kills [another person] with malice aforethought’.<sup>1336</sup>

Both refer to ‘unlawfully’. However, this is simply to deal with the exception of an enemy alien in the heat of battle.

***In conclusion, it should be murder for a person to kill another: (a) intentionally.***

#### **(b) Intent to cause GBH - Constructive & Implied Malice**

From *Cunningham* (1982),<sup>1337</sup> it has been settled that, for murder, the intention may either be: (a) to kill; or (b) to inflict GBH.<sup>1338</sup> This is clearly a public policy issue and derived from Goddard CJ’s judgment in *Vickers* (1957).<sup>1339</sup> In that case, Goddard CJ held that the Homicide Act 1957, s 1 abolished ‘constructive malice’ (as a side note to s 3 indicated) but not ‘express’ and ‘implied’ malice. Further, that it did not abolish (b), so that it was still murder where death arose from an intention to inflict GBH. Unfortunately, in *Vickers* (1957), counsel made little attempt to set out the legal history of ‘premeditated malice’ and, thus, various errors were made. In respect of these:

- **Constructive/Implied Malice.** These are one and the same.
  - All the principal legal writers up to Kenny (1902)<sup>1340</sup> - including Lambard (1581),<sup>1341</sup> Pulton (1609),<sup>1342</sup> Dalton (1619),<sup>1343</sup> Coke (1641),<sup>1344</sup> Hale (c. 1670),<sup>1345</sup> Hawkins (1716-21),<sup>1346</sup> Blackstone (1769),<sup>1347</sup> East

<sup>1332</sup> Most of these are contained in the Offences against the Person Act 1861. See McBain, n 215, ss 41-7.

<sup>1333</sup> This was subject to ss 56, 58, 59, 62 & 64 (defences in respect of provocation, DR, use of excessive force, suicide pact killing and infanticide). See also LC 290, n 1123, p 26. Also, the Nathan Committee Report (*Report of the Select Committee on Murder and Life Imprisonment*) 1988-9 HL 78-1.

<sup>1334</sup> See n 82.

<sup>1335</sup> See n 1267.

<sup>1336</sup> See n 1268 (following Coke’s formulation).

<sup>1337</sup> [1982] AC 566.

<sup>1338</sup> LC 290, n 1123, p 22, para 2.50 ‘As we have seen, the ‘intention’ required may either be to kill or to cause [GBH]. This was finally settled by the House of Lords in *Cunningham* [1982].’

<sup>1339</sup> [1957] 2 QB 644.

<sup>1340</sup> Kenny (see 40(b)) took a different tack. He combined express and implied malice, into 6 categories of ‘murderous malice’ due to the fact that he regarded premeditated malice as an ‘arbitrary symbol.’ Kenny did refer to ‘constructive’ malice, but by way of an aside, see n 1028.

<sup>1341</sup> Lambard, see 24(b).

<sup>1342</sup> Pulton, see 26(a).

<sup>1343</sup> Dalton, see 27(b).

<sup>1344</sup> Coke, see 28(b).

<sup>1345</sup> Hale, see 30(a)(ii).

<sup>1346</sup> Hawkins, see 31(a).

(1803),<sup>1348</sup> Russell (1819)<sup>1349</sup> and Stephen (1883) - referred to 'implied' malice or to a 'presumption of malice'. They were all referring to an implication, construction or presumption of law in which 'malice' was held to exist although it did not actually exist, in order to make an act murder. This need arose due to the limitations arising from the outmoded concept of 'premeditated malice';

- Turner (in 1945) made reference to 'constructive' malice as opposed to 'implied' malice.<sup>1350</sup> However, it is clear that he regarded it the same as implied malice.<sup>1351</sup> Turner's usage was picked up by the Royal Commission in 1953 (see 43) who (it seems, clear) thought that 'constructive malice' covered only the two examples discussed by Turner in his article in 1945 (*viz.* killing a police officer and a thief killing) without noting that Turner used the term 'constructive malice' for what virtually every other legal writer before him had called 'implied malice'.<sup>1352</sup> Both Turner's article of 1945 and the Royal Commission report of 1953 would have been familiar to Goddard CJ and to counsel in *Vickers* (1957). Goddard CJ himself noted that: 'Constructive malice' is an expression which I do not think will be found in any particular decision, but it is to be found in the text books, and is something different from implied malice.'<sup>1353</sup>
- Further, it seems that Goddard CJ drew little distinction between 'constructive' and 'implied' malice since, only a few lines further on in his judgment, he stated: 'Murder is, of course, killing with malice aforethought, but 'malice aforethought' is a term of art. It has always been defined in English law as, either an express intention to kill...or implied, where by a voluntary act, the accused intended to cause grievous bodily harm to the victim and the victim died as a result.'<sup>1354</sup> Goddard CJ then cited what had always been regarded as examples of implied malice, such acts being unlawful and, more particularly, felonies.<sup>1355</sup>

***In conclusion, the analysis in Vickers (1957) was incorrect (but not, in any case, relevant to the outcome). 'Implied malice', 'constructive malice' and 'presumption of malice' all meant the same thing.***

- **Abolition of Constructive Malice.** The Homicide Act 1957, s 1 cannot have abolished all implied malices since it only referred to two which the Act chose to refer to as 'constructive' malices, *viz.*

- (a) a person killing another in the course (or furtherance) of some other offence;
- (b) a killing done in the course (or for the purpose of) resisting an officer of justice or of resisting or avoiding or preventing a lawful arrest, or of effecting or assisting an escape or rescue from legal custody,

However, legal writers since Coke have referred to, in total, some 7 forms of implied malice, *viz.*

- (a) unprovoked killing (which included random killing);
- (b) killing a police officer in the execution of his duty;
- (c) killing arising from an unlawful act;
- (d) killing by a thief (robber);
- (e) killing by transferred malice;
- (f) killing by cruelty/neglect (including the duress of a gaoler);
- (g) killing by poison.

Thus, the Homicide Act 1957, s 1 left 'alive' as examples of implied malice (a), (e) and (f) even if the word 'offence' in section 1 could be said to have abolished the remainder. Indeed, there is no evidence that the Act sought to abolish any of (a), (e) and (f) which were still needed to get round the problem of premeditation.

***In conclusion, the Homicide Act 1957, s 3 did not abolish all implied (constructive) malices.***

- **Unlawful Act leading to Death.** Counsel did not discuss the history of this form of implied malice which, doubtless, led to confusion. As previously noted, Bracton (a cleric) in c.1240 had indicated that there was criminal liability where a person performed an unlawful act (*illicitae*) leading to death. However, Bracton failed to specify how this would be treated if: (a) intentional; (b) negligent; (c) accidental. The result was that the courts and legal writers (progressively) determined their own formulations.

<sup>1347</sup> Blackstone, see 32(a).

<sup>1348</sup> East, see 35(b).

<sup>1349</sup> Russell, see 36(a).

<sup>1350</sup> See n 1092. Harris, n 54 (17<sup>th</sup> ed, 1943 & 18<sup>th</sup> ed, 1950), p 249 referred to 'constructive murder' but to implied malice.

<sup>1351</sup> See Turner, *Malice Implied and Constructive* [1958] Crim LR 15 stating 'it had for very many years been believed by most lawyers that 'implied malice' and 'constructive malice' were alternative terms for the same legal concept.' One would agree. Turner also thought, p 17, that the term had come as a result of the forced and artificial interpretation of certain statutes, such as the Treason Act 1352, by which 'constructive treasons' were created by the judges. He also noted that, in *Skeet* (1866) 4 F & F 931 (176 ER 854), Pollock CB, p 933, referred to 'constructive homicide.' As it is, it is likely that Turner, himself, as edited of Kenny's work, adopted the expression from Kenny.

<sup>1352</sup> Indeed, the Royal Commission report, (see 43), p 29 stated: 'The doctrine of constructive malice was expounded in the middle of the seventeenth century by Coke'. (*italics supplied*). Leaving aside that Coke did not create the term (which belonged to Lambard (1581) or earlier) Coke only referred to 'implied' malice and the 3 examples Coke (and the Commission cited) were those of Lambard.

<sup>1353</sup> *Vickers* [1957] 2 QB 664.

<sup>1354</sup> *Ibid*, p 670.

<sup>1355</sup> *Ibid*. 'The expression 'constructive malice' is generally used where a person causes death during the course of carrying out a felony which involves violence - that always amounted to murder...Another illustration...would be if a man raped a woman, and she died in the course of a struggle...because if he caused death, he did so during the commission of the felony of rape...Another instance of constructive malice which was always held sufficient to amount to murder was if a police officer was killed in the execution of his duty...'

- By *Herbert* (1558), Brooke CJ was ‘of opinion... that in all cases, where a man...comes to do an unlawful act to an other, as to beat him...it is murder.’ His reasoning (in light of Bracton) would seem accurate. Where a man was doing an unlawful act (battery), intentionally, his ‘malice’ was either: (a) transferred from the battery to the killing; or (b) regardless of (a), the law would imply malice because the act was unlawful and intentional;
- Unfortunately, this case was never pointed out to Goddard CJ who held that, where the intent was to inflict GBH, it was murder if the person died. However, the ‘implied’ malice was actually much wider - if any battery resulted in the death, it was murder. Therefore, if GBH was preserved by the Homicide Act 1957, s 1, then so was all battery since s 1 excepted neither.<sup>1356</sup>

***In conclusion, the law was not accurately presented to Goddard CJ. It was that any battery leading to death was implied to be murder. And, this remained the law - even though legal writers such as Kenny (1902) and Turner (1945) sought to restrict its application only to felonies involving violence. The issue then is, what did the Homicide Act 1957, s 1 get rid of?***

- **Homicide Act 1957.** One suspects that the Act, s 1, was only designed to abolish the two cases which Turner (1945) had so vociferously attacked in his article in 1945 (see 42) viz. (a) where a person caused the death: (a) of a police officer when resisting arrest or imprisonment; or (b) of another ‘by an act of violence done in the course or furtherance of a felony involving violence’ which two situations were also dealt with by the Royal Commission (see 43).
  - The Act, s 1(1) stated: ‘Where a person kills another in the course or furtherance of some other offence, the killing shall not amount to murder unless done with the same malice aforethought (express or implied) as is required for a killing to amount to murder when not done in the course or furtherance of another offence.’;
  - The Act, s 1(2) stated: ‘For the purposes of the foregoing subsection, a killing done in the course or for the purpose of resisting an officer of justice or of resisting or avoiding or preventing a lawful arrest, or off effecting or assisting an escape or rescue from legal custody, shall be treated as a killing in the course or furtherance of an offence.’;
  - Thus, it seems clear that s 1(2) abolished Turner’s (a) and (b). However, since s 1(1) used the word ‘offence’ it clearly seems to have embraced all unlawful acts - including any battery or GBH and whether intentional, reckless, negligent or accidental.

***In hindsight, s 1 should simply have abolished ‘premeditated malice’. This would have abolished all of Coke’s 7 implied malices, apart from ‘transferred malice’ which is a misnomer in any case.***

- **Policy Argument.** One suspects that Goddard CJ was aware of what s 1 was likely trying to do - to abolish all implied malices linked to any unlawful act (preserving Coke’s implied malices in respect of unprovoked killing, transferred malice and killing by neglect, which were still required due to the preservation of the concept of ‘premeditated malice’).
  - However, it also seems likely that Goddard CJ determined to still treat the infliction of GBH leading to death - as a matter of public policy - since he must have been aware that - if this was removed from the category of murder - it would, *ipso facto*, cut the murder rate by c. 80%.<sup>1357</sup>
  - In the light of strong passions over the abolition of the death penalty prevailing in 1957 when *Vickers* was decided Goddard CJ would have been aware - if the murder rate was dramatically reduced - this would likely cause widespread social concern (he also supported the death penalty). Thus, in effect, he took advantage of the poor drafting, to preserve the GBH exception;
  - The likely stance of Goddard CJ does not seem unfair since he was entitled to think that, if wrong, a higher court (or Parliament) would correct him. As it is, *Cunningham* (1982) upheld *Vickers* (1957) and Parliament has never shown an inclination to overrule this. Thus, although the Homicide Act 1957, s 1 used the word ‘offence’ and, thus, clearly seems to have intended to get rid of any exception *re* battery (including GBH), this exception remains.

***In conclusion, the law presently includes as murder death arising from the infliction of GBH. Thus, this should be part of any statutory formulation of murder - leaving it to Parliament to correct the same (on behalf of the general public) if so minded.***

### **57. A Statutory Definition of Manslaughter**

The current position on manslaughter is rather disastrous since there is no need to categorise involuntary manslaughter into: (a) gross negligence; (b) unlawful act, manslaughter.

- Both these sub-categories derive from Bracton. The first is a stage in the evolution of the concept of ‘recklessness’. The second is an ‘implied malice’ to get round the problems of the concept of premeditated malice. Both should be replaced by the word ‘reckless’ - leaving the same to be determined by the jury as a matter of fact. In this fashion, the law on battery and manslaughter (an aggravated battery) will be properly aligned;
- It should also be noted that the categorisation of involuntary manslaughter into these two sub-categories is not a judicial, but a textbook, formulation. Thus, it was Russell (in 1819) (see 36) who started to directly refer to

<sup>1356</sup> As far as I am aware, *Herbert* (1558) (see 24(a)) was never referred to by any of the writers on this matter. See also S & H, n 60, p 197 and Turner [1958] Crim LR 15. Cf. [1958] Crim LR 714 and [1957] Crim LR 615.

<sup>1357</sup> See n 1323.

'*criminal negligence*' and placed it in a different part of his text (lawful acts improperly performed) as opposed to unlawful acts.<sup>1358</sup> Prior to Russell, negligent acts were treated as, *ipso facto*, unlawful.<sup>1359</sup> Later writers then '*concretised*' Russell's categories of '*unlawful*' and '*lawful but negligent*' into a rigid formulation. For example Cross & Jones, writing in 1949.<sup>1360</sup>

#### (a) Gross Negligence

This description was developed in Victorian times, before the formulation of '*reckless*'. It was Stephen who pointed out, in the criminal sphere, that '*reckless*' and '*negligent*' acts should be distinguished.<sup>1361</sup>

- As it is, battery employs the term '*reckless*' and, since manslaughter is an aggravated battery, there is no good reason why manslaughter should not do so;
- Further, as Archbold (2015) indicates (see 53), both Lane LJ in *Stone and Dobinson* (1977) and Mackay LC in *Adomako* (1995) have approved the use of the word '*reckless*'.

Archbold also indicates, as to the existence of negligence (a duty of care) in a criminal context:

- this is a question of law for the judge;
- a person could become liable for manslaughter by neglect of a positive duty arising from his occupation but that this was not confined to the same.<sup>1362</sup>

However, it is asserted that these propositions derive from the law of negligence and they are not necessary. Instead, as with battery, the only issue (for the jury) should be is: '*Did X kill Y recklessly*? This should not be a matter of law but of fact. And, that a person did it as part of his employment is not relevant.<sup>1363</sup>

#### (b) Unlawful Act Manslaughter

Archbold notes that manslaughter includes what, it terms, '*unlawful act manslaughter*'. It stipulates 2 criteria for the same:

- (i) the killing must result from the unlawful act;
- (ii) the act must be such that all '*sober and reasonable people*' would inevitably realise that the victim (Y) was subject to the risk of some physical harm resulting.

It is asserted that (ii) simply reflects an objective test of recklessness with '*physical harm*' (or physical injury) being no different to the law on battery. In conclusion, this category (which flowed from nature of premeditated malice) is unnecessary. The only issue (for the jury) should be - *was the person reckless*? The reason why this category of '*unlawful act manslaughter*' is not needed can be seen from the cases which Archbold cites in respect of '*unlawfulness*' and, indeed, from a review of all cases since *Hull* (1664)(see **App C(b)**).

- **(Un)lawfulness a Peripheral Factor.** In many of the cases since *Hull* (1664), the unlawfulness or not, of the act was, actually, a *peripheral* factor. What was more important was the conduct of the person and what he actually did. For example, simply supplying drugs - including Class A drugs (Archbold cites *Kennedy* (2008)) or other noxious substance - to an adult, is not unlawful, *per se*, and the law would be rather absurd if it was.<sup>1364</sup> However, if the '*fact situation*' is only slightly altered, then it should be a crime. For example, supplying the same to a child.<sup>1365</sup> Whether an act is unlawful or not is not the determining factor, as was pointed out in *Church* (1996):

*an unlawful act causing the death of another cannot, simply because it is an unlawful act, render a manslaughter verdict inevitable. For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm.*<sup>1366</sup> (underlining supplied)

- **Lawful Act just as Reprehensible.** Lawful acts can be just as reprehensible as unlawful ones. For example, to supply an open can of petrol to a person with a flamethrower in his hand, albeit lawful, is reckless. And, although some abortions are lawful today - even if so - if a unskilled doctor effects it so as to recklessly kill another it should be manslaughter<sup>1367</sup> just as if the same occurred where the abortion was unlawful;
- **What is Lawful?** In *Lamb* (1967), by way of a joke, a loaded revolver was pointed at a person and the trigger pulled, killing him. The court (rather bizarrely) came to the conclusion that there was no assault and, thus, no

<sup>1358</sup> Russell, n 51, pp 768-71 and p 658 *et seq.*

<sup>1359</sup> See, for example, Blackstone, n 843 (acts arising from '*idleness*' when of '*dangerous consequence*' were unlawful).

<sup>1360</sup> Cross & Jones, n 59, p 223 'Manslaughter is...committed when death is caused...2. By an unlawful act which is either dangerous in the sense that it is likely to injure someone or else done in course of or in the furtherance of a felony which is not a felony of violence. 3. By culpable negligence consisting in (a) the omission to perform a duty recognized by the criminal law; or (b) the doing of a lawful act recklessly.'

<sup>1361</sup> See for example, n 999 as well as Stephen's definition of '*premeditated malice*', see 39(c).

<sup>1362</sup> Archbold cited the cases of *Lowe* (1850), *Markuss* (1864) and *Curtis* (1885), **App H** and n 1313. Today, these are all better taken as examples of '*reckless*' conduct. The fact that they occurred in an employment situation is irrelevant.

<sup>1363</sup> For example, if a person bungee jumps or sky dives or does an extreme sport - whether as a company activity or not - does not (and should not) obviate the fact that, if another person recklessly supplies a frayed rope (or recklessly packs the parachute), this should be manslaughter.

<sup>1364</sup> Then it would mean that no one could give an adult any noxious substance (poison, petrol, prescription drugs *etc*) in case they mis-used the same. See also Kenny, n 72, p 121 citing Hawkins J in *Paine* (Times, 25<sup>th</sup> Feb, 1880) 'If I saw a man, who was not under my charge, taking up a tumbler of poison, I should not become guilty of any crime by not stopping him. I am under no legal obligation to protect a stranger.'

<sup>1365</sup> See *Martin* (1827), see **App B(f)**(child taking alcohol).

<sup>1366</sup> See **App D(a)** and n 1309.

<sup>1367</sup> Archbold cites *Buck and Buck* (1960), see n 1300, an abortion performed by a person without adequate midwifery skills.

unlawful act.<sup>1368</sup> However, there, manifestly, *was* a battery. To hit a person with a bullet is a battery, just as to push a person off a bridge is.<sup>1369</sup> Thus, in reality, such acts were unlawful. However, the more important issue was whether such behaviour, lawful or not, was reckless, such that the criminal law should punish it;

- **Modern Cases.** If one considers all the modern cases cited by Archbold and Blackstone CP,<sup>1370</sup> then, implicit in them is the issue whether the killer was not just negligent but reckless;
- **Result Orientated.** A formulation of unlawfulness/negligence can be easily result orientated. Thus, an act can be held to be ‘unlawful’ and, if not ‘unlawful’, treated as ‘gross negligence’ by reading the same into the fact situation.<sup>1371</sup>
- **No Need for Unlawfulness.** The criterion of ‘unlawfulness’ was only required to deal with the concept of ‘premeditated malice’ for the purpose of implying certain acts as murder. This has now gone and to preserve it in the case of manslaughter is to import into manslaughter all the problems encountered with such a criterion in respect of murder. Further, a review of ‘unlawfulness’ in respect of manslaughter cases indicates that they can be better resolved by regard to whether they were ‘reckless’- with the issue of whether they were unlawful or not simply being a *factor* which the jury should take into account.
  - For example, *Mitchell* (1983) assaulted X who fell against Y (an elderly woman) who died.<sup>1372</sup> Thus, he committed battery against the woman, by way of transferred malice. This was an unlawful act as well as being grossly negligent. However, it was also reckless conduct;
  - In *Goodfellow* (1986) a person committed arson, to get re-housed, which resulted in the death of some people. Arson was an unlawful act as well as being grossly negligent.<sup>1373</sup> It was also reckless;
  - In *Page* (1983) X used Y as a human shield against the police, who died.<sup>1374</sup> In seizing Y, a battery - an unlawful act - was committed. However, X was also grossly negligent. And, reckless;
  - In *Lamb* (1967), in the course of playing around with a loaded revolver, a boy was killed. In similar such incidents, in *Newbury* (1977) a train guard was killed when a piece of paving stone was pushed from a bridge and, in *R v P* (2005) a boy was pushed from a bridge and drowned (see **App F**). In these cases, these acts were unlawful (being batteries). They were also grossly negligent. And, reckless. However, it is difficult to argue that removing a trap stick from a cart (*Sullivan*, 1836), or putting hot cinders and straw on a person (*Errington*, 1838) or throwing a box into the sea (*Franklin*, 1883) are unlawful as such. Yet, the common denominator for the jury should have been whether, in the prevailing factual situation, the action was reckless. So too, giving laxatives to a person as a joke and killing them (an illustration of Hale) or, perhaps, peanuts. While not unlawful, it may still be such that the criminal law should punish an act as criminally irresponsible (reckless) in light of the precise fact situation prevailing. For example, when the person knows the victim suffers from an allergy to peanuts *etc.*

In short, whether the act is lawful or not, is irrelevant. The issue is whether the act is reckless.

### (c) **Manslaughter**

Manslaughter is, at present, wholly out of kilter with the law on battery - even though it is an aggravated form of battery. Thus, just as battery can be committed recklessly, manslaughter should be. The concepts of ‘voluntary and involuntary manslaughter’ - as well as those of ‘unlawful act manslaughter’ and ‘gross negligence’ - derive from the problems connected with the concept of premeditated malice and they are no longer required. The only differences between battery and manslaughter should be:

- Some batteries can be committed *lawfully* (in the case of surgery, sports, chastisement) but manslaughter (the reckless killing of another) cannot;
- Battery cannot occur by omission (because it requires the infliction of physical injury). However, manslaughter can occur by omission, by neglect.

**In conclusion, manslaughter needs to be modernised and simplified.**

### 58. **Abortion & Infanticide**

Once statutory provision is made for murder and manslaughter (as well as for assault and battery) various pieces of legislation relating to abortion and infanticide may be placed thereafter.<sup>1375</sup> In respect of the Infanticide Act 1938, s 1, this was a precursor to the concept of DR and, therefore, should be modernised to become an aspect of the same.

### 59. **Conclusion**

The criminal law should not be a cow to be milked, in part, by making the law as obscure and complicated as possible. Most responsible lawyers (and judges) would accept that. Further, the criminal law *should* reflect modern times and society. As it is, the criminal law has scarcely emerged in many areas (especially in the case of common law crimes) from the Victorian era or

<sup>1368</sup> See **App F(c)**, at p 988 ‘no evidence to go to the jury of any assault of any kind.’

<sup>1369</sup> For *Lamb* (1967), see **App F(c)**. For *R v P* (2005) (pushing a person off a bridge, killing them), see **App F(c)**.

<sup>1370</sup> For Blackstone CP, n 67, see B.1.52-64.

<sup>1371</sup> See **App H** and a case such as *Salmon* (1880), where negligent conduct was treated as unlawful.

<sup>1372</sup> See n 1303.

<sup>1373</sup> See n 1304.

<sup>1374</sup> See n 1303.

<sup>1375</sup> See: (a) Infant Life (Preservation) Act 1929, ss 1 & 2; (b) OPA 1861, s 60 (concealment of birth); (c) OPA 1861, ss 58 & 59 (use of poison to cause miscarriage, supplying or procuring poison); (d) Abortion Act 1967, ss 1, 5 & 6.

even earlier. It is utterly weighed down by the legal *detritus* and formalisms of the centuries. But this was not always so. In Anglo-Saxon and early medieval times, it was likely simple and effective. It should be so again. When considering the law on murder and manslaughter, two major principles may be borne in mind:

- English law on battery and killing recognises that a person can be battered (or killed) in just 4 ways: (a) intentionally; (b) recklessly; (c) negligently; (d) accidentally;
- Under English law, it is vital that the principles of battery also govern grievous bodily harm (GBH), manslaughter and murder since they are, at base, aggravated forms of battery.

Thus, battery (and GBH) should be placed in statutory form, first. Then, manslaughter and murder. As to these:

- **Murder.** It is clear that murder can be committed intentionally. Also, as a result of public policy, where the infliction of GBH results in death;
- **Manslaughter.** This should occur where a person recklessly kills another. Also, where murder is extenuated to manslaughter as a result of: (a) provocation; (b) DR; (c) a suicide pact. The latter are now contained in legislation (Homicide Act 1957, Coroners and Justice Act 2009) which Acts should be consolidated;
- **Accidental & Negligent Killing.** These should bear no criminal liability but the latter, civil liability. This is the present legal position;
- **Defences.** The only case where it is justifiable to murder someone (killing an alien enemy in the heat of war) should be left to the common law at present. Defences to murder, manslaughter and battery (including GBH) are laid down in the Criminal Justice and Immigration Act 2008. The relevant wording could be better phrased so as to be more intelligible;
- **Matters of Fact.** Whether a killing was (a) intentional; (b) reckless; (c) negligent; or (d) accidental should be treated as matters of fact. So too, the issues of provocation, self-defence, defence of another and defence of property.

The reason *why* the law on homicide has become so convoluted, to date, is that no attempt has been made to place in legislation the common law on battery (including GBH and assault). Further, little attempt has been made (including by the Law Commission) to consider the legal history of homicide, where many answers can be found.

### APP A: ANGLO-SAXON TARIFF: KILLING A PERSON

The earliest Anglo-Saxon law - that of king Aethelbert, king of Wessex (597-616 AD) - established a tariff payable for the killing of a person. This tariff changed over time.<sup>1376</sup> In respect of it:

- **Status.** In Anglo-Saxon England, status was very important. The basic categories seem to have been: (a) the king; (b) archbishops and princes (*aetheling*); (c) bishops and earls (*eorl, ealdormen*); (d) *thegns* (usually officials or landowners); (e) freeman (*ceorl, churl*); (f) slaves of various sorts.<sup>1377</sup> This status (and terminology) varied according to the various Anglo-Saxon kingdoms;
- **Basic Sum.** The tariff was based on the amount payable (the *wergild*) for the killing of a freeman (a commoner). This was 100s.<sup>1378</sup> It was paid to the kin of the person slain, to prevent them resorting to revenge (also, called the vendetta or blood feud);
- **Addition.** An additional sum was payable, in various situations. Thus, an additional sum was payable to the king or an earl (noble, lord) for the infraction of their seigniorial rights, since their protection (*mund*) over the person killed was broken. And, in the case of the killing of the *dependent* of a freeman, the latter received 6s in addition to the *wergeld* payable;<sup>1379</sup>
- **Reduction.** In the case of the killing of a *laet* (a class intermediate between a freeman and a slave), less than a freeman's *wergeld* was paid to the kin. In the case of the killing of a slave, it would seem that a sum below 40s was payable. In the case of the killing of: (a) an outlaw; or (b) a thief caught with the stolen goods on him; or (c) an Englishman in penal slavery who absconded, no *wergeld* was payable.

The basic laws of Aethelbert (of Wessex) were added to by other Anglo-Saxons law. Further, different sums applied when the Danelaw, West Saxon law or Mercian law applied. Thus, by the Norman Conquest of 1066, the position must have been complex.

#### (a) Status of Victim

If a person kills:

- |                                     |   |
|-------------------------------------|---|
| • The king                          | 600s (in total) <sup>1380</sup>   |
| • Earl (noble, lord)                | 300s (in total) <sup>1381</sup>   |
| • Freeman (commoner, <i>ceorl</i> ) | 100s<br>+50s (to the king for infraction of his seigniorial rights) <sup>1382</sup> |
| • Smith in king's service           | +100s (ibid) <sup>1383</sup>  |
| • King's messenger                  | +100s (ibid) <sup>1384</sup>  |
| • King's <i>fedesl</i> (nurse)      | +20s (ibid) <sup>1385</sup>   |
| • Dependent of a commoner           | +6s (to a freeman, for loss of his dependent) <sup>1386</sup>                       |

<sup>1376</sup> For example, Hudson, n 18, p 201 noted that the standard *wergeld* for a freeman in the time of king Alfred (871-99) was 200s.

<sup>1377</sup> See generally, Hudson, n 18, ch 8. Also, P & M, n 88, vol 1, pp 32-5.

<sup>1378</sup> Attenborough, n 18, p 7 (*Laws of Athelbert*) 'If one man slays another, the ordinary *wergeld* to be paid as compensation shall be 100 shillings.'

<sup>1379</sup> Wormold, n 18, p 14 'We can see...that the amount of compensation due was determined by the sufferer's status. A king himself was entitled to all of fifty shillings for infringement of his 'protection'...A noble ('*earl*') got twelve shillings, a commoner ('*ceorl*') six. For killing *ceorls* one paid 100 shillings, twice the royal protection; killing an earl was apparently at this stage inconceivable; we only know from the next Kentish code [*Laws of Hlothhere and Eadric*] that the sum due was 300 shillings, three times what was payable for a *ceorl* (by then, in West Saxon law, the multiplier was six). In short, some people's blood was more valuable than others.'

<sup>1380</sup> Reeves, n 221, vol 1, pp 15-6 'Every man's life had its value, called a *were*, or *capitis estimatio*. This had been various at different periods; in the time, therefore, of king Athelstan, a law was made to settle the *were* of every order of persons in the State. The king, who on this occasion was only distinguished as a superior personage, was rated at 30,000 *thrymsae*; an archbishop or earl, at 15,000; a bishop or ealdorman, at 8,000; *belli imperator*, or *summus praefectus*, at 4,000; a priest or thane, at 2,000; a common person, at 267 *thrymsae*.' Reeves also noted that a *thrymsa* according was worth 4 pence. Cf. Attenborough, n 18, p 194. See, for a modern statement, Hudson, n 18, p 201.

<sup>1381</sup> Robertson, n 18, p 19 (*Laws of Hlothhere and Eadric*) 'If a man's servant slays a nobleman, whose *wergeld* is 300 shillings, his owner shall surrender the homicide [killer] and pay the value of three men in addition.'

<sup>1382</sup> Attenborough, n 18, p 5 (*Laws of Aethelbert*) 'If a man slays a free man, he shall pay 50 shillings to the king for infraction of his seigniorial rights.'

<sup>1383</sup> Ibid, (*Laws of Aethelbert*), p 5 'If [a man] slays a smith in the king's service, or a messenger belonging to the king, he shall pay an ordinary *wergeld*.' As a fn explains (see p 175) 'The payment here specified is not, apparently, a *wergeld* proper but a sum equivalent to the *wergeld* of an ordinary freeman, i.e. 100 shillings...and double the compensation under cap 6 [i.e. for a freeman], owing to the fact that they are specially skilled servants.'

<sup>1384</sup> Ibid, p 5.

<sup>1385</sup> Ibid, p 7 (*Laws of Aethelbert*) '20 shillings shall be paid for killing a *fedesl* belonging to the king.' Possibly, *fedesl* referred to a nurse.

- *Laet* (best class) 80s
- *Laet* (second class) 60s
- *Laet* (third class) 40s<sup>1387</sup>
- Foreigner 2/3rds of *wergeld* to the king, 1/3rd to the son (or relatives)<sup>1388</sup>
- Godson (or godfather) of another payment to relatives equal to amount paid to the dead man's lord<sup>1389</sup>
- Priest excommunicated and outlawed, compensation to the victim's kin<sup>1390</sup>
- Thief no *wergeld* payable<sup>1391</sup>
- Englishman in penal slavery nothing payable to his lord, if he had absconded<sup>1392</sup>
- Woman with a child in womb full *wergeld* for woman and half for the child<sup>1393</sup>

If a servant kills a:

- Servant who committed no offence his full value<sup>1394</sup>
- Freeman owner shall surrender him and pay the value of another man<sup>1395</sup>
- Nobleman owner shall surrender him and pay the value of three men<sup>1396</sup>

If a Welsh slave kills an:

- Englishman owner shall hand him over to the dead man's lord and kinsman (or purchase his life for 60s);<sup>1397</sup>

#### (b) Location

If a man kills another on the premises of:

- The king +50s (for infraction of his protection)<sup>1398</sup>
- Nobleman +12s (for infraction of his protection)<sup>1399</sup>

<sup>1386</sup> Ibid, 'If a man slays the dependent of a commoner, he shall pay [the commoner] 6 shillings compensation.' A dependent would probably refer to one of the freeman's household (a breadeater), see Ibid, p 177.

<sup>1387</sup> Ibid, p 7 'If he slays a *laet* of the best class, he shall pay 80 shillings; if he slays one of the second class, he shall pay 60 shillings; [for slaying one of] the third class, he shall pay 40 shillings.' A fn (see p 177) notes 'The word *laet* does not occur except here. It is obviously identical with the term *litus, latus, lazzus* of the continental laws. The latter term denotes a class which is found among nearly all Teutonic peoples – intermediate between freemen and slaves, and consisting presumably of freedmen and their descendants, and perhaps also of subject populations. There is no trace of such a class in the other Anglo-Saxon kingdoms, where apparently manumitted slaves became equivalent to freemen in regard to *wergeld* etc.'

<sup>1388</sup> Ibid, p 43 (*Laws of Ine*). 'Foreigner' probably includes a subject of another English kingdom. Ibid, p 185. See also p 47 (*Laws of Ine*) 'The *wergeld* of a Welsh horseman who is in the king's service and can ride on his errands shall be 200 shillings.'

<sup>1389</sup> Attenborough, n 18, p 61. It continues 'If, however, it is the godson of a king [who is slain], a compensation equivalent to the *wergeld* shall be paid to the king, as well as [the *wergeld* itself] to the kindred. If, however, he was engaged in a struggle with him who slew him, the godfather shall lose his compensation, just as [in similar circumstances] the lord loses his fine. In the case of the godson of a bishop, [the sum] shall be half [the amount paid for the godson of a king].'

<sup>1390</sup> Robertson, n 18, p 197 (*Laws of Canute*) 'If anyone slays a minister of the altar, he shall be both excommunicated and outlawed, unless he make amends to the best of his ability by pilgrimage, and likewise by [the payment of compensation] to the kin [of the slain man], or else he shall clear himself by an oath equal in value to his *wergeld*.' See also 'If a minister of the altar commits homicide or perpetrates any other great crime, he shall be deprived of his ecclesiastical office and banished, and shall travel as a pilgrim as far as the pope appoints for him, and zealously make amends.'

<sup>1391</sup> Ibid, p 29 (*Decrees of Wihtried*) 'If anyone slays a man in the act of thieving, no *wergeld* shall be paid for him.' See also p 41 (*Laws of Ine*) 'If a thief is taken he shall die the death [i.e. summary execution], or his life shall be redeemed by the payment of his *wergeld*.' Ibid, 'He who kills a thief shall be allowed to declare on oath that the man he slew was guilty.' Ibid, p 31 (*Decrees of Wihtried*) 'If a man from afar, or a stranger, quits the road, and neither shouts, nor blows a horn, he shall be assumed to be a thief, [and as such] may be either slain or put to ransom.' See also p 43 (*Laws of Ine*).

<sup>1392</sup> Attenborough, n 18, p 45 (*Laws of Ine*) 'If an Englishman [living] in penal slavery absconds, he shall be hanged, and nothing shall be paid to his lord. If he is slain, nothing shall be paid for him to his kinsmen if they have left him unransomed for twelve months.'

<sup>1393</sup> Ibid, p 69 (*Laws of Alfred*) 'If anyone slays a woman with child, while the child is in her womb, he shall pay the full *wergeld* for the woman, and half the *wergeld* for the child, [which shall be] in accordance with the *wergeld* of the father's kindred.'

<sup>1394</sup> Ibid, p 17 (*Laws of Athelred*). It is not clear what his 'full value' is. It would have been less than the *wergeld* of a freeman (100s). It may have been 60s (see *ibid*, p 179).

<sup>1395</sup> Attenborough, n 18, p 19 'If a man's servant slays a freeman whose *wergeld* is 100 shillings, his owner shall surrender the homicide and [pay] the value of another man in addition.'

<sup>1396</sup> See n 1379.

<sup>1397</sup> Attenborough, n 18, p 61 (*Laws of Ine*). As to killing between Danes and English, a treaty of king Alfred with the Danes (c. 880-90), provided, p 99 'if a man is slain, whether he is an Englishman or a Dane, all of us shall place the same value on his life – namely 8 half marks of pure gold, with the exception of commoners who occupy tributary land, and freedmen of the Danes. These also shall be valued at the same amount – [namely] 200 shillings – in either case.' See also *Laws of Aethelred*. Ibid, p 59 'If an Englishman slays a Dane, both being free men, he shall pay 25 pounds for him, or the actual delinquent shall be delivered up. And likewise in the case of a Dane who slays an Englishman.'

<sup>1398</sup> Attenborough, n 18, p 5 (*Laws of Aethelbert*) 'If one man slays another on the king's premises, he shall pay 50 shillings compensation.'

**APP B - MURDER****Note:**

- The courts always treated duels as murder - being premeditated, see (a);
- Since, at least, *Burchet* (1574), the courts treated unprovoked killing as murder, see (c);
- Since, at least, 1557 until the Homicide Act 1957, the courts indicated that words and gestures, *per se*, were insufficient provocation to reduce murder to manslaughter, see (d);
- Since, at least, 1328, the courts treated murder as a crime capable of occurring by omission (neglect) as well as by way of commission, see (e);
- English law permitted the moderate chastisement of children and servants. However, if the child (servant) died and the act was deemed as one of 'cruelty', it was (generally) treated as murder. Otherwise, if not held accidental, it was treated as manslaughter, see (f).

| <u>Case</u>                     | <u>Date</u> | <u>Ref</u>                     | <u>Explanation</u>  |
|---------------------------------|-------------|--------------------------------|---|
| <b>(a) <u>Murder - Duel</u></b> |             |                                |   |
| Morgan                          | 1610        | 1 Bul 84 <sup>1400</sup>       | Challenge sent at 9 in the evening. The parties fought next morning. M killed his opponent and was found guilty of murder [ <b>Murder</b> ]. Coke CJ, at p 86 'If a challenge had been sent, and then instantly upon hot blood, they had met, <i>and fought, and one of them kills the other, this had been but manslaughter; but if after a challenge sent, they do once sleep upon it, and so the challenge is accepted of, and afterwards they fight, and one of them kills the other, this is murder in him clearly, for that this is done sedato animo, &amp; intervallo temporis, [with a sedate [firm] mind and interval of time] and so it is murder.</i> ' |
| Taverner                        | 1616        | 3 Bul 171 <sup>1401</sup>      | Challenge sent by B to T because he did not pay money due. T accepted. They met 2 days later, according to an appointment. In the duel, T killed B. [ <b>Murder</b> ]   |
| Legg                            | 1662        | Kel 27                         | It was held to be murder if one killed another without a ' <i>sudden quarrel</i> '. It was also on the party indicted to prove the sudden quarrel. It was also agreed that: ' <i>if two men fall out in the morning, and meet and fight in the afternoon, and one of them is slain, this is murder, for there was time to allay the heat and their after-meeting is of malice.</i> ' [ <b>Murder</b> ]  |
| Hugget                          | 1666        | Kel 62                         | In this case (one of impressment) Kelyng CJ and the other judges held that: <ul style="list-style-type: none"> <li>• if A assaulted B without provocation, and drew his sword and ran at him and B defended himself with his sword and they fought, if A killed B it was murder (B drawing his sword in self-defence did not lessen the offence). [<b>Murder</b>]</li> <li>• if two men fought and another man came to the aid of one and killed the other, it was manslaughter, there being fighting.<sup>1402</sup> [<b>Manslaughter</b>]</li> </ul>  |
| Mawgridge                       | 1707        | Kel 128 <sup>1403</sup>        | M was invited to the Tower of London by C, a lieutenant of guards. M insulted a woman and C interfered to protect her. M, with intent to provoke him to fight, demanded satisfaction of C who said that, at a convenient time and place, he would be ready to give M satisfaction and asked him to leave. M, on leaving, threw a bottle at C. It hit C on the head. C threw a bottle back at M who drew his sword and killed C. Treated as a duel (and the throwing back of a bottle as self-defence). [ <b>Murder</b> ].   |
| Oneby                           | 1727        | 2 Ld Raym 1485 <sup>1404</sup> | O was playing hazard in a tavern. He quarrelled with G, a fellow player. O threw a bottle at G who threw one in return (they missed). They fetched their swords but   |

<sup>1399</sup> Ibid, p 7 (*Laws of Athelbert*) 'If one slays another on the premises of a nobleman, he shall pay 12 shillings compensation.'

<sup>1400</sup> 80 ER 783. See also Beville, n 47, p 106.

<sup>1401</sup> 81 ER 144. See also 1 Rolle Rep 361 (81 ER 534) and Beville, n 47, p 101. The Biblical allusions of Coke CJ, and other judges, in this case may be noted. It may also be noted that James I had issued a proclamation Against Private Combats and Combatants in 1613/1614, in an effort to further suppress duels (see imprint of Barker in 1613 of which Middle Temple has a copy). See also Kaye, n 457, p 600.

<sup>1402</sup> Because there was hot blood. Kel 136 in *Mawgridge* (1707) also cited *Salisbury* (1553), see App D(e). See also Foster, n 77, p 314; East, n 50, vol 1, p 327 and Stephen, n 55, vol 3, pp 69-71.

<sup>1403</sup> See also Beville, n 47, pp 107-9 and Russell, n 51, vol 1, p 647.

<sup>1404</sup> 92 ER 465. See also 2 Str 765 (93 ER 835). In particular, what counted against O and made it premeditated malice was that: (a) he told G he would have his blood; (b) there was a delay; (c) he invited G back into the room. See also Beville, n 47, pp 103-5; Russell, n 51, vol 1, pp 647-9 and Stephen, n 55, vol 3, pp 72-3.

others prevented them from fighting. After an hour, G offered O his hand in reconciliation. O replied 'No, damn you, I will have your blood.' Everyone later left but O called back G. The door was shut and swords clashed. G was given a mortal wound, O three slight wounds. [Murder]

|                    |      |                             |  |
|--------------------|------|-----------------------------|--|
| Young              | 1838 | 8 C & P 644 <sup>1405</sup> | In a duel, M was shot and killed by E. [Murder]. If seconds were present, assisting and encouraging, when the fatal shot was fired, murder in them. <sup>1406</sup>  |
| Cuddy              | 1843 | 1 C & K 210 <sup>1407</sup> | X was charged with aiding and abetting M in murdering F in a duel. Williams J, at p 210 'where two persons go out to fight a deliberate duel, and death ensues, all persons who are present on the occasion, encouraging or promoting that death, will be guilty of abetting the principal offender.' [Murder] |
| Barronett & Allain | 1852 | Dears 51 <sup>1408</sup>    | Duelling was murder, whether a fair duel or not was irrelevant.  |
| Note               | 1852 |                             | After this date, duels ended. Today, killing in a duel would be treated as intentional.  |

#### **(b) Murder - Child at Birth or Precipitated Birth**

|        |      |                             |  |
|--------|------|-----------------------------|--|
| Senior | 1832 | 1 Mood 346 <sup>1409</sup>  | Giving a child, while in the act of birth, a mortal wound before the head appears and the child breathes, if the child is afterwards born alive, and dies and there is malice, is murder. [Murder] <sup>1410</sup>   |
| West   | 1848 | 2 C & K 784 <sup>1411</sup> | If a person, intending to procure an abortion, does an act which causes a child to be born so much earlier than the natural time, in a state much less capable of living, and it afterwards dies in consequence of its exposure to the external world, the person who, by this misconduct, so brings the child into the world and puts it thereby into a situation where it cannot live, is guilty of murder. And, the mere existence of a possibility that something might have been done to prevent the death, would not render it less murder. [Murder] |

#### **(c) Murder - No (Insufficient) Provocation**

|                    |      |                              |  |
|--------------------|------|------------------------------|--|
| Burchet            | 1574 | Holinshed <sup>1412</sup>    | B, a prisoner in the Tower of London, killed his jailer, suddenly, with a billet (piece of wood) from the fire. [Murder]   |
| Anon               | 1601 | Crompton <sup>1413</sup>     | A man, quarrelling with his wife, suddenly struck her with a pestle. She died instantly. [Murder]  |
| Mackalley          | 1611 | 9 Co Rep 67a <sup>1414</sup> | The case concerned the killing of a sarjeant of the mace. Coke CJ at p 67b 'if one kills another without provocation, and without any malice prepense, which can be proved, the law adjudges it murder, and implies malice...'   |
| Sir Charles Blount | 1624 | 2 Rolle 460 <sup>1415</sup>  | C promised a dog to B but refused to deliver it. B fetched his sword and went to C's house to claim the dog. C stood at the door and resisted his entry. B killed C. [Manslaughter, but should have been murder] <sup>1416</sup> |

<sup>1405</sup> 173 ER 65. See also Stephen, n 55, vol 3, p 102. See also Russell, n 51 (last ed, 1964), vol 1, p 597.

<sup>1406</sup> See also Cross & Jones, n 59, p 219.

<sup>1407</sup> 174 ER 779. See also Stephen, n 55, vol 3, p 101.

<sup>1408</sup> 169 ER 633. For the law on dueling and fighting by 1832, see Bacon, n 37 (1832 ed), vol 5, pp 757-63.

<sup>1409</sup> 168 ER 1298.

<sup>1410</sup> In the case the midwife was grossly ignorant to the necessary skills and was held guilty of manslaughter (1 year imprisonment).

<sup>1411</sup> 175 ER 329.

<sup>1412</sup> R Holinshed, *Chronicles of England, Scotland and Ireland* (1809), vol 4, p 324. Burchet had previously sought to kill one John Hawkins, mistaking him for a courtier of Queen Elizabeth, Christopher Hatton. The Queen was so incensed that she wanted Burchet immediately executed pursuant to martial law, but was dissuaded from this course of action. See also Kaye, n 457, pp 590-1.

<sup>1413</sup> Before Walmsly at Stafford assizes. Walmsley J was a Justice of the Common Pleas, 1589-1612. See also Beville, n 47, p 51.

<sup>1414</sup> 77 ER 824. Also discussed in Kel 67a. See also Hale, n 45, vol 1, p 438. 'Mackalley' was also spelt 'Mackaley'.

<sup>1415</sup> 81 ER 916. See also Kel 134-5 which discussed this case. He noted 'The jury were merciful, and found this fact in Sir Charles Blunt, to be but manslaughter. Dodderidge was clearly of opinion it was murder. But the Lord Chief Justice [Ley, CJ, 1621-5] was a little tender in his direction to the jury. But Rolls makes this remark, that it was not insisted upon by the appellant's council, that Clement was in defence of his house, and that Blunt attacked Clement to force in: it was without all question murder, though of sudden heat, for there was no assault made by Clement upon him nor on any of his friends, but all the violence and force was on Sir Charles Blunt's side.'

<sup>1416</sup> It is asserted it should have been murder since (a) C was defending his own house; and (b) there was no provocation on his part.

|            |      |                             |   |
|------------|------|-----------------------------|---|
| Mason      | 1756 | Foster, p 132               | M fought his brother B in a tavern after drinking. M left and returned after 30 minutes. The fight continued. M stabbed his brother, killing him. [ <b>Murder, no longer hot blood</b> ] <sup>1417</sup>  |
| Willoughby | 1791 | East, vol 1, p 288          | Soldiers demanded beer from publican at 11 at night. He refused. They went away. They later returned. One, refusing to depart, the landlord collared him and removed him from the tavern. At the door the other soldier gave the landlord a violent blow on the head. He died. Murder. The landlord was entitled to remove the soldier from his property and there was reasonable evidence of their return a second time with a deliberate intention to use violence if their demand for beer was not complied with. [ <b>Murder, no longer hot blood</b> ] |
| Smith      | 1804 | Bacon, vol 5, p 770         | No excuse for killing a man at night, who was dressed as a ghost for the purpose of alarming the neighbourhood, even though he could not be otherwise taken. <sup>1418</sup>  |
| Hayward    | 1833 | 6 C & P 157 <sup>1419</sup> | X turned H out of his mother's house, giving him a kick. H told X that he would make him remember it. H went back to his own lodgings and picked up a knife. X followed X after 5 minutes, to return his hat. They met in the street and talked. On being given his hat, H stabbed X, who died. [ <b>Murder, no longer hot blood</b> ]. <sup>1420</sup>   |
| Note:      |      |                             | <i>These cases reflect where there was no provocation or the blood had cooled. Today, with premeditation gone, such a division is not required.</i>   |

**(d) Murder - Words (or Grimaces) - Insufficient Provocation**

|                |      |  |   |
|----------------|------|--|---|
| Anon           | 1557 | Crompton 22 <sup>1421</sup>              | A was stealing pears in B's orchard. B came and rebuked him. A killed B. [ <b>Murder</b> ]  |
| Eldred         | 1560 | Dyer, SS, vol 110, p 424 <sup>1422</sup> | E was drinking in a tavern. On words with another whom he bore no malice or grudge against, E stabbed him, killing him. It was doubted whether it was murder or manslaughter. But E could not read [i.e. no benefit of clergy]. Therefore, he was hanged for murder. [ <b>Murder</b> ]  |
| Emerie (Emery) | 1584 | Crompton 21 <sup>1423</sup>              | Two, playing at cards, quarrelled. One, suddenly, killed the other. [ <b>Murder</b> ]   |
| Watts v Brains | 1600 | Cro Eliz 778 <sup>1424</sup>             | A and B quarrelled and B was hurt. 2 days later B came by A's shop, smiled at him and made a mouth at him. A then struck B from behind, on the calf of his leg (it seems with a sword), killing him. [ <b>Murder</b> ]  |
| Williams       | 1639 | W Jones 432 <sup>1425</sup>              | A case whether under the Statute of Stabbing 1603 (held not). W, a Welshman, walking on St David's day with a leek in his hat, was jeered by a porter. W threw a hammer at him. Missing him, it killed another. If W had been indicted for murder it is thought he would have been found guilty since the provocation was insufficient. <sup>1426</sup> [ <b>Likely, Murder</b> ] |
| Frances        | 1685 | 3 Mod 68 <sup>1427</sup>                 | A man made a caustic remark to a person who had just been whipped at Tyburn. On receiving a scurrilous reply, he stabbed him in the eye with a small sword. [ <b>Murder</b> ]   |
| Anon           | 1722 | 88 Mod 121 <sup>1428</sup>               | Two men were beating another in a street. A passer-by said to them ' <i>I am ashamed</i>  |

<sup>1417</sup> East, n 50, vol 1, p 241 noted there were many *indicia* of intention such as a vow to fetch something to '*stick*' the brother with, his putting on a thicker coat (to conceal a sword) *etc.* 'he appeared to have returned with a deliberate resolution to take a deadly revenge for what had passed; and the blows were plainly a provocation fought on his part, that he might execute the wicked purpose of his heart with some colour of excuse.' See also Beville, n 47, pp 31-4.

<sup>1418</sup> Bacon, n 37 (1832 ed), vol 5, p 770. The prisoner was afterwards reprieved. For the Hammersmith ghost see also Kenny, n 57, p 103.

<sup>1419</sup> 172 ER 1188.

<sup>1420</sup> Tindal CJ noted that the issue for the jury was, p 159 'whether the prisoner had shown thought, contrivance and design.'

<sup>1421</sup> This precedent was cited in *Herbert* (1558), see **App C**.

<sup>1422</sup> Baker Oxford, n 459, p 559.

<sup>1423</sup> Cited in Kel 55. Held by Bromley J at Chester Assizes. See also Beville, n 47, p 46.

<sup>1424</sup> 78 ER 1009. See also Hale, n 45, vol 1, p 455 and Kel 131. Also, Beville, n 47, pp 44-5.

<sup>1425</sup> 82 ER 227. See also Hale, n 45, vol 1, pp 469-70.

<sup>1426</sup> See Kel 131-2 'if the indictment had been for murder, I do think that [W] ought to have been convicted thereof, for the provocation did not amount to that degree, as to excuse him designedly to destroy the person that gave it him.'

<sup>1427</sup> See also Beville, n 47, p 47.

|                                    |        |   |   |
|------------------------------------|--------|---|---|
|                                    |        |   | <i>to see two men beat one.</i> One of them gave him a deep wound of which he later died. [ <b>Murder</b> ]   |
| Langstaffe                         | 1827   | 1 Lew 162 <sup>1429</sup>                 | X, told not to take wood chips from a shop was sought to be prevented by a 12 year old apprentice who extended his arms. X took a whittle (sharp knife) from a bench and threw it at him, resulting in his death. Hullock B <i>'If, without adequate provocation, a person strikes another with a deadly weapon, likely to occasion death, although he had no previous malice against the party, yet he is presumed to have had no such malice at the moment from the circumstances, and he is guilty of murder.'</i> [ <b>Manslaughter</b> ] |
| Noon                               | 1852   | 6 Cox CC, p 137                           | X came home at night, drunk. His wife made use of some taunting language to him. He took down his sword and stabbed her. Cresswell J, at p 139 <i>'If he used it intending to inflict a wound, then he is guilty of murder.'</i> However, if X had the sword in hand but without any intention to use it, there was careless (negligent) use of the sword, which made it manslaughter. [ <b>Manslaughter</b> ]  |
| Lesbini                            | 1914   | 3 KB 1116                                 | X, a firing range attendant, used some provocative words to a customer who shot her shortly afterwards. It was held that the provocation was insufficient. Reading CJ, p 1120 indicated the test was whether the provocation was sufficient to deprive a <i>reasonable</i> person of his self control - not whether it was sufficient to deprive the particular person charged with the murder. [ <b>Murder</b> ]   |
| Note                               | 1957   |   | <i>The Homicide Act 1957, s 3 did not preclude words (or grimaces) from being provocation.</i>  |
| <b>(e) Murder - Neglect/Duress</b> |        |   |   |
| Thomas                             | 1328   | Seipp 1328.022                            | A son exposed his sick father to cold weather, hastening his death. [ <b>Murder</b> ] <sup>1430</sup>   |
| Page                               | 1559   | Dyer, SS, vol 110, p 422. <sup>1431</sup> | P was delivered of a child. She abandoned it under a haystack. It died of hunger. [ <b>Murder</b> ]   |
| Anon                               | 1599   | Crompton 23 <sup>1432</sup>               | A whore exposed her new born child in an orchard. It was killed by a kite. [ <b>Murder</b> ]  |
| Anon                               | c.1628 | Palm 548 <sup>1433</sup>                  | A woman placed her illegitimate child in a hogstye. It was devoured. [ <b>Murder</b> ]  |
| Anon                               | c.1628 | Palm 548 <sup>1434</sup>                  | Parish officers shifted a child from one parish to another. It died from a lack of care and sustenance. [ <b>Murder</b> ]   |
| Self                               | 1776   | 1 Leach 136 <sup>1435</sup>               | An ill apprentice was made to lie on the floor on account of being verminous, without covering or medical care. He died. The jury found no malice. [ <b>Manslaughter</b> ] <sup>1436</sup>  |
| Squire                             | 1799   | Burn (23 <sup>rd</sup> ed), vol 2, p 798  | S had treated his apprentice in a most cruel and barbarous manner, who died. [ <b>Murder</b> ]  |
| Martin                             | 1827   | 3 C & P 211 <sup>1437</sup>               | M charged with causing the death of a child (aged 4) who seized liquor, when offered by his father and drank it and died. Held, not guilty because the child seized the liquor. If he had given it to the child, however, it would have been  |

<sup>1428</sup> Ibid, pp 47-8.<sup>1429</sup> 168 ER 998.<sup>1430</sup> In *Saunders (1573)*, see App G, Alderson B indicated as to this case, and the two subsequent ones, 'Those were cases of acts done, and not cases of mere omission.'<sup>1431</sup> See also Baker Oxford, n 459, p 554, n 14.<sup>1432</sup> See also Hale, n 45, vol 1, p 432 and Dyer, SS, vol 110, p 442 (citing Crompton).<sup>1433</sup> 81 ER 1213. This case was mentioned by Dodderidge J (Justice of the Queen's Bench, 1612-28) in Palm 548 (81 ER 1214), at p 548.<sup>1434</sup> This case was mentioned by Popham J (CJ of the King's Bench, 1592-1607) in Palm (18 ER 1214), at p 548.<sup>1435</sup> 168 ER 170. See also East, n 50, vol 1, p 226 and Russell, n 51, pp 767-8.<sup>1436</sup> See comments of East, n 50, vol 1, p 227 on this case. Also, Beville, n 47, pp 5-6. In a note to *Self*, at p 133 reference was also made to *Wade* (1784, see Old Bailey reports online, no t17840225-63. Charged with murder by neglect of a female apprentice who died. She was kept in a damp cellar with inadequate bedding and insufficient food, drink and necessities to support life. Not Guilty) and *Patmore* (1789, see no t17890225-1. Charged with murder by neglect of wife by failing to supply her with sufficient food and drink. Not Guilty).<sup>1437</sup> 172 ER 390.

|             |      |                              |  |
|-------------|------|------------------------------|--|
|             |      |                              | manslaughter. <sup>1438</sup> [ <b>Accident</b> ]  |
| Stockdale   | 1838 | 2 Lew 215 <sup>1439</sup>    | A woman was charged with the murder of her child through exposure. [ <b>Evidence insufficient for conviction</b> ].  |
| Marriott    | 1838 | 8 C & P 425 <sup>1440</sup>  | Indictment for the murder of an aged and infirm woman by not giving her food, medicine etc. Patteson J, p 433 ' <i>If the prisoner was guilty of wilful neglect, so gross and wilful that you are satisfied he must have contemplated the death of [W], then he will be guilty of murder. If...you think only that he was so careless, that her death was occasioned by his negligence, though he did not contemplate it, he will be guilty of manslaughter.</i> ' [ <b>Manslaughter</b> ]   |
| Walters     | 1841 | Car & M 164 <sup>1441</sup>  | An unmarried mother gave birth to a child by the roadside. She carried it about a mile and then abandoned it by the roadside, naked and without tying the umbilical cord. She was charged with murder by leaving the child exposed and failing to give it sufficient food. [ <b>Manslaughter</b> ]. Coltman J, p 170: ' <i>If a party do any act with regard to a human being helpless and unable to provide for itself, which must necessarily lead to its death, the crime amounts to murder. But if the circumstances are not such, that the party must have been aware that the result would be death, that would reduce the offence to the crime of manslaughter, provided that the death was occasioned by an unlawful act, but not such as to imply a malicious mind.</i> ' |
| Packard     | 1841 | C & M 236 <sup>1442</sup>    | An officer gave a distress warrant against X, and left P in possession for him. X and others gave excessive quantities of alcohol to P (to get him out of possession) and carried him around in a cab for 2 hours. Y died. Parke B, p 243 ' <i>If the act were such as to denote wickedness and maliciousness of mind it would amount to murder; but if merely negligence then only to manslaughter.</i> ' Held manslaughter in X. [ <b>Manslaughter</b> ]   |
| Pinhorn     | 1844 | 1 Cox 70                     | Indictment for murder of a child by exposing it to cold and inclement weather and neglecting to supply it with due care and necessities. The indictment was held defective since it failed to allege that it was the duty of the person charged to supply such care and necessities. [ <b>Indictment defective</b> ]   |
| Waters      | 1848 | 1 Den 356 <sup>1443</sup>    | W mother threw her child on ash heap and left it exposed to the cold. [ <b>Indictment for Murder. Indictment defective at first instance</b> ] <sup>1444</sup>   |
| Bubb & Hook | 1850 | 4 Cox CC 455 <sup>1445</sup> | B charged with murder by neglecting to supply a child of 4 with proper food and clothing. Held aggravated manslaughter. [ <b>Aggravated Manslaughter</b> ]   |
| Phillpot    | 1853 | Dears 179 <sup>1446</sup>    | If a woman wilfully abandons her infant child of too tender years to provide for itself to render her indictable at common law, it was necessary to aver (and prove) an injury to the child's health. It was insufficient to show the child suffered injury, but not to any serious extent. [ <b>Conviction for misdemeanour quashed</b> ]   |
| Shepherd    | 1862 | Le & Ca 147 <sup>1447</sup>  | S not guilty of manslaughter when death resulted from her failure to employ a midwife to assist at the confinement of her daughter, aged 18. [ <b>Not Guilty</b> ]   |
| Smith       | 1865 | L & C 607 <sup>1448</sup>    | A mistress is not criminally responsible for the death of her servant, caused by neglecting to supply her with proper food and clothing, unless the servant is helpless and unable to take care of herself or so under the dominion and restraint of her mistress as to be unable to withdraw herself from her control.  |

<sup>1438</sup> Today, one would suggest that the case would have been one of manslaughter (negligence) and one of murder, if intentionally given to kill or reckless as to the same (there was no evidence of this in the case).

<sup>1439</sup> 168 ER 1132.

<sup>1440</sup> 173 ER 559.

<sup>1441</sup> 174 ER 455. See also Russell, n 51 (1964 ed), vol 1, p 472.

<sup>1442</sup> 174 ER 487.

<sup>1443</sup> 169 ER 278.

<sup>1444</sup> See *Waters* (1849) 3 Cox CC 300 (on appeal, the 2<sup>nd</sup> count of the indictment was held good).

<sup>1445</sup> See also Russell, n 51, (1964 ed), vol 1, p 473.

<sup>1446</sup> 169 ER 686.

<sup>1447</sup> 169 ER 1340.

<sup>1448</sup> 169 ER 1533.

| <b>[Conviction for Manslaughter quashed]</b> |      |                               |  |
|--|------|-------------------------------|--|
| Wagstaffe                                    | 1868 | 10 Cox CC 530                 | Parents refused to have a doctor attend a sick child on a religious basis. If the child died, it was not manslaughter (culpable homicide). <b>[Not Guilty]</b>   |
| Nicholls                                     | 1874 | 13 Cox CC 75                  | A grown up who chooses to undertake the charge of another who is helpless from infancy, simplicity, lunacy or other infirmity is bound to execute that charge without wicked negligence. If such a person, by such negligence, lets that person die, it is manslaughter. <b>[Not Guilty]</b>   |
| Handley                                      | 1874 | 13 Cox CC 79                  | A person is guilty of the manslaughter of a newly born child if, without having made up her mind that the child shall die, she determines to be alone at the birth, for the purposes of temporary concealment, and the child afterwards dies by reason of her wicked negligence. <b>[Manslaughter]</b> <sup>1449</sup>   |
| Finney                                       | 1874 | 12 Cox CC 625                 | To render a person liable for manslaughter through neglect of duty, there must be a degree of culpability to amount to gross negligence. In charge of a lunatic, X turned on the hot water, scalding him to death in a bath. Lush J, p 626 ' <i>To render a person liable for neglect of duty there must be such a degree of culpability as to amount to gross negligence on his part.</i> ' <b>[Not Guilty – Accident]</b>  |
| Downes                                       | 1875 | 13 Cox CC 111                 | If a parent failed to provide medical aid to a child due to his religious beliefs, if the child died, manslaughter. Coleridge CJ, p 115, ' <i>if the death of a person results from the culpable omission of a breach of duty created by the law, the death so caused is the subject of a manslaughter.</i> ' <b>[Manslaughter]</b>  |
| Morby  | 1882 | LR 8 QBD 571                  | M's child died of smallpox. Had received no medical treatment due to his father's religious beliefs. Convicted of manslaughter. On appeal held that no positive evidence that the death was caused or accelerated by the neglect to provide medical care. <b>[Conviction overturned]</b>   |
| Instan                                       | 1893 | 17 Cox CC 602                 | X neglected to give assistance to an ill relation in order to help her obtain requisite food and medical help. <b>[Manslaughter]</b>   |
| Senior                                       | 1898 | 19 Cox CC 219 <sup>1450</sup> | A person having custody of a child who failed to supply it with necessary medical attention was guilty of wilful neglect under the Prevention of Cruelty to Children Act 1894 (57 & 58 Vict c 41, s 1). <sup>1451</sup> If the child died, it was manslaughter. <b>[Manslaughter]</b>  |
| Chattaway                                    | 1922 | 17 Cr App R 7                 | A girl of 25 had returned to her parents. Her health gradually deteriorated and she died due to neglect and semi-starvation. The court held that there was a common law duty to take proper care of an adult <i>sui juris</i> who was helpless and unable for any reason to withdraw himself from the dominion of those who had charge of him, and neglect in such a state could amount to manslaughter. <b>[Manslaughter]</b>   |
| Bateman                                      | 1925 | 19 Cr App R 8                 | Criminal negligence of a doctor in the birth of a child. Hewart CJ, pp 11-2 ' <i>In explaining to juries the test which they should apply to determine whether the negligence, in the particular case, amounted or did not amount to a crime, juries have used many epithets, such as 'culpable', 'criminal', 'gross', 'wicked', 'clear', 'complete'. But, whatever epithet be used and whether an epithet be used or not, in order to establish criminal liability the facts must be such that, in the opinion of the jury, the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving of punishment.</i> ' |
| Lowe   | 1973 | QB 702                        | L (of low intelligence) knew his child was sick but did not call a doctor. The child died from dehydration and gross emaciation. Manslaughter by negligence required   |

<sup>1449</sup> The court indicated that it would be murder if the mother (either before or after the birth) had made up her mind that the child should die and, after the child was born (with that intent she left it to die) which it then did. Or, if - intending to kill - she concealed the birth of the child by methods which would probably end in its death and which, being carried out, did so.

<sup>1450</sup> See also Cross & Jones, n 59, p 227.

<sup>1451</sup> This Act was passed after the judgment of Willes J in *Wagstaffe*. See also 31 & 32 Vict c 122, s 37 (1868)(rep) and 52 & 53 Vict c 44, s 18 (1889, rep). See also S & H, n 60, p 217. Senior belonged to a religious sect, the '*Peculiar People*', who believed that making use of medical aid showed a want of faith in God.

proof of a high degree of negligence amounting to recklessness. Where none, mere neglect, being an act of omission, which was wilful only in the sense of not being inadvertent did not - if death resulted - automatically involve conviction for manslaughter. [**Conviction quashed**]

Stone 1977 QB 354

S, and his mistress D, looked after S's sister, F who developed anorexia. F refused to reveal the name of her doctor, in fear of being 'put away.' S and D sought in vain to find her doctor or another and failed to tell any social worker of the problem. F died. S and D were convicted of manslaughter. Geoffrey Lane, p 363: 'The duty which a defendant has undertaken is a duty of caring for the health and welfare of the infirm person. What the prosecution have to prove is a breach of that duty in such circumstances that the jury feel convinced that the [D's] conduct can properly be described as reckless, that is to say a reckless disregard of danger to the health and welfare of the infirm person. Mere inadvertence is not enough. The [D] must be proved to have been indifferent to an obvious risk of injury to health, or actually to have foreseen the risk but to have determined nevertheless to run it.'<sup>1452</sup>

Note:

In past times, neglect was seen as non-active (omission). Today, most of these cases would be seen as active (commission).

#### (f) **Murder - Neglect/Duress**

Britton c.1290

Britton, n 23, pp 38-9 'If any person die in prison...if the inquest find that his death was hastened by the harsh keeping of his goalers, or by pain unlawfully inflicted on him...let all those, who are indicted as being the cause of his death, be ... immediately apprehended and detained as felonious homicides.'

Note c.1641

Coke, n 44, vol 3, p 52 'If a prisoner by the duress of the gaoler, comes to untimely death, this is murder in the gaoler and the law implies malice in respect of the cruelty.'<sup>1453</sup>

Bambridge & Corbet 1729 2 Str 856<sup>1454</sup>

B confined a prisoner X against his will with another who had smallpox, in the house of C. X died of smallpox. [**Murder in C**]<sup>1455</sup>

Huggins 1730 2 Stra 882<sup>1456</sup>

H was warden of the Fleet and G his deputy. B, servant of G, put A (a prisoner) in a dank and unwholesome room without chamber pot or other necessary convenience for 45 days. A died. Murder in B. H not guilty. [**Murder**]

#### (g) **Murder - Excessive Chastisement**<sup>1457</sup>

Bible Proverbs 13:24

'He who spares the rod hates his son, but he who loves him is careful to discipline him'. Ibid, 22:15 'Folly is bound up in the heart of a child, but the rod of discipline will drive it far from him.' 23:13 'Do not withhold discipline from a child; if you punish him with the rod, he will not die.'<sup>1458</sup>

Ulpian Digest 9.2.5

Edict, bk 18, a teacher only has the right to administer reasonable chastisement.

Paul Digest 9.2.6

Edict, bk 22, excessive brutality on the part of a teacher is blameworthy.

<sup>1452</sup> See also Williams (1<sup>st</sup> ed), n 69, p 266.

<sup>1453</sup> See also Hale, n 45, vol 1, p 466.

<sup>1454</sup> 93 ER 894.

<sup>1455</sup> On the facts B (the Warden of the Fleet prison) was held not guilty.

<sup>1456</sup> 93 ER 915. Raymond CJ, p 884 'there is no particular way of killing another, that is necessary to constitute a murder...In the case of a prisoner there is no occasion for an actual stroke: the restraining him by force, and killing him by ill usage is enough to constitute this offence...Another consideration to make it murder, that it is a deliberate act, of long continuance and of great cruelty. It is likewise accompanied with force, against the consent of the party. On all which accounts the law implies malice.' See also 93 ER 915. Also, Russell, n 51, vol 1, pp 668-9.

<sup>1457</sup> Kelyng CJ in *Mawgridge* (1707), see **App B**, stated generally, p 134 'obstinate and perverse children...are a great grief to parents, and when found in ill actions, are a great provocation. But if upon such provocation the parent shall exceed the degree of moderation, and thereby in chastising him kill the child, it will be murder.'

<sup>1458</sup> The rod (*shebet*) was used on children and slaves. Also, by law (Book of Deuteronomy, 25:2, with 40 lashes being the maximum). If the slave died, the master was punished (Book of Exodus 21:20) but it was unclear what the punishment was. Sulzberger, n 98, pp 113, 137 considered that it referred to imprisonment. Killing a child through physical correction by means of a rod, would appear to impose no punishment, since fathers had great authority over their children.

|                               |         |                                    |   |
|-------------------------------|---------|------------------------------------|---|
| Rawly (Rowly) <sup>1459</sup> | 1612    | 12 Co Rep 87                       | A boy beaten by another ran home bloody. His father ran ¾ of a mile and hit the other child on the head with a little cudgel, who died. [ <b>Manslaughter</b> ] <sup>1460</sup>   |
| Holloway(e)                   | 1628    | Cro Car 131 <sup>1461</sup>        | A parker finding a boy stealing wood in park, bound him to a horse's tail. The horse took fright and dragged the boy, who broke his shoulder and died. [ <b>Murder</b> ].   |
| Anon                          | c. 1665 | Kel 64 <sup>1462</sup>             | A blacksmith reprimanded a servant. On receiving a cross answer, he ran a red hot iron into his belly. [ <b>Murder</b> ]  |
| Grey                          | 1666    | Kel 64 <sup>1463</sup>             | A blacksmith, after his servant answered back on being reprimanded, struck him with iron bar on his skull, killing him. [ <b>Murder</b> ]   |
| Anon                          | 1670    | Hale, vol 1, p 474 <sup>1464</sup> | A master struck his apprentice with his great staff, killing him. [ <b>Murder</b> ]   |
| Keite (Keat)                  | 1696    | L Raym 138 <sup>1465</sup>         | K intending to dismiss his gardener (W) asked him ( <i>via</i> a servant) for the key to the garden. On a refusal, K got his sword and met W. On a rude reply, K drew his sword and struck W on the head. W attempted to strike K with a scythe in return, but was hindered by a kitchen rack. He then punched K several times. K then wounded W, which wound killed him. [ <b>Indictment defective. Later Manslaughter</b> ] <sup>1466</sup>   |
| Turner                        | 1697    | Comb 407 <sup>1467</sup>           | A woman complained to her husband that the servant had not cleaned her clogs. He immediately struck the boy on the head with one of them (a small one), killing him. [ <b>Manslaughter</b> ]  |
| Anon                          | 1775    | East, vol 1, p 261 <sup>1468</sup> | Son often guilty of stealing. Beaten with a rope by his father. Died. [ <b>Manslaughter</b> ]   |
| Wiggs                         | 1784    | East, vol 1, p 237 <sup>1469</sup> | After work done improperly, an angry shepherd threw a wooden stake at a boy, killing him. [ <b>Manslaughter</b> ]   |
| Hazel                         | 1785    | 1 Leach 368 <sup>1470</sup>        | After work done improperly, H threw a stool at her 10 year old daughter in law, killing her. [ <b>Pardon advised, no intention found</b> ].   |
| Cheeseman                     | 1836    | 7 C & P 454 <sup>1471</sup>        | Where a person, <i>in loco parentis</i> , inflicts corporal punishment on a child and the child (aged 15) dies, the death being of consumption but hastened by the ill treatment, it will not be murder, but only manslaughter in the person inflicting the punishment, although it was cruel and excessive, and accompanied by violent and threatening language, if such person believed that the child was shamming illness, and was really able to do the quantity of work required. [ <b>Manslaughter</b> ] |

<sup>1459</sup> Also spelt Royley and Rawley. See Holdsworth, n 65, p 303 and Russell, n 51 (last ed, 1964), p 531.

<sup>1460</sup> See explanation of this case in East, n 50, vol 1, pp 237-8. Also, Foster n 77, pp 294-5. See also Cro Jac 296 (79 ER 254) and Godb 182 (78 ER 111). Beville, n 47, p 74 'it was held that he was guilty of manslaughter, because done in a sudden heat and passion. Lord Coke says, that the blow was given with a cudgel, Croke says it was a little cudgel, and Godbolt says that it was a rod, and I think it may be inferred the blow was given with something not likely to be dangerous. The father had no right to beat the boy, and if he had struck him with any thing likely to occasion death it would have been murder.' It is likely that the blow inflicted was not treated as excessive in the circumstances and that there was no intention to kill. See also Hale, n 45, vol 1, p 43.

<sup>1461</sup> 81 ER 1213. See also W Jones 198 (82 ER 105) and Kel 127. Also, Hale, n 45, vol 1, 453. It may be noted the parker also hid the body which, likely, did not help his case. See also Beville, n 47, pp 45.

<sup>1462</sup> This was mentioned by Kelyng by a fellow judge (Morton J, Justice of the King's Bench, 1665-72) who indicated that he had been told it by Jones J (this would likely be Sir Thomas Jones, judge of the King's Bench, 1676-83) when the latter was an assize judge on the Oxford assize.

<sup>1463</sup> See also Beville, n 47, pp 51-2. In this case was cited one where a woman was indicted for the murder of her child, by kicking it and stamping on its belly. See also Green, n 94, p 497 (a case in 1667 before Kelyng CJ where a weaver beat a boy with a broomstick, who died. Held to be murder). See also Holdsworth, n 65, vol 8, p 303.

<sup>1464</sup> See also Beville, n 47, p 52.

<sup>1465</sup> 91 ER 989. See also Comb 406 (90 ER 557). Also, Holdsworth, n 65, vol 8, p 303.

<sup>1466</sup> Beville, n 47, p 53 'Holt [CJ] said that the master was guilty of murder but the other judges did not give their opinion, and as the indictment was found to be defective, there was no decision upon the case itself.' Holt CJ stated, Comb (90 ER 557) at p 408 'if a servant gives occasion to be corrected, it must be done with a proper instrument, as a cudgel, and if death ensue, 'tis *per infortunium*, bare words are no provocation to draw a sword and kill.'

<sup>1467</sup> 90 ER 558. See also Russell, n 51, vol 1, p 706 and (last ed, 1964), vol 1, p 532. Holt CJ thought it was an unlikely thing to kill a boy with.

<sup>1468</sup> See also Russell, n 51, vol 1, pp 766-7.

<sup>1469</sup> This case was also referred to in *Hazel* (see text).

<sup>1470</sup> 168 ER 287. At p 383 per Lord Mansfield 'Murder is where a man of sound sense unlawfully kills another of malice aforethought, either express or implied. If the malice be express, the facts remain with the jury. If the malice is to arise from implication, it is a matter of law, the entire consideration of which resides with the court.'

<sup>1471</sup> 173 ER 202. See also Russell, n 51, (last ed, 1964), vol 1, p 584.

|                      |      |                             |   |
|----------------------|------|-----------------------------|---|
| Hopley               | 1860 | 2 F & F 202 <sup>1472</sup> | A schoolmaster beat a child to death. Cockburn CJ, p 206 'a parent or a schoolmaster...may...inflict moderate and reasonable corporal punishment...the beating was manifestly protracted far beyond the bounds of reason, moderation or humanity.' [ <b>Manslaughter</b> ]  |
| Griffin              | 1869 | 11 Cox 402 <sup>1473</sup>  | The judge (Martin B) indicated that the law as to correction had reference only to a child capable of appreciating correction and not to an infant. Although a slight slap might lawfully be given to an infant by her mother, more violent treatment by her father would not be justifiable in an infant so young. In this case the child (aged 2 ½) was given 6-12 severe strokes with a strap. [ <b>Manslaughter</b> ]   |
| Halliwell v Counsell | 1878 | 38 LT 176                   | Counsel noted that there was no modern authority for establishing that a master might chastise his apprentice at all and that the <i>dicta</i> relied on might just as well be relied on to justify him in beating an adult servant. <sup>1474</sup>  |
| Cleary v Booth       | 1893 | 1 QB 465                    | The authority delegated by the parent of a pupil to a schoolmaster to inflict reasonable personal chastisement on him is not limited to offences committed by the pupil on the premises of the school, but may extend to acts done by such pupil on the way to (and from) school.   |
| Woods                | 1921 | 85 JP 272                   | An elder brother had no right to strike a younger who was cheeky to him. If he did, he had to take the risk of the physical condition of his brother and if the latter died he might be guilty of manslaughter. Here, a boy struck his younger brother (aged 15) on the mouth. The latter died, since he had a medical condition. [ <b>Not Guilty</b> ]   |
| Mackie               | 1973 | 57 Cr App R 453             | The appellant was convicted of the manslaughter of a 3 year old boy to whom he was in <i>loco parentis</i> , by putting him in fear of excessive punishment so that he ran away and fell downstairs, dislocating his neck. The court approved the question posed by the judge 'Had [D] passed from lawful chastisement to unlawful violence?' It upheld the decision of the judge to admit evidence of excessive violence by the accused upon the child on previous occasions, not to prove violence or threat of violence at the time of the incident resulting in death, but to prove that the child's fear of being hurt, which caused him to try to escape, was reasonable. [ <b>Manslaughter</b> ] |
| Note                 | 2004 |                             | <i>Children Act 2004, s 58 provides that, in relation to an offence under the Offences against the Person Act 1861, ss 18, 20 &amp; 47 battery of a child cannot be justified on the ground that it constituted reasonable punishment. A fortiori, where death results.</i>   |

### APP C - KILLING PURSUANT TO AN UNLAWFUL ACT

**Note:** Since, at least, 1512, the courts have treated a killing resulting from an unlawful act to be murder. However, in practice, this tended to be only where the unlawful act was a *felony*, see (a). Where the unlawful act resulted in accidental or negligent killing, it tended to be treated as manslaughter, see (b). These forms of implied malice was abolished by the Homicide Act 1957 (excepting death arising from GBH).

| <u>Case</u>                               | <u>Date</u> | <u>Ref</u>                                 | <u>Explanation</u>  |
|---|-------------|--|---|
| <b>(a) Murder - Unlawful Act - Felony</b> |             |  |   |
| Newbolt                                   | 1512        | Caryll, SS, vol 115, p 614 <sup>1475</sup> | In this case, Fineux CJ said that, if 20 persons went to beat a man and one killed him, that one was the principal and the others accessories to the felony, because the act was unlawful. However, if the others happened to be there for a lawful purpose, they were not accessories. [ <b>Murder - Battery</b> ] |

<sup>1472</sup> 175 ER 1024. See also Russell, n 51, (last ed, 1964), vol 1, p 584.

<sup>1473</sup> See also Russell, n 51, (last ed), vol 1, p 585.

<sup>1474</sup> Archbold, n 52, para 19-48 cites this case. Today, it is dubious whether a person has a right to physically chastise a servant or employee or apprentice.

<sup>1475</sup> See also Baker Oxford, n 459, p 556.

|                         |        |   |  |
|-------------------------|--------|---|--|
| Lord Dacre              | 1541/2 | Dalison, SS <sup>1476</sup><br>vol 124, pp 129-30 | D unlawfully hunted in a private park with others. It seems they agreed, if anyone should resist them, they would kill him. A parker was killed by one of them. On the basis that, if a number of persons were committing an unlawful act, and a murder was committed by one, all were principals, D was executed. [ <b>Murder - Poaching - Agreement to Kill</b> ] <sup>1477</sup>  |
| Herbert                 | 1558   | Dalison, SS <sup>1478</sup><br>vol 124, p 127     | H, with 40 or more others, assembled at the house of M, for the purpose of an affray and to fight, but with no intention of killing. M's sister, seeking to intercede, was killed by a rock thrown by one of H's servants. Held murder in H and the others because it derived from an unlawful act. [ <b>Murder - Affray</b> ]   |
| Anon                    | 1584   | Sav 67 <sup>1479</sup>                            | A keeper and his son ordered poachers to yield. They fought and killed the keeper.<br><br>The judges, in conference, held that: ' <i>the assembling to do an act unlawful, and coming with weapons, and the first assault offered by shooting an arrow, doth declare their intention to be malicious against such as should withstand them.</i> ' [ <b>Murder - Poaching</b> ]   |
| Wormal & Tristan        | 1619   | Palm 35 <sup>1480</sup>                           | He and 3 others entered a park to stalk deer. They intended to kill anyone who resisted them. <sup>1481</sup> Confronted by park keepers, W wounded one with a pike, who died. Following <i>Lord Dacre</i> (see above), held murder in them. [ <b>Murder - Poaching - Agreement to Kill</b> ]  |
| Horsey                  | 1862   | 3 F & F 287 <sup>1482</sup>                       | H had wilfully set fire to a stack of straw close to a barn or outhouse, in an enclosure not adjoining to a dwelling house. The deceased (D, who was unknown) was burnt to death either in the outhouse or on (or by) the side of the stack. It was held H was not guilty of murder, unless D was there when H had set fire to the stack. <i>Quaere</i> whether H would be so, even if D had been there at the time, he had no knowledge not having any reason to believe, or suppose, anyone was there.<br><br>[ <b>Acquitted of Murder</b> ] |
| Desmond, Barrett        | 1868   | Times, 28 April                                   | X exploded gunpowder against a prison wall, intending to enable a prisoner to escape, killing a number of persons. Cockburn CJ stated that it was murder ' <i>If a man did an act, more especially if that were an illegal act, although its immediate purpose might not be to take life, yet if it were such that life was necessarily endangered by it – if a man did such an act, not with the purpose of taking life, but with the knowledge or belief that life was likely to be sacrificed by it.</i> ' [ <b>Murder</b> ]                |
| McNaughten <i>et al</i> | 1881   | 14 Cox CC 576                                     | If parties assemble to obstruct the law, all parties so assembling are guilty of an unlawful assembly whether a riot takes place or not. If a homicide takes place in consequence of that assembly, everyone taking part may be personally responsible for the homicide. <sup>1483</sup> [ <b>Riot</b> ]   |
| Serne                   | 1887   | 16 Cox CC 311 <sup>1484</sup>                     | S set fire to his house which he had insured for considerably more than its value. In the fire his two boys perished. He had been a kind father and had no intention of causing their deaths. On an indictment for murder, he was acquitted. He was later found guilty of arson. [ <b>Arson</b> ]  |

<sup>1476</sup> See also Brooke, n 31, *Corone*, pl 171 'Note that if twelve people come to commit a robbery, affray, riot, or such like, which are unlawful acts) and one of them enters the house and kills someone, or does some other unlawful act, all the others who came with him to do the unlawful act are principals. The same law was applied in the case of Fiennes, Lord Dacre, where one of his company killed a man while hunting in a forest, and the Lord Dacre and other hunters, such as Mantell and others, were principals; and they were all hanged.' See also SS, vol 109, p 2 (Dacre confessed), Reeves, n 221, vol 4, p 394, Keilw 161 (72 ER 335), Fitzherbert, n 471, p 73, Kel 56 and Hale, n 45, vol 1, pp 439, 443. See also Bellamy, n 251, pp 41-3 (Dacre was only 24 when he died).

<sup>1477</sup> For prior authority in 1329, see SS, vol 97, p 190 (case of *Sir Warin del Idle*).

<sup>1478</sup> See also Beville, n 47, pp 15-6 and Hale, n 45, vol 1, p 438. Also, Baker Oxford, n 459, p 556.

<sup>1479</sup> 123 ER 1016.

<sup>1480</sup> 81 ER 966. See also 2 Rolle Rep 120 (81 ER 698).

<sup>1481</sup> '*ab initio pur occider chescunque resist lour wicked purpose ove les weapons queux ils carrion.*'

<sup>1482</sup> 176 ER129. See also Russell, n 51, (1964 ed), vol 1, p 473 and Blom-Cooper, n 69, p 27.

<sup>1483</sup> In the case B was about to serve an ejection process in Ireland. He was protected by constables of the Royal Irish Constabulary. There was a riot. Constable A was attacked and died. Constables M & D fired into the crowd, killing two people. The coroner's jury found a verdict of willful killing against M and D and manslaughter against H (another constable) for the homicide of C who was also killed.

<sup>1484</sup> See also Russell, n 51, (1964 ed), vol 1, p 475.

|                |      |                               |   |
|----------------|------|-------------------------------|---|
| Beard          | 1919 | 26 Cox CC 573                 | Homicide by an act of violence done in the course of, or in furtherance of, a felony involving violence (in this case, rape) is murder. Lord Birkenhead, p 590, ' <i>it was proved that death was caused by an act of violence done in furtherance of the felony of rape. Such a killing is by the law of England murder.</i> ' <sup>1485</sup> Beard, who had been drinking, raped a girl of 13 after a violent struggle in the course of which he placed his hand over her mouth, throttling her, causing her death. Held to be murder. <b>[Murder – Rape]</b>  |
| Betts & Ridley | 1930 | 29 Cox CC 259 <sup>1486</sup> | When in pursuance of a common design to commit robbery with violence, X strikes a blow which results in death, and Y is present aiding and abetting the robbery as a principal in the 2 <sup>nd</sup> degree, both are guilty of murder, although the latter may have consented to the use of only a limited degree of violence and the former may have departed from the agreed method of attack. <sup>1487</sup> <b>[Murder – Robbery]</b>  |
| Stone          | 1937 | 3 AE 920                      | S charged with murder of girl. At the trial the jury asked Hewart CJ if, as a result of an intention to commit rape, a girl was killed, although there was no intention to kill, was that murder. He confirmed it was and this was upheld by the Court of Criminal Appeal. <b>[Murder – Rape]</b>   |
| Larkin         | 1943 | KB 174                        | L entered a house with open razor to frighten a man who had sex with a women with whom he had been living. She ran against the blade and was killed. Manslaughter. <b>[Manslaughter]</b>  |
| Jarmain        | 1946 | KB 74                         | J went into a garage and demanded money from the cashier at the point of a loaded gun. The gun went off, killing the cashier. J said it was an accident. The Court of Criminal Appeal said that, even if true, it was murder. Pointing a loaded gun was an act of violence and to intend to do such an act, with the further intention of stealing, was sufficient <i>mens rea</i> . <sup>1488</sup> <b>[Murder - Robbery]</b>  |
| DPP v Smith    | 1961 | AC 290 <sup>1489</sup>        | S was driving a car containing stolen goods. A constable (P), looking into the car, told D to draw in to the near side. Instead, S accelerated. P ran beside the car and clung on to it. Thrown off it, he was killed. S drove on some distance and threw out the stolen goods. S's defence was that the killing was an accident, he panicked. The jury convicted him of murder, which the House of Lords upheld (but not the Court of Appeal). Kilmur LC, p 327 ' <i>the sole question is whether the unlawful and voluntary act was of such a kind that [GBH] was the natural and probable result. The only test available for this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result. That, indeed, has always been the law.</i> ' <b>[Murder – Stolen Goods]</b> |

**(b) Murder - Unlawful Act - Accident**

|      |      |          |  |
|------|------|----------|--|
| Hull | 1664 | Kel 40-1 | H and others were building a house about 30 feet from the highway. About evening H threw down a piece of timber from the house and shouted ' <i>stand clear</i> '. It was heard by the labourers and all of them went from the danger but not C who was hit and died. Hyde CJ held it manslaughter since he said the timber should have been let down by a rope. Wylde and Kelyng JJ thought it an accident. However, they all agreed that, if in London, because ' <i>there is a continual concourse of people passing up and down the streets, and a new passenger, who did not hear him call out, and therefore the casting down any such thing from an house into the streets, is like the case where a man shoots an arrow or gun into a market place full of people, if any one be killed it is manslaughter.</i> ' <b>[Accident/Manslaughter]</b> |
|------|------|----------|--|

<sup>1485</sup> Cf. on appeal in this case (14 Cr App R 110) Reading CJ at p 116 'By the law of England that is murder: it is an act of violence done in the course or in furtherance of a felony involving violence, and beyond all question and beyond the range of any controversy that is murder.'

<sup>1486</sup> See also Russell, n 51(1964 ed), vol 1, pp 488-9.

<sup>1487</sup> S & H, n 60, p 195 put it thus 'In *Betts & Ridley* D2 agreed with D1 that P should be '*pushed down*' and robbed. D1 struck P a violent blow which killed him and it was held that D2 was equally guilty of the murder.'

<sup>1488</sup> See also S & H, n 60, p 195.

<sup>1489</sup> Blom-Cooper, n 69, p 28.

|         |      |                                       |   |
|---------|------|---------------------------------------|---|
| Hodgson | 1690 | East, vol 1, pp 258-9 <sup>1490</sup> | X and others, armed, were hired by Y (a tenant) to carry away his goods to prevent a distress. The landlord, assisted by others, sought to prevent them. In the affray, after a constable in vain sought to disperse them, a boy watching was killed by one of the company unknown. Holt and Pollexfen CJJ held it murder, but the other judges held it an accident since the boy was not involved in the affray at all.<br>[ <b>Accident</b> ] <sup>1491</sup> |
| Plummer | 1701 | Kel 166 <sup>1492</sup>               | Several persons met to smuggle goods, an unlawful act. Meeting customs officers, one fired a gun and killed one of his own party. Acquitted of murder. Holt CJ noted: ‘if two men have a design to steal a hen and one shoots at the hen for that purpose, and a man be killed, it is murder in both, because the design was felonious.’ [ <b>Acquitted of murder</b> ]   |

### APP D - PROVOCATION (‘HOT BLOOD’)

#### Note:

- The courts distinguished between duels (murder, being premeditated) and killing in brawls (in ‘hot blood’), on the basis it was chance medley (mixture of intention and accident). In time, this distinction was replaced by the issue of whether there had been sufficient *provocation* to reduce the crime from murder to manslaughter, see (a);
- Where a third party intervened as a peacemaker in a brawl and was killed, this treated as manslaughter, see (b);
- Where a third party intervened to kill, this was usually treated as manslaughter, being in hot blood, see (c);
- In the case of a husband catching his wife *in flagrante*, this was usually treated as manslaughter and not murder (unless there was an interval), see (d).

| <u>Case</u>                    | <u>Date</u> | <u>Reference</u>               | <u>Explanation</u>  |
|--------------------------------|-------------|--------------------------------|---|
| <b>(a) General Provocation</b> |             |                                |   |
| Robinson                       | 1576        | Crompton <sup>1493</sup>       | R and X engaged in sudden combat. After some blows, X fled. R went to his house, which was near, fetched a staff and killed X after pursuing him. [ <b>Manslaughter</b> ]   |
| Newbury                        | 1611        | 12 Coke Rep 87 <sup>1494</sup> | Two men, playing at bowls, quarrelled. A third person, in revenge for his friend, suddenly struck one of the party with a bowl, of which he died. [ <b>Manslaughter</b> ]   |
| Lanure                         | 1641        | Hale, vol 1, 456               | If A passed in the street and B met him (there being a convenient distance between A and the wall) and B took the wall and A killed him. [ <b>Murder</b> ] If B had jostled A in provocation. [ <b>Manslaughter</b> ] If A riding on the road and B whipped the horse of A out of the track and A, alighting, killed B. [ <b>Manslaughter</b> ] |
| Buckner                        | 1655        | Sty 467 <sup>1495</sup>        | Two men (H and Y) went to B’s lodgings, H being B’s creditor. When they got in, H placed Y at the door with a drawn sword, to prevent B leaving, while a bailiff was sent for to arrest him. B stabbed H who was discoursing with him, taking a dagger from his pocket. [ <b>Manslaughter. Not in the Statute of Stabbing 1603</b> ]            |
| Lord Morley                    | 1666        | Kel 53 <sup>1496</sup>         | Resolution of Judges of 28 April 1666, prior to his trial before the High Steward and the House of Lords, <sup>1497</sup> that:   |

<sup>1490</sup> See also 1 Leach 6 (168 ER 105). Also, called (by East) ‘*Hubson*’.

<sup>1491</sup> It is difficult to distinguish this case from that of *Lord Dacre* or *Herbert*, since the affray was unlawful. See the explanation of East, n 50, vol 1, p 259.

<sup>1492</sup> See also 12 Mod 627 (88 ER 1565). Also, Stephen, n 55, vol 3, pp 68-9.

<sup>1493</sup> Crompton, n 39(1584 ed), fo 20b ‘*tout fuit fait in un continuing fury*.’ See also Kaye, n 457, p 589.

<sup>1494</sup> 77 ER 1364. This case was also referred to in *Keite* (1696) Comb 406 (90 ER 558) at p 558 (although it was mis-reported). See also Russell, n 51, vol 1, p 720 and last ed (1964), p 531.

<sup>1495</sup> 82 ER 867. See also Beville, n 47, p 79; Hale, n 45, vol 1, p 470 and Russell, n 51, vol 1, p 703.

<sup>1496</sup> See also 7 ST 421 and 1 Sid 277 (82 ER 1103) and 1 Lev 180 (83 ER 358). This case was also cited as *Bromwich’s (or Bromwick’s) Case*. See also Holdsworth, n 65, vol 8, p 303 and East, n 50, vol 1, p 255.

<sup>1497</sup> Lord Morley (Morly) quarreled in a tavern with H. He said to H that, if he fought ‘at this time, I shall have the dis-advantage from the height of the heels of my shoes.’ They went to fight in the fields a little time after. With Morley was one Bromwich [B] who made a thrust at H and, while H sought to parry it, Lord Morley stabbed H, who died. Tried by his peers, Morley was found guilty of manslaughter. At the trial of B, the court directed the jury that it was murder, B being present, aiding and abetting. However, the jury found him only guilty of manslaughter.

- no words in law, were sufficient provocation to reduce murder to manslaughter;
  - if, on ill words, ‘both parties suddenly fight and one kills the other, this is but manslaughter, for it is a combat between two upon a sudden heat’;
  - ‘if upon words the men grow to anger, and afterwards they suppress their anger, and then fall to other discourses, or have other diversions for such a space of time as in reasonable intendment, their heat might be cooled, and some time after they draw one upon another, and fight, and one is killed, this is murder, because being attended with such circumstances as it is reasonably supposed to be a deliberate act, and a premeditated revenge upon the first quarrel, but the circumstances of such an act being matter of fact, the jury are judges of those circumstances.’
- |                  |      |                                  |  |
|------------------|------|----------------------------------|--|
| Anon             | 1671 | Hale, vol 1, 483 <sup>1498</sup> | A and B were in a street. B used provoking language and A boxed him on the ear. They closed and B was thrown, breaking his arm. B ran to brother’s house which was nearby and his brother (C) went out with sword drawn towards A who retreated 10-12 yards. C kept pursuing A who drew his sword and killed C, although A might have retreated out of danger. <b>[Manslaughter]</b>   |
| Anon             | 1675 | Hale, vol 1, 456                 | On words of provocation (‘son of a whore’) addressed to him in a tavern, a man threw a broomstick at the woman, killing her. <b>[Pardon advised. Treated as an accident]</b> . <sup>1499</sup>   |
| Kirk & Cage      | 1698 | 12 Mod 304 <sup>1500</sup>       | 3 men quarrelled in a park. Some blows passed between them. They immediately walked out of the park. A 4 <sup>th</sup> person joined them as they were going. Outside the park all 4 fought. One received a wound which brought on a fever occasioning his death. Held to be a ‘sudden’ offence. <b>[Manslaughter]</b>   |
| Nailor           | 1704 | Foster, p 278                    | A man ordered his drunk son (X) to go to bed. They scuffled. X’s brother came downstairs, threw X down and kept him down. X gave his brother a wound with a penknife, causing his death. <b>[Manslaughter]</b> . <sup>1501</sup>   |
| Stedman          | 1704 | Foster, p 292 <sup>1502</sup>    | A soldier killed a woman after being struck in the face with a clog with great force. <b>[Manslaughter]</b> .  |
| Reason & Tranter | 1721 | 1 Stra 499 <sup>1503</sup>       | After giving a man a light blow with a cane he was killed by two men with great violence. <b>[Manslaughter, however, should have been murder]</b> <sup>1504</sup>  |
| Taylor           | 1771 | 5 Burr 2793 <sup>1505</sup>      | 3 Scots were in a tavern. Words passed between one Scot (X) and another drinker (E). X struck E with a small rattan cane and another Scot (Y) struck him with his fist. E went to get his servants to turn them out the house. When they had gone, the victualler told X to pay for his drink and go. X refused. The pub landlord (S) then said the same. X went to go without paying. S seized him by the collar and shoved him into a passage. E returned and assisted S to push X out of the tavern. The moment he was outside, X turned and stabbed S. While in the passage X had said that he did not mind killing an Englishman. <b>[Manslaughter]</b> |

<sup>1498</sup> See also Beville, n 47, pp 64-5 and Russell, n 51, vol 1, p 720.

<sup>1499</sup> Beville, n 47, p 47 said that the judges ‘were not unanimous whether the broomstick was to be considered as a deadly weapon or not, and he was therefore pardoned.’ See also East, n 50, vol 1, p 236 and Stephen, n 55, vol 3, p 67.

<sup>1500</sup> 168 ER 178. At p 305 per Holt CJ ‘it being upon a sudden falling out, and in pursuance of that heat, it cannot be murder.’ See also Beville, n 47, p 111.

<sup>1501</sup> Foster, n 77, p 278 ‘for there did not appear to be any inevitable necessity so as to excuse the killing in this manner.’ That is, there was no question of self defence by X. See also East, n 50, vol 1, pp 277, 285 and Bacon, n 37 (1832 ed), vol 5, p 776 (who cites it as ‘Vailor’).

<sup>1502</sup> Ibid, p 292 ‘The smart of the man’s wound, and the effusion of blood might possibly keep his indignation boiling to the moment of the fact.’ See also East, n 50, vol 1, pp 234-5 and Beville, n 47, pp 80-1.

<sup>1503</sup> 93 ER 659. See also 6 ST 195 and Russell, n 51, vol 1, pp 760-1.

<sup>1504</sup> There is a variance in the reports. It may have been that the victim dealt the first blow and, prior to that, he had made menaces and produced a pair of pistols. See also Foster, n 77, pp 292-4 and East, n 50, vol 1, pp 320-1.

<sup>1505</sup> 98 ER 466. See also East, n 50, vol 1, p 244 and Beville, n 47, pp 81-2. Also, Russell, n 51, vol 1, pp 716-7.

|         |      |                                    |  |
|---------|------|------------------------------------|--|
| Brown   | 1776 | 1 Leach 148 <sup>1506</sup>        | If, on a sudden quarrel between two parties of keel men and soldiers, the blow intended for an individual of one party would, if death ensues, have amounted only to manslaughter, it will be only manslaughter though by accident it kills another. In a violent affray between soldiers and keel men a soldier, brandishing a sword against the mob, struck a passer-by on the head. [ <b>Manslaughter</b> ]   |
| Snow    | 1776 | 1 Leach 151 <sup>1507</sup>        | A quarrel which later re-started. P used ill language and S replied. P collared S, dragged him to his feet and rolled him in the road. S stabbed P with a work tool which was not concealed. [ <b>Manslaughter. Pardon recommended</b> ].  |
| Fray    | 1785 | East, vol 1, p 236 <sup>1508</sup> | F threw a pickpocket in a pond who drowned. [ <b>Manslaughter, no intent to kill</b> ]   |
| Kessal  | 1824 | 1 Car & P 437 <sup>1509</sup>      | Two persons quarrel and fight. One runs away. When the other overtakes him he pulls out a knife and stabs him. If death ensues, then manslaughter. [ <b>Manslaughter</b> ]<br>If, before the conflict began, the party had drawn a knife in cool blood [then feigned to run away], then, murder. In this case L was indicted for intent to murder or GBH. [ <b>Not Guilty. Self Defence was assumed</b> ].   |
| Lynch   | 1832 | 5 C & P 324 <sup>1510</sup>        | X (who had a 'weak intellect') and L had been drinking. There was a scuffle and X gave L a black eye. A policeman came and L left, but soon returned and stabbed X, killing him. [ <b>Manslaughter</b> ] <sup>1511</sup>   |
| Wild    | 1837 | 2 Lew 214 <sup>1512</sup>          | A kick is not a justifiable mode of turning a person out of one's house and if it causes death, manslaughter. Alderson B, p 214 ' <i>If a person becomes excited, and being so excited, gives to another a kick, it is an unjustifiable act.</i> ' [ <b>Manslaughter</b> ]   |
| Kirkham | 1837 | 8 C & P 115 <sup>1513</sup>        | To reduce the killing to manslaughter, there must not only be sufficient provocation but the jury must be satisfied that the fatal blow was given in consequence of the provocation. If A had formed a deliberate design to kill B and, after this, they met and quarrelled and many blows passed and A killed B, it was murder, if the jury were of the opinion that it was in consequence of prior malice and not of any sudden provocation. [ <b>Manslaughter</b> ] <sup>1514</sup>   |
| Thomas  | 1837 | 7 C & P 817 <sup>1515</sup>        | If a person receives a blow and immediately avenges it with any instrument he may happen to have in his hand, and death ensues, this will only be manslaughter provided the fatal blow is to be attributed to the passion of anger arising from the prior provocation. The law requires two things: (a) there should be provocation; and (b) the fatal blow should be clearly traced to the passion arising from the provocation. Therefore, if, from the circumstances, it appears that a party, before any provocation given, intended to use a deadly weapon towards anyone who might assault him, this would show that a fatal blow given afterwards was not to be attributed to the provocation, and the crime would, therefore, be murder.<br>[ <b>Indictment for Maliciously Stabbing. Not Guilty</b> ] |
| Canniff | 1840 | 9 C & P 359 <sup>1516</sup>        | A brawl in a pub between X and Y. X gave no blows but fell on Y three times, the last rupturing this stomach and causing death. Patterson J, p 360 indicated that ' <i>All struggles in anger, whether by fighting or wrestling, or any other mode – all contests in anger are unlawful...If [X] laid hold of [Y] in anger, and struggled with</i>   |

<sup>1506</sup> 168 ER 177. See also Beville, n 47, pp 82-4. East, n 50, vol 1, p 246 'This was holden manslaughter: it was not murder as the jury had found, because there was a previous provocation, and the blood was heated in the contest: nor was it in self-defence, because there was no inevitable necessity to excuse the killing in that manner.' See also Russell, n 51, vol 1, pp 721-2 and last ed (1964), pp 517-8.

<sup>1507</sup> 168 ER 178. See also East, n 50, vol 1, p 244; Beville, n 47, pp 84-5 and Russell, n 51, vol 1, pp 717-8.

<sup>1508</sup> See also Russell, n 51, vol 1, p 705.

<sup>1509</sup> 171 ER 1263.

<sup>1510</sup> 172 ER 995.

<sup>1511</sup> Tenderten CJ stated, p 325 'If you think that there was not time and interval sufficient for the passion of a man proved to be of no very strong intellect to cool, and for reason to regain her dominion over his mind then you will say that the prisoner is guilty only of manslaughter.'

<sup>1512</sup> 168 ER 1132.

<sup>1513</sup> 173 ER 422.

<sup>1514</sup> In this case, the father stabbed his son with a knife.

<sup>1515</sup> 173 ER 356. As to a deadly weapon see also *Howlett* (1836) 7 C & P 274 (173 ER 121) and *Macklin* (1838) 2 Lew 225 (168 ER 1136).

<sup>1516</sup> 173 ER 868. See also Archbold, n 52, para 19-104.

|               |      |                             |  |
|---------------|------|-----------------------------|--|
|               |      |                             | <i>him and threw him, then it was a case of manslaughter.</i> ’ Held, not guilty (presumably on the basis it was an accident). [ <b>Accident</b> ]   |
| Sherwood      | 1844 | 1 C & K 556 <sup>1517</sup> | If A killed B under provocation of a blow not sufficiently violent in itself to render the killing manslaughter, but the blow is accompanied by very aggravating words and gestures, that will be manslaughter in A. [ <b>Murder, in this case</b> ]   |
| Welsh         | 1869 | 11 Cox CC 336               | Keating J, p 338 ‘ <i>The law is, that there must exist such an amount of provocation as would be excited by the circumstances in the mind of a reasonable man, and so as to lead the jury to ascribe the act to the influence of that passion.</i> ’  |
| Caton         | 1874 | 12 Cox CC 624               | If A and B agree together to assault C with their fists, and C receives a chance blow of the fists from either of them, both A and B are guilty of manslaughter. If A should, of his own impulse, kill C with a weapon suddenly caught up, B would not be responsible for the death, being only liable for acts done in pursuance of the common design of himself and A. [ <b>Caton (i.e. B) - Not Guilty</b> ]  |
| Doherty       | 1887 | 16 Cox CC 306               | D lost a lot of money at cards to H who insisted he pay. D said that he could not at a meeting with H that MG accompanied him to. D and MG had dinner and MG indicated that D should pay up. After dinner, there was a noise of scuffling and MG was shot. [ <b>Manslaughter with wilful violence</b> ]. Stephen J at p 307 ‘ <i>Murder is unlawful homicide with malice aforethought. Manslaughter is unlawful homicide without malice aforethought... ‘Aforethought’ does not necessarily imply premeditation,<sup>1518</sup> but it implies intention which must necessarily precede the act intended...’</i> |
| Simpson       | 1915 | 25 Cox CC 269               | S, a soldier, returned home to find home and children in a very neglected state. His wife admitted she had been unfaithful. She left home refusing to return even though one of the children had water on the brain and was in intense pain. S killed the child. Held that a defence of provocation owing to the neglect of the wife could not be set up as a defence to the murder of the child, to reduce to manslaughter. <sup>1519</sup> [ <b>Murder</b> ]   |
| Hopper        | 1915 | 2 KB 431                    | H was an army sergeant in charge of 12 men, including D. When drunk, H accused D of stealing his whisky bottle. A fight ensued between them with Y also joining in. An officer ordered H to disarm D and Y and take them to the guardroom. On the way D refused to give up his bayonet. In the altercation, H shot D. [ <b>Manslaughter (reduced from murder)</b> ].   |
| Mancini v DPP | 1942 | AC 1 <sup>1520</sup>        | Per Lord Simonds, p 9 ‘ <i>It is not all provocation that will reduce the crime of murder to manslaughter. Provocation to have that result, must be such as temporarily deprives the person provoked of the power of self control, as a result of which he commits the unlawful act which causes death.</i> ’  |
| Duffy         | 1949 | 1 AE 932                    | Per Devlin J ‘ <i>Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable person, and actually causes in the accused, a sudden a temporary loss of self-control, rendering the accused so subject to passion as to make him or her for the moment not master of his mind.</i> ’ <sup>1521</sup>   |
| Bedder v DPP  | 1954 | 1 WLR 1119 <sup>1522</sup>  | The test in the case of provocation to be applied throughout was the effect on a reasonable and normal man of the acts of provocation alleged. Infirmity of body or affliction of mind in the accused was not a material factor to be considered. B killed a prostitute who jeered at his impotency. [ <b>Murder</b> ]   |
| Church        | 1966 | 1 QB 59                     | C, mocked by W for failing to satisfy her sexually, knocked her semi-conscious. Thinking he had killed her, C threw her in the river. Acquitted of murder but convicted of manslaughter, upheld on appeal. An unlawful act causing the death of  |

<sup>1517</sup> 174 ER 936.

<sup>1518</sup> This would seem incorrect. Aforethought is a synonym for premeditation.

<sup>1519</sup> Per Reading CJ at p 270 ‘There is no authority for that proposition...There was a definite intention to kill, and the justifiable anger of the [soldier] towards his wife would not warrant the jury in returning a verdict of manslaughter.’

<sup>1520</sup> See also Russell, n 51, vol 1, p 539.

<sup>1521</sup> At p 932, Goddard CJ cited Devlin’s direction to the jury. As S & H noted in their text (in 1965), n 60, p 206 this was regarded as the classic direction.

<sup>1522</sup> See also Russell, n 51, last ed (1964), vol 1, p 544.

another could not, simply because it was an unlawful act, render a verdict of manslaughter inevitable. The unlawful act must be such that all sober and reasonable people would inevitably recognise it as an act which must subject the other person to (at least) the risk of some harm resulting therefrom - albeit not serious harm. Applying that test, it was a misdirection for the judge to tell the jury *simpliciter* that it mattered nothing for manslaughter whether C believed W to be dead when he threw her into a river. **[Manslaughter]**

Ives 1970 1 QB 208

D killed his wife with an axe handle. He raised the defence of provocation alleging that she had had a sudden recurrence of puerperal insanity and was about to attack their newly born child and that he had acted in defence of the child but had lost self control and had no intention to cause GBH to her. Held that it was for the jury to determine in accordance with the Homicide Act 1957, s 3 whether the provocation was enough to make a reasonable man act as D had done. But that, in accordance with the Criminal Justice Act 1967, s 8, in considering D's reaction, it was necessary to consider what had been established as being his intent when he acted as did.

Camplin 1978 AC 705

In respect of the Homicide Act 1957, s 3 the judge should state what the question is using the very terms of that section. He should then explain to the jury that the reasonable man referred to is a person having the power of self control to be expected of an ordinary person of the sex and age of the accused, but in other respects sharing such of the accused's characteristics as they think would affect the gravity of the provocation to him, and that the question is not merely whether such a person would in like circumstances be provoked to lose his self control but also whether he would react to the provocation as the accused did. **[Manslaughter]**

Doughty 1986 83 Cr App R 319

An act of provocation need not be unlawful. In this case, a crying baby. [Homicide Act 1957, s 3 allowed insults as provocation]

**(b) Third Party Peacemaker Killed**

*Laws of Henry I* c. 1113 Downer, p 279

*'If anyone, while he is endeavouring to separate persons fighting among themselves, is killed, though innocent, either intentionally or through the negligence of the disputants, the one who slew him shall pay amends for him, even though he did not start the quarrel.'*

Tailour 1348 Seipp 1348.279ass

A fight between T and X. A third party (WC) came between them and was killed by accident by T. Held manslaughter. **[Manslaughter]**

Note 1486/7 *Caryll, SS, vol 115, p 5*

*Caryll noted that Kebell [a serjeant at law] said that, if I assault someone, and a stranger comes between us to preserve the peace and I kill him, I should be hanged.*<sup>1523</sup> **[Manslaughter]**

Herbert 1588 Dalison

H, with 40 or more, assembled at the house of M for the purpose of an affray but (it seems) with no intention of killing anyone. During the affray, M's sister - seeking to intercede - was killed by a rock thrown by one of H's servants. The court was divided over the issue (the final outcome of the case is not known). However, the majority opinion seems to have been that it would be murder, on the basis of an intentional unlawful act (affray, battery).

Tomson 1666 Kel 66<sup>1524</sup>

T and his wife were fighting in D's house. D endeavoured to part them. T pushed D away and threw him down upon an iron bar in a chimney which kept up the fire, breaking D's rib, producing his death. **[Manslaughter]**<sup>1525</sup>

<sup>1523</sup> Cf. *The Notebook of Sir John Port*, SS, vol 102, p 86 (note after Hilary 1498) 'if two are fighting together and someone comes between them and is killed, he who committed the felony shall be called a murderer on account of the malice (Yet it seems to be felony, not murder). [It depends on whether the fight was a duel or not. If a duel, then the killer would be a murderer]. See also Ibid, p 107, *A Moot* (Littleton) 'If two people assault each other, and someone comes between them to keep the peace, and is killed, both are felons even though it happened against their will, because the beginning was unlawful.'

<sup>1524</sup> See also Beville, n 47, pp 79-80.

<sup>1525</sup> Kel 66 indicated that it was not murder because there was no premeditated malice. However, that it would have been if T knew that D was acting to part them to keep the peace 'for otherwise if two are fighting, and a stranger runs in with intent to part them, yet the party who is fighting, may think he comes in aid of the other with whom he is fighting, unless some such notice be given as aforesaid, that he was a constable, and came to part

**(c) Third Party Intervention**

|                   |      |                             |   |
|-------------------|------|-----------------------------|---|
| Salisbury         | 1553 | 1 Plowd 100 <sup>1526</sup> | Several persons sought to murder E. They attacked him when his servants were with him. A fight ensued. A third party (S), who knew nothing of this, joined the affray. A servant of E was killed by the conspirators and S. The conspirators were held guilty of murder [ <b>Murder</b> ]. S was held guilty of manslaughter, since no premeditated malice. [ <b>Manslaughter</b> ] |
| Sir Fernando Cary | 1616 | Kel 61 <sup>1527</sup>      | FC and O were fighting in a field on a quarrel. MC (a kinsman) rode up, drew his sword and killed O. Manslaughter in MC (because hot blood), but murder in FC (because premeditation, being a duel). [ <b>Manslaughter</b> and <b>Murder</b> ]  |

**(d) Adultery**

|                          |         |  |  |
|--------------------------|---------|--|--|
| <i>Laws of Alfred</i>    | 871-99  | Attenborough, p 85                       | <i>'A man may fight, without becoming liable to vendetta, if he finds another [man] with his wedded wife, within closed doors or under the same blanket; or [if he finds another man] with his legitimate daughter [or sister]; or with his mother, if she has been given in lawful wedlock to his father.'</i>  |
| <i>Laws of Canute</i>    | c. 1020 | Robertson, p 203                         | <i>'If, while her husband is still alive, a woman commits adultery with another man and it is discovered...her lawful husband shall have all that she possesses and she shall then lose both her nose and her ears.'</i>   |
| <i>Laws of Henry I</i>   | c. 1113 | Downer, p 259                            | <i>'a man may fight against a person whom he finds with his wedded wife, after the second and third prohibition, behind closed doors or under the one covering, or with his daughter whom he begot on his wife, or with his sister who was legitimately born, or with his mother who was lawfully wedded to his father.'</i>   |
| <i>Laws of William I</i> | c. 1140 | Robertson, p 269                         | <i>'If a father finds his daughter in adultery in his own or in his son-in-law's house, he shall have full permission to slay the adulterer(s). Similarly if a son finds his mother in adultery during his father's lifetime, he shall have permission to slay the adulterer(s).'</i>  |
| Parker                   | 1550/1  | Spelman, SS vol 93, p 72 <sup>1528</sup> | 'Note that Fitzherbert Justice showed an indictment [which alleged] that one Parker found a man between his wife's legs committing lechery, and he killed the man, and all the justices held this to be felony. [ <b>Manslaughter</b> ] But suppose a man means to ravish my wife against her will, and I kill him, it seems that I can do so in defence of my wife, just as in the case where he means to kill her.' [since rape was a felony]<br><br>[ <b>Defence of Another</b> ] |
| Manning <sup>1529</sup>  | 1672    | T Raym 212 <sup>1530</sup>               | M killed a man caught <i>in flagrante</i> with his wife, striking him with a stool.<br><br>[ <b>Manslaughter</b> ].  |
| Pearson                  | 1835    | 2 Lew 215 <sup>1531</sup>                | Parke B stated, p 215: <i>'If a man kill his wife, or the adulterer, in the act of adultery, it is manslaughter, provided the husband has ocular inspection of the act and only then.'</i> [ <b>Manslaughter</b> ]   |
| Fisher                   | 1837    | 8 C & P 182 <sup>1532</sup>              | If a father sees a person committing an unnatural offence with his son and kills him instantly, manslaughter. If he only heard of it and then killed him, murder.<br><br>[ <b>Manslaughter</b> ] <sup>1533</sup>   |

them.' Beville, n 47, pp 79-80 'If this man had commanded the peace, or done any thing by which he would have been entitled to the same protection as a peace officer, it then would have been murder.' Cf. Hurnard, n 345, p 99 for a 13<sup>th</sup> century equivalent case in which a pardon was granted, though this appears over lenient.

<sup>1526</sup> 1 Plowd 100 (75 ER 158) at 100-1. See also Beville, n 47, pp 11-2, Hale, n 45, vol 1, pp 438 & 446; Green, n 94, p 484 and Holdsworth, n 65, vol 8, p 303. Also, Reeves, n 221, vol 4, p 534.

<sup>1527</sup> See also a note in Cox's CC, n 71, vol 4, pp 457-8.

<sup>1528</sup> See also Baker Oxford, n 459, p 559.

<sup>1529</sup> Also, called *Maddy's Case*. See also Beville, n 47, p 29 and Russell, n 51, vol 1, p 704.

<sup>1530</sup> 83 ER 112. See also 1 Vent 158 (86 ER 108) in which Twisden J (a judge of the King's Bench, 1660-78) mentioned that Jones J (see n 1181) had informed him of a case before him in which a cuckold, informed that his wife was committing adultery with X, told X that he would be '*revenged of him*'. Later, finding X *in flagrante* with his wife, he killed him. Held, murder. See also Beville, n 47, p 76; Kiralfy, n 428, pp 32-4 and Stephen, n 55, vol 3, p 63. See also Russell, n 51(1964 ed), p 525.

<sup>1531</sup> 168 ER 1133.

<sup>1532</sup> 173 ER 452. See also Russell, n 51(last ed, 1964), vol 1, p 532.

|                      |      |                             |  |
|----------------------|------|-----------------------------|--|
| Kelly                | 1848 | 2 C & K 814 <sup>1534</sup> | If a man finds his wife in the act of committing adultery, and kills her, this will be manslaughter only; but if a man takes away the life of a woman (even his own wife) because he suspects, however, strongly, that she has been engaged in some illicit intrigue, this will be murder. [ <b>Murder</b> ] |
| Rothwell             | 1871 | 12 Cox CC 145               | The jury were told they could find manslaughter where a husband, suddenly hearing from his wife that she had committed adultery, killed her. [ <b>Manslaughter</b> ]   |
| Birchall             | 1914 | 9 Cr App R                  | Mere suspicion of a wife's adultery is not sufficient to reduce a husband's homicide of the suspected lover to manslaughter. As to <i>Rothwell</i> , (see above) Bray J, p 93: 'that was an extreme case...In the opinion of the court there should be no extension of the doctrine there laid down.'        |
| Holmes v DPP         | 1946 | AC 588 <sup>1535</sup>      | Killing after a confession of adultery was insufficient to reduce the crime to manslaughter. Viscount Simon, p 600 'In my view, however, a sudden confession of adultery without more can never constitute provocation of a sort which might reduce murder to manslaughter.' <sup>1536</sup>                 |
| Clinton <i>et al</i> | 2012 | 1 Cr App R 26               | The ancient common law defence of provocation, reducing murder to manslaughter, was abolished and consigned to legal history books by the 2009 Act (see 53).   |

### APP E - DEFENCES

**Note:** Likely, from Anglo-Saxon times, English law recognised self defence as a defence to killing, see (a);

- From, at least the *Laws of Henry I* (c. 1113), it recognised defence of family (and kin) and one's lord, as a defence to killing, see (b);
- In Anglo-Saxon times, attacking another man's house (and enclosure) was a crime (*hamsocn*) and, likely, it was self defence to kill such a person. At least from 1352, it seems to have been treated as an aspect of self defence to kill one unlawfully attacking one's house, see (c).

#### (a) Self Defence

|                 |        |  |  |
|-----------------|--------|--|--|
| Laws of Henry I | c.1113 |  | 'Any person may defend himself in any matter except against his lord...Anyone may defend himself; if someone attacks him, in every place or circumstance, except against his lord.'  |
| Osbern          | 1329   | Kiralfy, p 26 <sup>1537</sup>          | O quarrelled with N on the way to a tavern. N struck O with a wooden stave on the head so that he fell. As soon as he got up, O fled as best he might. N kept pursuing him, to kill him if he could, and chased him to a wall between two houses, past which he could not go. Seeing that N wished to kill him, and that he could not save his life except by defending himself, O killed N. [ <b>Self defence</b> ] |
| Anon            | 1329   | Fitz <i>Corone</i> 287                 | A and B quarrelled in A's house. B struck A with a staff on the head, making a large wound. A fled to a corner of the house. B followed, to kill A. There was neither door nor window by which A could escape. Perceiving he could not otherwise save his life, A killed B. [ <b>Self defence</b> ]  |
| Anon            | 1369   | Seipp 1369.161ass <sup>1538</sup>      | A pursued B with a stick and hit him. B struck back, killing A. Because it was proved that B might have fled but, rather, chose to hit A, it was held to be felony. [ <b>No self defence</b> ]   |
| Copplestone     | 1573   | Dyer, SS, vol 110, 267 <sup>1539</sup> | C fought with S several times. Meeting suddenly in the street C said he would fight S but S resisted and fled to the wall as far as he could and called on persons nearby to witness it. C struck at S who then killed C. [ <b>Self defence</b> ]  |

<sup>1533</sup> In this case it seems clear that the jury held contrary to the judge's direction.

<sup>1534</sup> 175 ER 342.

<sup>1535</sup> See also Cross & Jones, n 59, p 224.

<sup>1536</sup> He also noted, p 600 'the application of common law principles in matters such as this must to some extent be controlled by the evolution of society.'

<sup>1537</sup> *Ibid*, n 428, p 95. See also SS, vol 97, p 164 and Fitzherbert, n 30, title *Corone*, no 284.

<sup>1538</sup> See also Beville, n 47, p 64.

|                               |      |                             |  |
|-------------------------------|------|-----------------------------|--|
| Byard                         | 1633 | W Jones 340 <sup>1540</sup> | Words between B and W. B struck W who struck back. After some dry blows, B killed W with a knife. This case was brought under the Statute of Stabbing 1603. However, if it had been for murder, the return blow by W would likely have been treated as self-defence. [ <b>Self defence</b> ]   |
| Cooper                        | 1639 | Cro Car 544 <sup>1541</sup> | A woman kept a tavern. At night, A came to the tavern and attempted to break open the door, breaking one of the hinges. A swore he would enter and slit the woman's nose since she was a bawd and kept a bawdy house. C, a person lodged in the house, reprimanded A who swore he would cut his throat. A broke open a window and thrust a rapier through the window at C. The latter had a spit in his hand and, in defence of himself, he thrust it into A's eye, killing him. [ <b>Self defence</b> ] <sup>1542</sup>   |
| Bull                          | 1839 | 9 C & P 160 <sup>1543</sup> | Killing a man on a highway is not justifiable homicide unless there was an intention on the part of the person killed to rob or murder or do some dreadful bodily injury to the person killed. In other words, the conduct of the party killed must be such that it is necessary to act in self defence.   |
| Knock                         | 1877 | 14 Cox CC 1                 | K, being challenged and attacked by D, who had taken of his coat to fight, also took off his coat. Blows were exchanged, D died. Lindley J, p 2 ' <i>If you think [K] was doing what was lawful, simply defending himself, find him not guilty; but if he was fighting, then he was doing what was unlawful, and your verdict should be against him.</i> ' [ <b>Not Guilty. Self defence</b> ]   |
| Dudley & Stephen              | 1884 | LR 14 QBD 273               | It is murder, in order to escape death, if a person kills another for the purpose of eating his flesh, although at the time of the act he is in such circumstances that he believes, and has reasonable grounds for believing, it affords the only chance of preserving his life. [ <b>Not Self Defence</b> ]  |
| Symondson                     | 1896 | 60 JP 645                   | On a charge of manslaughter, before a person can avail himself of the defence that, in taking the life of another, he was acting in self defence, he must show his act was necessary to protect his life, and that he did all he could to avoid it, and that he had reasonable apprehension that his life was in immediate danger. Before he can avail himself of the defence that he was protecting his property, he must show that he was preventing the commission of a crime of a serious and felonious nature intended to be carried out by force. Kennedy J, p 646 ' <i>the infliction of death must be to prevent no ordinary crime, it must be a crime of a serious and also felonious nature.</i> ' [ <b>Manslaughter</b> ] |
| <b>(b) Defence of Another</b> |      |                             |  |
| Anon                          | 1352 | Seipp 1352.087ass           | A thief robbed, and killed, a merchant. The merchant's servant came suddenly upon the thief and killed him. It was held not to be felony. [ <b>Defence of Another</b> ]  |
| Anon                          | 1505 | Seipp 1505.050              | Tremalye JKB indicated that a servant could slay in order to defend his master if his master could not otherwise escape. [ <b>Defence of Another</b> ]   |
| Bourne                        | 1831 | 5 C & P 120                 | A fighting with brother T. To prevent this, B laid hold of A and held him down, but struck no blow. A stabbed B. Parke B told the jury that if B did nothing more than was sufficient to prevent B from beating his brother and died of the stab wound then it was murder. If B did more than was necessary, manslaughter. The indictment had 3 counts: (a) stabbing and wounding with intent to murder under 9 Geo IV c 3, [1828], ss 11 & 12; (b) the same, but the intent being to disable; (c) to do him GBH. The jury held him guilty of (c).   |

<sup>1539</sup> This case is also cited as *Copplestone v Stowell* as well as *Stowell's Case*. SS, vol 110, p 268 cites Crompton's note on this case 'If there is malice between A and B and A strikes B upon the said malice, and B does not lie in wait for A or appoint a place to fight, but flees to the wall, or as far as he can if there is a crowd of people, and A pursues B to the said wall or etc and then B kills A, this is not murder or manslaughter in B but a killing of A in self defence; as appears in *Copplestone's Case*...But if he had given the first blow, and then had fled as above [i.e. luring the person] and the other pursued him, and he who fled had killed the other who pursued, that shall be murder: by Catlyn and other learned men in *Stowell's Case*...' See also Beville, n 47, p 96; East, n 50, vol 1, pp 283 and Kaye, n 457, p 574.

<sup>1540</sup> 82 ER 179.

<sup>1541</sup> 79 ER 1069. See also Beville, n 47, pp 98-9.

<sup>1542</sup> The court noted that this complied with the Act of 1532 (see **20(d)**) which reflected the common law position.

<sup>1543</sup> 173 ER 723.

|            |      |               |   |
|------------|------|---------------|---|
| Harrington | 1866 | 10 Cox CC 370 | A woman was assaulted by X (her husband), who was drunk. H, her father, who was also drunk, hit him. X died. Cockburn CJ, p 371 <i>'the only ground upon which the offence could be reduced to manslaughter would be that the fatal blow was struck under the impulse of strong resentment, caused by seeing his daughter assaulted by her husband, although not in a manner tending to endanger her life.'</i><br>[ <b>Manslaughter, not treated as Defence of Another</b> ]   |
| Rose       | 1884 | 15 Cox CC 540 | P attacked his wife and it looked as if he was killing her. It was held his son was justified in killing him if he reasonably believed the action he took was, per Lopes J at p 541, <i>'absolutely necessary'</i> for the preservation of his mother's life. [ <b>Defence of Another</b> ]   |
| Julien     | 1969 | 1 WLR 839     | Widgery CJ at p 843 <i>'It is not, as we understand it, the law that a person threatened must take to his heels and run in a dramatic way suggested by [counsel]; but what is necessary is that he should demonstrate by his actions that he does not want to fight. He must demonstrate that he is prepared to temporise and disengage and perhaps to make some physical withdrawal; and that that is necessary as a feature of the justification of self defence is true, in our opinion, whether a charge is a homicide charge or something less serious.'</i> |

**(c) Defence of Property/ Self Defence**

|                 |      |  |   |
|-----------------|------|--|---|
| Anon            | 1352 | Seipp 1352.087ass                        | The deceased and another came to the house of A, intending to set fire to it. From his house, A fired an arrow, killing the deceased. [ <b>Self defence</b> ]   |
| Slingsbie       | 1488 | Caryll, SS, vol 115, p 5 <sup>1544</sup> | Held by all the justices that, if someone comes to another's house and assaults him (acting unlawfully) and out of malice, if the person indoors (or his servant) shoots an arrow, killing him, it was <i>self defence</i> , for the law <i>'wills that every man shall be as safe and sound in his own house as he shall be in the king's presence.'</i> <i>But, if someone is in the fields so that he can get away, and nevertheless kills one of his assailants, it is felony.'</i> [ <b>Self Defence</b> ]   |
| Anon            | 1505 | Seipp no 1505.050.                       | <i>Dictum</i> of Fyneux CJKB: if one were in his house, if he heard (oyent) that such a one wanted to come to his house to beat him, he could well make an assembly of folk (genz) among his friends (amis) and neighbours (voisins) to assist him, and to aid in safeguarding his person, but if one was threatened (menace) that if he came to such a market, or into such a place, he would be beaten there, in this case he cannot make an assembly of folk (gens) to assist him to go there to safeguard his person, because he does not need (ne besongne) to go there, and he could have a remedy (against one who threatened him) by surety of the peace, <i>but the house of one is to him his castle and his defence, and where he properly ought to remain, etc. (italics supplied).</i> [ <b>Self Defence</b> ] |
| Harecourt       | 1562 | Crompton 24 <sup>1545</sup>              | X pretended he was entitled to a house. He went to get it into his possession, with another. X shot an arrow at H who was in house and had been in possession for several years. H shot arrow out of house, killing the third party. [ <b>Self Defence</b> ]  |
| Drayton Bassett | 1579 | Crompton 24 <sup>1546</sup>              | X with 30 others forcibly entered Z's manor house and turned out his family and servants. 3 days later 20 persons (on the part of Z) went at 10 at night to recover possession. One of Z's men cast fire into a thatched house adjoining the manor house. One of X's men fired from house, killing one of the Z's men. Manslaughter. The others (of X's men) were treated as principals. [ <b>Manslaughter</b> ] <sup>1547</sup>  |
| Semayne         | 1604 | 5 Co Rep 91a <sup>1548</sup>             | Coke CJ at 91b <i>'That the house of everyone is to him as his castle and fortress, as well for his defence against injury and violence as for his repose; and although the</i>   |

<sup>1544</sup> See also Baker Oxford, n 459, p 562.

<sup>1545</sup> See also Beville, n 47, pp 68-9 and Hale, n 45, vol 1, p 445. Also called *'Harcourt'*. See also Baker Oxford, n 459, p 562 and Kaye, 457, p 587.

<sup>1546</sup> See also Hale, n 45, vol 1, pp 440-1; East, n 50, vol 1, pp 259-60. Drayton Bassett is a village in Lichfield, Staffordshire.

<sup>1547</sup> Beville, n 47, p 69 *'It was said that one of the twenty threw some fire upon the thatch of a building which adjoined the house but whether this was true or not, as it was known that they came only to get possession of the house for the owner, the persons in the house could not have been justified in firing the gun.'* See also Hale, n 45, vol 1, p 440. Cf. East, n 50, vol 1, pp 259-60.

<sup>1548</sup> 77 ER 194.

*life of a man is a thing precious and favoured in law; so that although a man kills another in his defence, or kill him per infortunium; without any intent, yet it is felony, and in such case he shall forfeit his goods and chattels, for the great regard which the law has to a man's life; but if thieves come to a man's house to rob him, or murder, and the owner of [or] his servants kill any of the thieves in defence of himself and his house, it is not felony, and he shall lose nothing.'*

|              |         |                               |  |
|--------------|---------|-------------------------------|--|
| Ford         | 1627-31 | Kel 51 <sup>1549</sup>        | F had a room in tavern. Several persons sought to turn him out. On refusing, they drew swords. F drew his sword and killed one. [ <b>Self defence</b> ] <sup>1550</sup>  |
| Longdon      | 1812    | Russ & Ry 228 <sup>1551</sup> | A stood with a weapon in the doorway of room wrongfully to prevent B from leaving and others from entering. C who had a right to be in the room struggled to get his weapon from him. D, a comrade of A, then stabs C. It will be murder in D if C dies. [ <b>Murder. C defending his property</b> ]   |
| Hinchcliffe  | 1823    | 1 Lew 161 <sup>1552</sup>     | A man and his servant insisted in placing corn in X's barn. She refused. There was a scuffle. X received a blow on the breast. She threw a stone at the master who fell down dead. Indicted for manslaughter. Holroyd J, p 162 'it is not proved that the death was caused by the blow, and, if it had been, it appears that the deceased received it in an attempt to invade her barn against her will. She had a right to defend her barn, and employ such force as was reasonably necessary for that purpose, and she is not answerable for any unfortunate accident that may have happened in so doing.' [ <b>Accident</b> ]   |
| Meade & Belt | 1823    | 1 Lew 185 <sup>1553</sup>     | A civil trespass will not justify firing a pistol. The forcible possession of a close, and BOTP is more than a trespass. So is a forcible invasion of another man's dwelling. A man is not authorised to fire a pistol on every intrusion or invasion of his house. The law regards an attack on a dwelling in the night as equivalent to an assault. When a person is attacked, he is not justified in killing if less violent means will avert the danger. Per Holroyd J at p 185 'no words or singing are equivalent to an assault.' In this case troublemakers surrounded M's house, singing songs. He fired from it and killed one. [ <b>Manslaughter</b> ] <sup>1554</sup>       |
| Scully       | 1824    | 1 Car & P <sup>1555</sup>     | X, set to watch a yard or garden, was not justified in shooting one who came in the night even if he saw him go into his master's hen roost. However, if from the conduct of the party, he had fair ground for believing his own life to be in actual and immediate danger, he was justified in shooting him. X shot a man on a wall in the dark, killing him. The man was found to have housebreaking equipment on him.<br><br>[ <b>Not Guilty of Murder</b> ]  |
| Hussey       | 1924    | 18 Cr App R 160               | T was given notice to quit by W. T asserted it was invalid. W, G (a woman) and C (a man) sought to recover possession with a hammer, spanner, poker and chisel. T fired through a gap in the door wounding G and C. Hewart CJ cited Archbold, 26 <sup>th</sup> ed (1922), p 887 ' <i>In defence of a man's house the owner or his family may kill a trespasser who would forcibly dispossess him of it, in the same manner as he might by law, kill in self-defence a man who attacks him personally; with this distinction, however, that in defending his home he need not retreat, as in other cases of self-defence, for that would be giving up his house to his adversary.</i> ' |

### **APP F - SPORTS & HORSEPLAY**

<sup>1549</sup> Kelyng mentions this case was when Sir Nicholas Hyde was CJ. Since Hyde was CJ of the King's Bench in 1627-31, it would seem to place it then. See also Beville, n 47, p 70, East, n 50, vol 1, p 242 and Russell, n 51, vol 1, p 793.

<sup>1550</sup> See East, n 50, vol 1, p 243 for a discussion of this case.

<sup>1551</sup> 168 ER 774. See also Carrington, n 952, p 201.

<sup>1552</sup> 168 ER 998.

<sup>1553</sup> 168 ER 1006.

<sup>1554</sup> It seems the jury were convinced that it was only a matter of singing songs and that there was no attack on the house. However, the troublemakers had ducked the man earlier that day and had threatened they would come at night and pull his house down. Thus, this case is out of kilter with some of the older cases cited.

<sup>1555</sup> 171 ER 1213.

**Note:**

- In Roman law, the killing of another in public games (*pancratium*, including boxing) authorised, or permitted, by the State was treated as accidental. This, likely, was adopted into English law. Thus, killing in an authorised tournament (or joust) was treated as accidental, see (a);
- In the case of any other game, if not accidental, it was treated as manslaughter or murder, where premeditated, see (b);
- In the case of jokes/horseplay, this was generally treated as manslaughter.

**(a) Tournaments & Jousts**

|                     |      |                                    |   |
|---------------------|------|------------------------------------|---|
| <i>Ulpian</i>       |      | Digest 9.2.7                       | <i>'If a man kills another in the colluctatio or in the pancratium or in a boxing match (provided the one kills the other in a public bout), the Lex Aquila does not apply because the damage is seen to have been done in the cause of glory and valour and not for the sake of inflicting unlawful harm...Clearly, if someone wounds a contestant who has thrown in the towel the Lex Aquila will apply...'</i> |
| Anon                | 1496 | Seipp 1496.029                     | Fineux CJ stated that, if two played with swords (or jousted) and one killed the other, this was felony since it was unlawful. <b>[Manslaughter]</b> If by king's command and one killed the other, it was an accident, since the play was not unlawful. <b>[Accident - If lawful Joust]</b> <sup>1556</sup>  |
| <i>Brooke</i>       | 1586 | Abridgment <sup>1557</sup>         | After taking note of Fineux CJ's opinion (see above), he said that the justices in the time of Henry VIII (1507-47) held it to be a felony to kill a man in a joust or similar activity, notwithstanding the king's command, since it was against the law.  |
| Sir John Chichester | 1670 | Hale, vol 1, p 472 <sup>1558</sup> | C was playing as if at foils with a servant. C had a sword in its scabbard, his servant a bed staff (pole). C made a thrust. In parrying the servant knocked off the chase of the scabbard. The point of the sword entered servant's groin, killing him. <b>[Manslaughter]</b>  |

**(b) Sports**

|   |         |                  |   |
|---|---------|------------------|---|
| <i>Paul (Roman Jurist)</i>                    |         | Digest 9.2.10    | Edict, bk 22 <i>'For playing dangerous games is blameworthy conduct.'</i>   |
| <i>Ulpian (Roman Jurist)</i>                  |         | Digest 9.2.9     | Edict, bk 18 <i>'If a slave is killed by people throwing javelins by way of sport, the Aquilian action lies. On the other hand, if when other people were already throwing javelins in a field a slave walked across the same field, the Aquilian action fails, because he should not make his way at an opportune time across a field where javelin throwing is being practised. However, anyone who deliberately aims at him is liable under the Lex Aquila.'</i> [i.e. <b>Accident</b> ] |
| <i>Alfenus (Roman Jurist)</i> <sup>1559</sup> |         | Digest 9.2.52    | Digest, bk 2. <i>'Take this case of some people playing ball. One of them pushed a little slave boy when he was trying to pick up the ball, and he fell and broke his leg. When I was asked if I thought his owner could sue the person who pushed him over, I replied that he could not, as it seemed to me to be a purely accidental injury.'</i> <b>[Accident]</b>   |
| <i>Laws of Henry I</i>                        | c. 1113 | Downer, pp 271/9 | <i>'If a person in the course of a game of archery or of some exercise [possibly, it refers to some military exercise] kills anyone with a spear or as a result of some accident, he shall pay compensation to him. For it is a rule of law that a person who unwittingly [unintentionally] commits a wrong shall consciously make amends.'</i>   |

<sup>1556</sup> See also cases mentioned by Baker, n 459, pp 312-3. At p 313 'In 1496, Fyneux CJ and others declared jousting and playing with to be illegal without royal licence...Then, some time in Henry VIII's reign, the judges advanced to the bold conclusion that even the king's licence could not justify death from jousting. The decision may have reflected a change in court opinion after the king's own serious jousting accident in 1536, for in 1553 the judges seem to have been willing enough to attend the queen's coronation jousts had they been invited.'

<sup>1557</sup> See Brooke, n 31, title *Corone*, no 228. This decision of the judges was likely post 1536 when Henry VIII was knocked unconscious in a joust. See *The Reports of Sir John Spelman*, SS, vol 94, p 313. See also *Coney* (1882) LR 8 QB 534, per Stephen J at p 549 'in the time of Henry VIII the judges held that even the king's command would not justify or excuse a person who killed another in a tournament, because the commandment itself was illegal.' See also Baker Oxford, n 459, pp 560-1.

<sup>1558</sup> See also Beville, n 47, pp 61-2. Also, Russell, n 51, vol 1, p 758 and (last ed 1964), vol 1, pp 569, 577.

<sup>1559</sup> Alfenus Varus lived around 1<sup>st</sup> c BC.

Also, 'If anyone suffers any injury or mischief through the sudden discharge of a bow...the person who set it up [who fired] shall pay amends.'

|                   |           |                                   |   |
|-------------------|-----------|-----------------------------------|---|
| Roger of Stainton | 1212      | SS, vol 1, no 70 <sup>1560</sup>  | Throwing a stone in a sport, he killed a girl. [ <b>Accident</b> ]  |
| Anon              | 1329      | SS, vol 97, p 183                 | Man shot another in the head, when standing by a target. [ <b>Accident</b> ].   |
| Woderove          | 1329      | SS, vol 97, p 218 <sup>1561</sup> | Men throwing stones at a target. Boy of 7 crossed the target and was accidentally killed. [ <b>Accident</b> ]   |
| Anon              | pre- 1762 | Foster, p 261 <sup>1562</sup>     | A man throwing a cock as a diversion, missed his aim. His staff struck a child, killing it. [ <b>Manslaughter</b> ]. <sup>1563</sup>  |
| Ward              | 1789      | East, vol 1, p 270                | X charged with the manslaughter of Y in a public boxing match which Y challenged him to, as a trial of skill. Held guilty. [ <b>Manslaughter</b> ]  |
| Young             | 1866      | 10 Cox CC 371                     | There is nothing unlawful in sparring (boxing) with gloves unless, perhaps, the men fight on until they are so weak that a dangerous fall is likely to result from the continuance of the game. Bramwell B, p 373 'No doubt if death ensued from a fight, independently of its taking place for money, it would be manslaughter, because a fight was a dangerous thing and likely to kill; but the witness...stated that this sparring with the gloves on was not dangerous, and not a thing likely to kill.' [ <b>Not Guilty. i.e. Accident</b> ]  |
| Bradshaw          | 1878      | 14 Cox CC 83                      | In a friendly football game, if a player commits an unlawful act by which death is caused to another, manslaughter (in the case it was found to be an accident). [ <b>Accident</b> ]  |
| Salmon            | 1880      | LR 6 QBD 79                       | A, B & C went to a field for rifle practice. Placing a board in a tree they shot at it. A stray shot killed a boy in another tree (393 yards from the firing point). They were found guilty of manslaughter, upheld on appeal, being in breach of a duty of firing without taking proper precautions to prevent injury to others. [ <b>Manslaughter</b> ]   |
| Coney             | 1882      | LR 8 QB 534                       | Prize fighting was illegal and consent of parties did not afford an answer to assault. All those aiding and abetting were also guilty of assault. This case reviewed a number of cases on prize fighting. <sup>1564</sup>   |
| Moore             | 1898      | 14 TLR 229                        | M indicted for manslaughter of B in a football match. X, the goalkeeper, ran forward to kick the ball. As he kicked M jumped with his knees up against B's back throwing him violently against X's knee. B was seriously injured internally and died. Hawkins J indicated it did not matter whether M broke the rules of the game or not. If a blow was struck recklessly which caused a man to fall and, if in falling, he struck against something and was injured and died, the person who gave the blow was guilty of manslaughter, even if the blow itself would not have caused injury. Hawkins J asked the jury whether M had used illegal violence. Found guilty. [ <b>Manslaughter</b> ] <sup>1565</sup> |

**(c) Jokes/Horseplay**

|        |        |                           |  |
|--------|--------|---------------------------|--|
| Hale   | 1670's | Hale, vol 1, p 431        | If A gives purging comforts (laxative) to B to make sport and not to hurt him and B dies, manslaughter (quoting Dalton).   |
| Fenton | 1830   | 1 Lew 179 <sup>1566</sup> | In sport, F and others threw large stones down a mine, breaking scaffolding, and killing a man. Tindal CJ, pp 179-80 'If death ensues as a consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse, it is not accidental death, but manslaughter. If the wrongful act was done under circumstances which show an intent to kill, or do any serious injury in the |

<sup>1560</sup> See also Hurnard, n 345, p 25.<sup>1561</sup> See also Kiralfy, n 428.<sup>1562</sup> Foster mentioned this case when he had been on circuit but did not cite a date. The first edition of his work was in 1762. Blackstone cited him in respect of this case in 1769, see Blackstone, n 48, vol 4, p 183. Also, East, n 50, vol 1, pp 270-1.<sup>1563</sup> Today, one would suggest, this would be treated as an accident.<sup>1564</sup> Stephen, n 55, p 17 'A consent to be maimed, or a consent to be beaten in a prize fight does not prevent the offender from being guilty of an offence.' See also Archbold, n 52, para 19-104. See also Russell, n 51 (last ed, 1964), vol 1, p 597.<sup>1565</sup> See also Cross & Jones, n 59, p 217.<sup>1566</sup> 168 ER 1004.

*particular case, or any general malice, the offence becomes that of murder.'*

|           |      |                              |  |
|-----------|------|------------------------------|--|
|           |      |                              | <b>[Manslaughter]</b>  |
| Sullivan  | 1836 | 7 C & P 641 <sup>1567</sup>  | X removed a trap stick from a cart as a joke, killing Y. Manslaughter. <b>[Manslaughter]</b>   |
| Errington | 1838 | 2 Lew CC 142 <sup>1568</sup> | P was drunk and went to sleep on a chest. D and others covered him with straw and put hot cinders on it. P was burnt to death. Patteson J told the jury that if D intended to do any serious injury to P, although not to kill him, it was murder. However, if the intention was only to frighten P in sport, it was manslaughter. <b>[Manslaughter]</b>   |
| Bruce     | 1847 | 2 Cox CC 262                 | X, when drunk, went into a shop. In play, he whirled the shop boy about until they got out of the shop. The boy broke away and X staggered into the road. Falling against a woman he knocked her down. She died. Held an accident. <b>[Accident]</b>   |
| Franklin  | 1883 | 15 Cox CC 163                | F took a box from a stall on a pier and ' <i>wantonly</i> ' threw it into the sea, killing a swimmer. Committed a tort against stall keeper. Field J refused to hold F guilty of manslaughter because of the tort as such and left the question to the jury whether F was guilty of criminal negligence. They held manslaughter. <b>[Manslaughter]</b> <sup>1569</sup>   |
| Lamb      | 1967 | 2 QB 981                     | As a joke, L pointed a gun at a friend and pulled the trigger, killing him. L argued that it was an accident. It was held that, <i>mens rea</i> being an essential ingredient, manslaughter could not be established in relation to the first ground [i.e. whether manslaughter] except by proving the element of intent without which there could be no assault. <b>[Accident]</b>  |
| Newbury   | 1977 | AC 500                       | Two 15 year old boys pushed a piece of paving stone from a bridge into the path of a train, killing a guard. Manslaughter. Conviction affirmed by the House of Lords. Accused was guilty of manslaughter if: (a) it was proved he intentionally did an act that was unlawful and dangerous and it inadvertently caused death and; (b) it was unnecessary to prove the accused knew the act was unlawful or dangerous: the test was still the objective test, namely, whether all sober and reasonable people would recognise that the act was dangerous and not whether the accused recognised the danger. <b>[Manslaughter]</b> |
| Brown (A) | 1994 | 1 AC 212                     | Lord Mustill said, as a matter of public policy, the courts had decided that the criminal law did not concern itself with such activities as ' <i>rough horseplay</i> '.   |
| R v P     | 2005 | 10 Archbold<br>News 2        | As a joke two youths threw a 16 year non-swimmer from a bridge, who drowned.   |

### **APP G - TRANSFERRED MALICE**

|                   |         |                               |  |
|-------------------|---------|-------------------------------|--|
| Bracton           | c. 1240 | Bracton, vol 2,<br>p 438      | <i>'if he has struck and killed one person when he intended to strike another feloniously; he is liable'</i> (si quis unum percusserit et occiderit cum alium percutere vellet in felonia, tenetur.)   |
| Anon              | 1533    | Baker, n 459,<br>p 308        | Woman indicted for sending poison to her husband in prison, to kill him. It was intercepted by another prisoner who died. <sup>1570</sup>  |
| Watson            | 1539    | Baker, n 459,<br>p 310        | J chastising his servant with a stick, accidentally killed another. <b>[Pardoned. Accident]</b>  |
| Saunders & Archer | 1575    | 2 Plowden 473 <sup>1571</sup> | S. gave his wife Y, a poisoned apple. She sampled it and gave it to S's child who died. The judges stated, p 474 ' <i>when death followed from his act, although it happened in another person than her whose death he directly meditated [intended]</i> , |

<sup>1567</sup> See also Cross & Jones, n 59, p 226 (S was fined 1 shilling, which suggests that this was, effectively, treated as an accident). See also Russell, n 51, (last ed, 1964), vol 1, p 589.

<sup>1568</sup> 168 ER 1133.

<sup>1569</sup> He was given 2 months imprisonment. See also Williams, n 69 (1st ed), p 274.

<sup>1570</sup> See also Ibid, p 310 where Baker comments 'The malice required in murder did not have to be towards the person slain.'

<sup>1571</sup> 75 ER 706.

|         |      |                              |   |
|---------|------|------------------------------|---|
|         |      |                              | <i>yet it shall be murder in him, for he was the original cause of the death, and if such death should not be punished in him, it would go unpunished.</i> <sup>1572</sup> [ <b>Murder</b> ]  |
| Gore    | 1611 | 9 Co Rep 81a <sup>1573</sup> | X intending to kill her husband Y put poison in his medicine. His apothecary took it (to prove there was nothing wrong with it). He died. Murder since, p 816 ' <i>the law conjoins the murderous intention... with the event which thence ensued.</i> ' [ <b>Murder</b> ]  |
| Brown   | 1776 | 1 Leach 148                  | See <b>App D</b> (if, on a sudden quarrel between two parties, the blow intended for an individual of one party would, if death ensues, have amounted only to manslaughter, it will be only manslaughter if, by accident, it kills another).  |
| Hunt    | 1825 | 1 Moo CC 93 <sup>1574</sup>  | X, intending to stab Y hit Z.   |
| Conner  | 1835 | 7 C & P 438 <sup>1575</sup>  | A mother threw piece of iron at a child, to frighten it. It killed another child.<br><b>[Manslaughter, Fined 1s. Treated as an Accident, in effect]</b>   |
| Michael | 1840 | 2 Mood 120 <sup>1576</sup>   | C knowingly administers poison to A to administer as medicine to B. A neglects to do so. B accidentally gives it to a child or other unconscious agent. Held as if B had given it himself. [ <b>Murder</b> ]  |
| Smith   | 1855 | 7 Cox CC 51                  | If A intending to murder B shoots and wounds C (thinking him to be B) he is guilty of wounding C with the intention to murder him, for he intends to kill the person at whom he shoots. Parke B, p 52 ' <i>The prisoner mistook the person; but there is no doubt that he intended to kill the man at whom he shoots...</i> ' [ <b>Wounding with Intent to Murder</b> ] |
| Latimer | 1886 | 17 QBD 361                   | X struck at a man, wounding a woman beside him. Coleridge CJ ' <i>It is common knowledge that a man who has an unlawful and malicious intent against another, and, in attempting to carry it out, injures a third person, is guilty of what the law deems malice against the person injured.</i> '  |
| Hopwood | 1913 | 8 Cr App R 143               | X said that he killed Y when endeavouring to kill himself. The trial judge indicated that such would have been murder, if the shot was intentionally fired for the purpose of killing himself. <sup>1577</sup> The jury, in any case, held X had intentionally killed Y (and not as part of his suicide attempt) and this was upheld on appeal. [ <b>Murder</b> ]       |
| Gross   | 1913 | 23 Cox CC 455                | G was struck several blows by her husband. She fired at him but hit X. Darling J, p 456 ' <i>if the firing at the person intended to be hit would be manslaughter, then, if the bullet strikes a third person who is not intended to be hit, the killing of that person equally would be manslaughter and not murder.</i> ' [ <b>Manslaughter</b> ]                     |

#### **APP H: INVOLUNTARY MANSLAUGHTER**

At present, manslaughter is divided into: (i) voluntary; and (ii) involuntary. If placed in legislation, such a categorisation would not be required. Involuntary manslaughter is divided into: (a) unlawful act; (b) gross negligence. It is asserted that *neither* of these categories are required, today, since:

- '*Unlawful act*' is a legal construction (deriving from Bracton) which was developed (mainly from Tudor times) to circumvent the problems with the definition of '*premeditated malice*'. This is no longer required, that concept having gone; and
- '*Gross negligence*' is an intermediate category on the emancipation of '*reckless*' from the concept of '*negligence*'.

<sup>1572</sup> Also, they stated, p 474: 'If a man of malice prepense shoots an arrow at another with an intent to kill him, and the person to whom he bore no malice is killed by it, this shall be murder in him, for when he shot the arrow he intended to kill, and inasmuch as he directed his instrument of death at one, and thereby has killed another, it shall be the same offence in him as if he had killed the person he aimed at, for the end of the act shall be construed by the beginning of it, and the last part shall taste of the first, and as the beginning of the act had malice prepense in it, and consequently imported murder, so the end of the act *viz.* the killing of another, shall be in the same degree, and therefore it shall be murder and not homicide only.'

<sup>1573</sup> 77 ER 853.

<sup>1574</sup> 168 ER 1198.

<sup>1575</sup> 173 ER 194.

<sup>1576</sup> 169 ER 48.

<sup>1577</sup> This would seem correct since suicide then was a crime (self murder). Fitzgerald, n 62, pp 26-7 'if a suicide failed to take his own life and killed another, he was guilty of murder. If X aimed a gun at his own head, but the gun kicked and he missed and killed Y, this was murder.'

In conclusion, manslaughter, today, need only refer to 'recklessly' killing another which should be a matter of fact which is determined by the jury. Further, a review of the caselaw from 1850 onwards on 'unlawful act' and 'gross negligence' shows that these concepts could have been dispensed with - and this would have produced a better outcome - if the concept of 'reckless' had been used instead. The history is now considered:

### 1. Bracton to Herbert (1588) - Unlawful Act

As previously noted (see 13), Bracton was a cleric and, when writing on homicide, he copied (almost word for word) from the writings of Raymond of Pennafort, another cleric who assembled the Decretals of Gregory IX (c.1230). The writings of Raymond of Pennafort - like those of Bernard of Pavia and St Thomas Aquinas - reflected the ecclesiastical view of their time. All killing, apart from wholly accidental killing (that is, pursuant to a lawful act) was a sin and bore liability (responsibility) for the same. Thus, a person bore liability where an act resulting in death was *illicit* (that is, unlawful) or where 'due care' had not been shown (that is, it was negligent).

In respect of the concept of an 'unlawful' act - in the context of homicide - the following may be noted:

- While such a categorisation may have been appropriate in the theological sphere, it was not appropriate in the legal sphere since it failed to distinguish between 'unlawful acts' - some of which were more reprehensible than others. Also, it failed to specify whether the due punishment should be any different if the unlawful act in question was: (a) intentional; (b) negligent; (c) accidental;
- Given that murder could only be imposed when the act derived from 'premeditated malice' - by a process of legal construction - the courts held that it could be murder, if an act resulting in death was 'unlawful.' This enabled the courts to treat certain acts which they viewed as particularly heinous, as murder even though there was, actually, no express malice or premeditation;
- Thus, in *Herbert* (1588), it was held by the minority of the court that - if people committed an affray - it was unlawful (and intentional) and, if a third party peacemaker was then killed, it was murder. Further, Brooke CJ indicated that - if a man beat another or sought to *disseise* him from his land - and, in the course of it, he killed another, it was murder.<sup>1578</sup> By a similar legal construction, it was argued - at least as early as 1520 - that an act, even if *accidental*, could, if death resulted, be treated as murder and Coke (published 1641) so held. By Foster (1772), it was recognised that this rather draconian construction should be limited to *felonious* acts, in order to be murder. And, by 1902, Kenny was arguing that it should be limited to *felonious acts involving violence*;
- However, there is no need for a concept of unlawfulness if: (a) murder; (b) manslaughter are sufficiently defined. Thus, if the concept of murder sloughs off the concept of 'premeditated malice' and relies, instead, on 'intent', the need to *imply* certain unlawful acts as murder, goes. So too, if manslaughter is restricted to recklessness;
- Also, an unlawful act is a flawed concept for the purposes of categorisation since an unlawful act can also be: (a) an act of transferred malice; or (b) gross negligence. Thus, an 'outcome' can be manipulated by relying on (a) or (b) instead - as well as by treating (b) as an 'unlawful act'. Such manipulation can be seen in some of the cases of gross negligence referred to in 3;
- An 'unlawful' act is also flawed in that it fails to separate the *mens rea* for that act (e.g. affray, burglary, illegal abortion) from the *mens rea* for the killing. This is flawed since the unlawful act may - in the fact situation - be irrelevant to the killing. That is, it may be only a very limited (or negligible) factor.

### 2. Negligence at Criminal Law

The present concept of 'negligence' in the criminal sphere - from which 'gross negligence' was to evolve - was very slow to develop in the law of homicide (and the criminal law generally). Although adverted to by Bracton, all of Lambard (1581), Pulton (1609), Coke (pub. 1641) and Blackstone (1765-9) treated accidents as only covering *lawful*, accidental, acts. Thus, any negligent act was, *per se*, treated as an unlawful act. As a result, negligent killing was treated not as separate from, but an aspect of, unlawful killing as shown in *Hull* (1664).

H and others were building a house about 30 feet from the highway. About evening, H threw down a piece of timber from the house and shouted 'stand clear'. It was heard by the labourers and all of them went from the danger but not C who was hit and died. Hyde CJ held it manslaughter since he said the timber should have been let down by a rope. Wylde and Kelyng JJ thought it an accident.<sup>1579</sup>

It may be noted that, in this case, the issue for the judges was not whether the act was accidental or negligent, but whether it was accidental or a 'mischief' (unlawful). Further, it is clear that the courts much relied on the fact situation since they considered that - if in London - it would have been different, since the streets were busier.<sup>1580</sup> Hale (writing in the 1670's) was one of the first to make reference to 'debitam

<sup>1578</sup> In the case of the majority of the court, it seems likely that they would have held that the killing of the peacemaker was one of transferred malice. See 13.

<sup>1579</sup> See App C (b).

<sup>1580</sup> Ibid, Kel 40-1. However, they all agreed that, if in London, because 'there is a continual concourse of people passing up and down the streets, and a new passenger, who did not hear him call out, and therefore the casting down any such thing from an house into the streets, is like the case where a man shoots an arrow or gun into a market place full of people, if any one be killed it is manslaughter.' See a further qualification by Russell in 1819, see Russell, n 51, vol 1, p 769.

*diligentiam* ('*due care*'), taking the expression from Bracton (see n 352) and he cited examples of lawful but *improperly* performed acts which were held to be manslaughter in respect of:

- throwing stones and shooting arrows;
- driving carts;
- riding horses (see 30(c))

Hale's reference '*diligentiam debitam*' was, gradually, replaced by a more direct reference to '*negligence*'. In 1704, when a woman was killed by a cart (the horse trotting) it was held to be an accident.<sup>1581</sup> Holt CJ, however, held that - if the incident had been in a highway where people usually passed - it would have been manslaughter. Commenting on this case, the Royal Commission in 1839 noted that the issue:

was treated as a matter of law; but surely it was properly a question for a jury whether, under such circumstances, the conduct of the driver was free from blame: consequently, whether the case was one of manslaughter or of misadventure.<sup>1582</sup>

The examples of Hale were followed by Russell in 1819 who directly referred to '*negligence*'.<sup>1583</sup> It was also Russell who started the bifurcation of: (a) unlawful acts; and (b) lawful negligent acts, which we have today, in the first edition of his textbook in 1819.<sup>1584</sup> By 1843,<sup>1585</sup> although the word '*negligence*' was used in caselaw - in the context of treating negligent acts as manslaughter - there was little attempt to restrict this to a higher degree of negligence (i.e. gross negligence).

### 3. Gross Negligence at Criminal Law

By 1860, there was a realisation that, in the criminal sphere, making all negligent - but lawful - acts manslaughter was too harsh. Thus, reference came to be made to '*gross negligence*' (from which recklessness derives). The change may be seen from *Lowe* (1850) to *Markuss* (1864)

- **Lowe** (1850).<sup>1586</sup> An engineer employed to manage a mining lift, left it in charge of an ignorant boy who told him he was unable to manage it. In the engineer's absence, from want of skill by the boy, a man was killed. Campbell CJ held that a person might, by a '*neglect of duty*' (negligence), render himself liable to be convicted of manslaughter; [Guilty]
- **Markuss** (1864).<sup>1587</sup> The court held that an unskilled practitioner who prescribed dangerous medicines (the use of which he was ignorant) which was '*culpable rashness*' would be guilty of '*gross negligence*' if the patient died as a result;<sup>1588</sup> [Not Guilty]
- **Dant** (1865).<sup>1589</sup> A dangerous horse, left to graze on a common, killed a child. It was found by the jury to be culpable negligence. Channell B, p 574 'if death ensues from such *culpable negligence*, the offence of manslaughter is complete;' [Not Guilty]
- **Noakes** (1866).<sup>1590</sup> A mistake on the part of a chemist in putting a poisonous liniment in a medicine bottle led to the death of a man. Erle CJ, p 921 indicated that the degree of criminal negligence required was 'such a degree of *complete negligence* as the law meant by the word *felonious*;'<sup>1591</sup> [Not Guilty]
- **Finney** (1874), see **App B(e)**. A person was scalded to death, Lush J, p 626 'To render a person liable for neglect of duty there must be such a degree of culpability as to amount to *gross negligence* on his part;' [Not Guilty]
- **Salmon** (1880), see **App F(b)**. Killing of a child when at rifle practice. Coleridge CJ, p 82 'If a person will, without taking proper precautions, do an act which is in itself dangerous, even though *not an unlawful act in itself*, and if in the course of it he kills another person, he does a *criminal act* which in law constitutes manslaughter.' Stephen J, p 83 'It is *unlawful* where caused by the culpable omission to discharge a duty tending to the preservation of life...It is a legal duty of every one who does an act, which without ordinary precautions is or may be dangerous to human life, to employ those precautions in doing it.' [Guilty]

<sup>1581</sup> *Anon* (1704) reported East, n 50, vol 1, p 263. See also Russell, n 51, vol 1, p 769.

<sup>1582</sup> See n 966.

<sup>1583</sup> Russell, n 51, vol 1, p 768 (written in 1819) 'Where persons employed about such of their lawful occupations...neglect the ordinary cautions, it will be manslaughter at least, on account of such *negligence*.' (*italics supplied*).

<sup>1584</sup> See 36.

<sup>1585</sup> Gabbett, n 53 (written in 1843) adds very little to Russell on this. See also *Knight* (1828) 1 Lew 168 (168 ER 1000). A cart driver sitting inside not attending at the horse's head ran over a child. Bayley B, p 168 '[X] by being in the cart instead of at the horse's head, or by his side, was guilty of negligence: and, death having been caused by such negligence, he is guilty of manslaughter.' The extent to which the law in this area was dependent on citations from Coke, Hale and Hawkins as late as 1832 may be seen from Bacon, n 37, vol 5, pp 770-3, 777-8.

<sup>1586</sup> 3 Car & K 123 (175 ER 489).

<sup>1587</sup> 4 F & F 356 (176 ER 598).

<sup>1588</sup> Willes J, p 599 'A person who with ignorant rashness, and without skill in his profession, used such a dangerous medicine acted with gross negligence.'

<sup>1589</sup> Le & Ca 567 (169 ER 1517).

<sup>1590</sup> 4 F & F 920 (176 ER 849).

<sup>1591</sup> At p 921. A note to the case states 'The real ground of the opinion was, that even a culpable mistake, and some degree of culpable negligence, is not felonious, unless it be so gross as to be *reckless*.' (*italics supplied*)

- **Doherty** (1887).<sup>1592</sup> Stephen J, p 309 ‘Manslaughter by negligence occurs when a person is doing anything dangerous in itself, or has charge of anything dangerous in itself, and conducts himself in regard to it in such a careless manner that the jury feel that he is guilty of *culpable negligence*, and ought to be punished.’ [Guilty]
- **Elliott** (1889).<sup>1593</sup> A train guard was indicted for manslaughter of a passenger in a train. O’Brien J, p 714 ‘what the prisoner must be found guilty of is *gross negligence*, or *reckless negligent* conduct.’ [Not Guilty]

Harris, in his text in 1881, stated ‘It has been said that to be criminal, the negligence must be so gross as to be *reckless*, but it is impossible to define culpable or criminal negligence’.<sup>1594</sup> A ‘run’ of all these cases is indicated in Russell (1896 ed).<sup>1595</sup> The central problems from a review of them were:

- there was no common description of ‘*gross negligence*’;<sup>1596</sup>
- the courts were making an issue of law of what should have been an issue of fact for the jury;
- the result could be achieved by simply re-categorising the negligent act as ‘*unlawful*’ (such as in *Salmon* above).

In 1902, Kenny (in the first edition of a major text) said that there must be ‘*wicked negligence*’.<sup>1597</sup> Cases and textbooks continued to have variant descriptions of the negligence required. In Cross and Jones (2<sup>nd</sup> ed 1949), the expression used was ‘*culpable*’ negligence - although they also referred to ‘*criminal negligence*’.<sup>1598</sup>

#### 4. Gross Negligence at Criminal Law

It was Turner (in 1945) who pointed out that the use of the word ‘*negligence*’ was not wise and that the issue should focus on the actual *mens rea* in the fact situation prevailing.<sup>1599</sup> Turner also noted the need for this when the act was unlawful.<sup>1600</sup> Finally, Turner noted, in *Andrews* (1937), where it was stated:

There is an obvious difference in the law of manslaughter between doing an unlawful act and doing a lawful act with a degree of carelessness which the legislature makes criminal.<sup>1601</sup>

that:

The judgment does not go on to state what this obvious difference in fact is, and when the statement is analysed it becomes increasingly difficult to discover any difference at all.<sup>1602</sup>

One would agree. Further, if one considers all the cases since *Hull* (1664) cited in legal texts up to Turner (in 1945), it is clear that:

- the categorisations of ‘*unlawful*’ and ‘*gross negligence*’ could have been dispensed with and the word ‘*reckless*’ employed instead, achieving an outcome more appropriate in the circumstances. The same applies post-1945, to date;
- despite the legal categorisation of acts into unlawful/gross negligence employed by judges, it seems clear from the guilty/not guilty outcomes, that juries made their own, personal, assessment of the situation.

#### 5. Conclusion

There is no need to preserve separate categories of (a) unlawful (illicit); and (b) gross negligence, which both emanated from the same source (Bracton). In both cases, the word ‘*reckless*’ should be used to match with the law on battery (and GBH) - not least because Bracton also applied (a) and (b) to battery. In short, (a) and (b), are outmoded (textbook) categorisations - initially deriving from Russell’s text of 1819 - which, with the disposal of ‘*premeditated malice*’, are no longer required.

<sup>1592</sup> 16 Cox 306.

<sup>1593</sup> 16 Cox 710.

<sup>1594</sup> Harris, n 54 (1881 ed), p 155. He cited a note to *Noakes* (1866)(see text) which stated ‘It is impossible to define it [culpable or criminal negligence], and it is not possible to make the distinction between actionable negligence and criminal negligence intelligible, except by means of illustrations drawn from actual judicial decisions.’

<sup>1595</sup> Russell, n 51 (1896 ed), vol 3, pp 183-204.

<sup>1596</sup> Hence, reference in the cases and texts to ‘*neglect of duty*’, ‘*culpable negligence*’, ‘*criminal negligence*’, ‘*complete negligence*’, ‘*gross negligence*’, ‘*reckless negligent conduct*’ etc.

<sup>1597</sup> Kenny, n 57, p 122 ‘But the degree of negligence must not be merely a culpable but a criminal one. It is not enough to show that there was such carelessness as would support a civil action for negligence; there must be ‘a *wicked negligence*.’ (*italics supplied*)

<sup>1598</sup> Cross & Jones, n 59, p 223 *et seq.*

<sup>1599</sup> Turner, n 58, pp 230-1.

<sup>1600</sup> *Ibid*, p 230 (criticising *Larkin*, see n 1294) *re* Humphrey J’s comments on unlawful ‘There is nothing indeed in the judgment to show that the court considered that the prisoner’s attitude of mind made any difference.’

<sup>1601</sup> See *Andrews v DPP*, n 1129.

<sup>1602</sup> Turner, n 58, p 239.

## **APP I: DEFINITIONS OF MURDER & MANSLAUGHTER**

### **1. Murder**

- (1) It is murder if a person kills another:
- (a) intentionally; *or*
  - (b) with intent to inflict serious bodily harm ('SBH').
- (2) Murder is reduced to manslaughter if the following apply:
- (a) Homicide Act 1957, s 2 (*diminished responsibility*); or
  - (b) Coroner and Justice Act, s 54 (*provocation*); or
  - (c) Homicide Act 1957, s 4 (*suicide pact*).
- (3) The punishment for murder is [ ].

### **2. Manslaughter**

- (1) It is manslaughter if a person kills another:
- (a) recklessly; or
  - (b) section 1(2) applies.
- (2) The punishment for manslaughter is [ ].

### **3. Violent Assault**

- (1) It is violent assault if a person:
- (a) intentionally or recklessly
  - (b) inflicts
  - (c) unlawful<sup>1603</sup>
  - (d) physical injury
  - (e) on another person.

'Person' includes any clothes they are wearing, if the intent (or recklessness) was to inflict injury on the person and not only their clothes.

- (2) The punishment for violent assault is [ ]. If it:
- (a) is against a police constable acting in the execution of his duty (*or a person assisting him*), the punishment is [ ];
  - (b) results in SBH, the punishment is [ ];
  - (c) is racially or religiously aggravated, the punishment is [ ].

### **4. Threatened Violent Assault**

- (1). It is threatened violent assault if a person threatens another person so that:
- (a) he reasonably believes
  - (b) he will become subject to
  - (c) an immediate
  - (d) violent assault.

No crime is committed if the threat is:

- (e) by words alone, without any accompanying act or gesture; or
- (f) unobserved by the person; or
- (g) cannot be carried out and the other person knows it.

- (2) The punishment for threatened violent assault is [ ]. When it is racially or religiously aggravated, the punishment is [ ].<sup>1604</sup>

### **5. Scope of Crimes**

- (1) The crimes in sections 1, 2 and 3 may be committed.<sup>1605</sup>

<sup>1603</sup> 'Unlawful' is needed to exclude lawful battery (or GBH), see ss 6 & 7.

<sup>1604</sup> See 47. It is asserted that a separate exception in the case of a police constable is not required.

- (a) directly or indirectly;
- (b) by the act being transferred to another person.

(2) The crimes in sections 1 and 2, as well as SBH, may be committed:

- (a) by omission as well as by act.<sup>1606</sup>

## **6. No Crime Committed**

(1) No crime is committed under:

- (a) sections 1, 2, 3 or 4, where the [CJA 2008, s 76] (*self defence*) applies;
- (b) section 3 (including SBH, where applicable),<sup>1607</sup> when a person:
  - (i) consents to medical treatment; or
  - (ii) it is required in his best interests and he is otherwise incapable of giving consent.
- (c) section 3 (excluding SBH),<sup>1608</sup> when an activity (including a sport) is conducted within the limits of what is acceptable as incidental to:
  - (i) social intercourse; or
  - (ii) life in the community.

No sport may, by its rules, authorise a crime under sections 1 or 2 or SBH under section 3.

'*Medical Treatment*' includes surgery, but does not include any non-therapeutic mutilation, save where legislation provides otherwise.<sup>1609</sup>

'*Sport*' means any game or sporting activity (organised or not) and includes horseplay.

## **7. Physical Correction**

A parent may administer moderate physical correction to a child providing no:

- (a) crime is committed under sections 1, 2 or 3;
- (b) implement is used;
- (c) blow to the head is inflicted;
- (d) shaking is inflicted.<sup>1610</sup>

'*Parent*' includes a person in *loco parentis*, including a teacher.<sup>1611</sup>

## **Copyright**

Copyright for this article is retained by the author(s), with first publication rights granted to the journal.

This is an open-access article distributed under the terms and conditions of the Creative Commons Attribution license (<http://creativecommons.org/licenses/by/3.0/>).

<sup>1605</sup> (a), (b) have always been the law since, at least, Bracton (c.1240) which includes (c)(transferred malice).

<sup>1606</sup> Battery (violent) assault has always required infliction of physical injury and so does not arise by way of omission. However, SBH (such as neglect) could arise by way of omission.

<sup>1607</sup> When a person has surgery or treatment, they are not consenting (and public policy should not permit them to consent) to: (a) be murdered (i.e. killed intentionally. i.e. s 1); (b) be recklessly killed (i.e. s 2). They *are* consenting to the fact that they may die accidentally. They are not consenting to be killed negligently. However, here, a crime is not committed, but there is civil redress - as with the general law on battery. As part of the surgery, persons are also consenting to GBH, where appropriate. For example, if they are having a heart operation. But not, for example, if they are having a small mole removed.

<sup>1608</sup> When a person plays a sport (including a contact sport), they are not consenting (and public policy should not permit them to consent) to: (a) be murdered (i.e. killed intentionally. i.e. s 1); (b) be killed recklessly (i.e. s 2). They are consenting to the fact that they may die accidentally. They are not consenting to be killed negligently. However, here, a crime is not committed, but there is civil redress - as with the general law on battery. Also, in any sport, a person is not consenting (and public policy should not permit them to consent) to GBH. For example, in rugby, football, fencing, judo *etc.*, a person is not consenting for another to intentionally (or recklessly) inflict GBH on him, such as breaking his neck, breaking his leg, stabbing them in heart *etc.*

<sup>1609</sup> Legislation makes provision on tattooing. It also proscribes female genital mutilation.

<sup>1610</sup> Alternatively, it may be preferable to prescribe the only forms of physical correction now permitted (e.g. a smack on the hand or bottom, without leaving a bruise or wound).

<sup>1611</sup> Physical correction of an apprentice or other employee (including servant) would not seem appropriate today. Cf.n 1464.