At common law, all unlawful homicides which are not murder are manslaughter. The offence has a broad scope, being limited by murder at one extreme and accidental killing at the other. There is an increasing number of statutory offences of unlawful killing including, for example, causing death by dangerous driving and corporate manslaughter. Some of these statutory offences preclude prosecution for manslaughter (notably corporate manslaughter) but in most cases manslaughter remains available as an alternative charge to the specific statutory offences.

It is customary and useful to divide manslaughter into two main groups: ‘voluntary’ and ‘involuntary’ manslaughter. The distinction is based on the accused’s intention at the time of the killing. Where there is no intention to kill or cause grievous bodily harm the offence falls within the category of involuntary manslaughter. In contrast, voluntary manslaughter comprises cases where D had the intention to kill or do grievous bodily harm but some defined mitigating circumstance – provocation, diminished responsibility or killing in pursuance of a suicide pact – reduces his crime to the less serious grade of criminal homicide. These partial defences to murder were originally introduced to avoid the death penalty. Today they subsist unsatisfactorily in order to avoid the mandatory life sentence for murder. The Law Commission has been involved in an ongoing process of reform of voluntary manslaughter since 2003, and legislative action is anticipated in the near future.

15.1. Voluntary manslaughter

At common law, voluntary manslaughter existed only where the killing was a direct result of provocation. The 1957 Act placed the provocation defence on a statutory footing and created two further categories of voluntary manslaughter where (i) D is suffering from diminished responsibility; and (ii) D kills in pursuance of a suicide pact. The problem of the suicide pact is looked at in the next chapter alongside the statutory crime of abetting suicide.

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1 These offences, their theoretical implications and the relationship with ‘normal’ manslaughter are considered in the valuable collection of essays edited by C Clarkson and S Cunningham (eds), *Criminal Liability for Non-Aggressive Death* (2008); see, in particular, A Ashworth, ‘Manslaughter Generic or Nominate Offences’ in that volume.

2 See also V Tadros, ‘The Limits of Manslaughter’, in Clarkson and Cunningham, *Criminal Liability for Non-Aggressive Death* (2008), who argues that the special offences discriminate and fail to optimize coherence in the law; see also V Tadros, *Criminal Responsibility* (2005) 348 et seq.


4 Section 2.

5 Section 4, below.

6 Below, p 553.
15.1.1 Provocation

The common law rule was stated by Devlin J in what the Court of Criminal Appeal described as a ‘classic direction’, as follows:

Provocation is some act, or series of acts, done by the dead man to the accused, which would cause in any reasonable man, and actually causes in the accused, a sudden and 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.

The common law rule has been modified by the Homicide Act 1957, s 3, which provides:

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.

Section 3 does not create or codify, but assumes the existence of, and amends, the common law defence. It does not state the effect of a successful defence – it is by virtue of the common law that the offence is reduced to manslaughter. The section assumes the existence of the dual test:

1. was the defendant provoked to lose his self-control? (a subjective question); and
2. was the provocation enough to make a reasonable man do as he did? (an objective question).

The Law Commission recently criticized the offence for its undue complexity, and, as will become obvious from what follows, the courts have struggled to reach agreement on the scope and definition of its terms. There have been numerous visits to the House of Lords and Privy Council in recent decades, with many divisions of opinion in these Committees.

Availability

The defence is available only to a charge of murder whether as a principal or secondary party. Provocation is not a defence to a charge of wounding or any charge other than murder. In Bruzas, Eveleigh J held that it was not a defence to a charge of attempted murder at common law and it is clear that it is not a defence under the Criminal Attempts Act 1981.

The defence has no relevance to the determination of whether D committed the acts causing

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8 Duffy [1949] 1 All ER 932n.
9 LCCP 177, para 2.78.
10 Marks [1998] Crim LR 676. It has been suggested that provocation (and diminished responsibility) should be available to all offences – J Horder, Excusing Crime (2003) 143–146.
13 See commentary and Fourteenth Report, para 98.
death when he has been found unfit to plead under s 4A of the Criminal Procedure (Insanity) Act 1964.15

Trial procedure

On a murder charge, in deciding whether D intended death or grievous bodily harm, the jury must consider evidence of provocation with all other relevant evidence.16 If they are not satisfied that he had the necessary mens rea, they must acquit. But even if they decide he did have mens rea, provocation may still be a defence to a charge of murder at common law, entitling D to be convicted of manslaughter.

Whether the defendant was provoked to lose his self-control is a question of fact. In accordance with the general rule, it is for the judge to say whether there is any evidence of that fact. In one tragic case,17 where the defendant yielded to the entreaties of his incurably ill and suffering wife to put an end to her life, it was held that there was no evidence of provocation: D had not lost his self-control, indeed the evidence was that he was so in control as to stop immediately when he thought, wrongly, that she had changed her mind. The case highlights the arbitrariness of a defence partially absolving those who kill in a state of anger or outrage, but not those who exercise mercy.18

Sufficient evidence of provocation may appear in the case presented by the Crown. If not, there is an evidential burden on the defendant.19 If no evidence is adduced by the Crown or D that D was provoked to lose his self-control, then the judge will withdraw the defence from the jury. Since the burden of proof is on the Crown, evidence which might leave a reasonable jury in reasonable doubt whether or not D was provoked is sufficient. There must be evidence of provocation, mere speculation will not suffice.20

Once the judge has decided there is sufficient evidence that D was provoked, whether or not the defence has been raised expressly by D or his counsel,21 he must leave it to the jury to answer the questions, (i) was the defendant provoked to lose his self-control? and (ii) was the provocation enough to make a reasonable man do as he did? Since the 1957 Act, the judge may not withdraw the defence from the jury on the ground that in his well-founded opinion there is no evidence on which they could answer the second question in the affirmative.22

Although the court in Dhillon23 was unwilling to admit it, the effect of the 1957 Act plainly is that D must not be deprived of his chance that the jury will return a perverse verdict; but the right is an imperfect one since the court said, obiter, that the conviction of murder is ‘safe’ and will be upheld if the court is sure that ‘at least 10 members of the jury would be drawn to that conclusion’.

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18 The focus of the defence on the element of anger and spontaneous loss of control as an excusing feature is critically examined by J Horder, ‘Reshaping the Subjective Element in the Provocation Defence’ (2005) 25 OJLS 123 who considers the Law Commission proposals to move to a defence based on fear of violence.
19 Mixed statements of the accused may be relied on: Jama [2004] EWCA Crim 960. Care needs to be taken with reliance on D’s lies: Davies [2004] EWCA Crim 1914.
21 Mancini v DPP [1942] AC 1, [1941] 3 All ER 272.
22 This seems to be a unique exception to the rule that the judge must not allow a matter of fact (or opinion) to be decided when there is no evidence of it. For discussion of this as a parliamentary ‘oversight’ see LCCP 177, para 1.65. cf the position before the Act, as discussed in Franco v The Queen [2001] UKPC 38 and Fox v The Queen [2001] UKPC 41. The CLRC recommended repeal of this rule: Fourteenth Report, para 88. The Law Commission in LC 304 also recommended repealing this provision: LC 304, para 5.16. An interlocutory appeal might also be made available against rulings on the issue.
15.1.1.1 Provocation by ‘things done or said’

Since provocation continues to be a defence at common law it might have been held that the words 'provoked' and 'provocation' in s 3 bear the limited meaning they had at common law, subject only to the changes expressly made by the section. This has not been the approach of the courts. These words have been given their ordinary natural meaning, free of the technical limitations of the common law. One of the starkest examples of this is Doughty,\(^{24}\) in which it was held that the judge was bound by the plain words of the section to leave provocation to the jury where there was evidence that the persistent crying of his baby had caused D to lose his self-control and kill it. Whatever the position may have been at common law, the statute does not require provocation to arise from illegal or wrongful acts. There must be ‘things done or things said’ and the crying of the baby was presumably regarded as a ‘thing done’. The court rejected an argument that the decision would open the floodgates: the decision did not mean that baby-killers would easily be able to avoid conviction for murder on the basis of provocation: ‘…because reliance can be placed upon the common sense of juries upon whom the task of deciding the issue is imposed by s 3 and that common sense will ensure that only in cases where the facts fully justified it would their verdict be likely to be that they would hold a defendant’s act in killing a crying child would be the response of a reasonable man within the section’.\(^{25}\) This broad interpretation of the trigger for the defence means that there is no requirement that the provoking acts or words were performed consciously, let alone with the deliberate intention to provoke. This dilution of the concept of ‘provocation’ to mean merely words or conduct that cause the loss of control in the defendant has been heavily criticized by academics.\(^{26}\)

In Acott,\(^{27}\) it was held by the House of Lords that it is not enough that D’s loss of temper may possibly have been the result of some unidentified words or actions by another. In such a case, there would be no material on which the jury could make the objective judgement demanded by the Act. There must be ‘some evidence of what was done or what was said to provoke the homicidal reaction’ (the court’s emphasis). The trial judge is best placed to make this assessment.

Mere circumstances, however provocative, do not constitute a defence to murder. Loss of control by a farmer on his crops being destroyed by a flood, or his flocks by foot-and-mouth, a financier ruined by a crash on the stock market or an author on his manuscript being destroyed by lightning, could not, it seems, excuse a resulting killing. An ‘Act of God’ could hardly be regarded as ‘something done’ within s 3. Since, where there is a provocative act, it no longer need be done by the victim, this distinction begins to look a little thin. If D may rely on the defence where the crops or the manuscript were destroyed by an unknown arsonist or the stock exchange crash was engineered by other anonymous financiers, why should it be different where no human agency was involved? The ‘provocation’ is no more and no less.

By whom the provocation may be given\(^{28}\)

Section 3 removed certain limitations on the defence as formulated in Duffy. That formulation limited the nature of operative provocation to acts done (i) by the dead person (ii) to the accused. Evidence would thus not be admissible of acts done (i) by third parties or (ii) to third parties. Under s 3, however, there is no such limitation and the only question seems to be


\(^{25}\) Per Stocker LJ at 326.


\(^{27}\) [1996] Crim LR 541; aff’d [1997] 1 All ER 706, HL; [1997] Crim LR 541. See also Bharj [2005] EWCA Crim 499 emphasizing that the jury would be looking at all the evidence.

whether the evidence is relevant to the issue – namely whether D was provoked to lose his self-control. The test of relevance should be – would a reasonable person regard the act in question as having a provocative effect on the person charged? So it was held in Davies, where D killed his wife, V, following her adultery with X, that the judge was wrong to direct that V’s conduct and, by implication, not X’s, was to be taken into account. 29

The defence was available, even at common law, if the blow was aimed at the provoker but, by accident, it missed him and killed an innocent person. The doctrine of transferred malice 30 operated and D was guilty of manslaughter only. In Gross, 31 D, provoked by blows from her husband, shot at him, intending to kill him but missed and killed V. It was held that:

if the firing at the person intended to be hit would be manslaughter, then, if the bullet strikes a third person not intended to be hit, the killing of that person equally would be manslaughter and not murder. 32

If D knew it was virtually certain that he would hit V, he would have an independent mens rea with respect to V, probably sufficient to fix him with liability for murder 33 at common law; but now the provocation given by the third party would be a defence even for D’s acts towards V.

There is, therefore, no limitation to prevent a third party oral account being sufficient to constitute provocation, as where D loses his temper following A’s report of V’s admission that V had attacked D’s daughter.

Acts not directed at D

Before the Homicide Act 1957, it used to be said that the provocation must consist in something done to the defendant; 34 but the Act requires the jury to take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable person. Such a broad definition is capable of including acts done to third parties if, in the jury’s opinion, they would have provoked a reasonable person in the position of the defendant. In Pearson, 35 where two brothers, M and W, killed their violent and tyrannical father, the ill-treatment meted out to M over a period of eight years when the older boy, W, was absent from home was deemed relevant to W’s defence, particularly as he had returned home to protect M from violence. The removal of this restriction is significant in the context of domestic killings where, for example an abusive man is attacking his wife and her child is provoked, on seeing the attack, to kill the man.

15.1.1.2 The subjective condition – the loss of self-control

The requirement of the loss of self-control represents an attempt to distinguish revenge killings of a premeditated or calculated nature from killings committed in the heat of the moment. It provides an imperfect tool for distinguishing between those two categories of killing. 36 It is unclear whether the main focus in applying the test should be on whether the accused has failed to exercise control, or was incapable of exercising control. Moreover, the test has the potential to operate in a discriminatory way, rendering the defence too readily available to those who are quick to temper (more commonly men), and less accommodating of those

29 [1975] QB 691, [1975] 1 All ER 890. cf the earlier decision to the same effect by Lawton J in Twine [1967] Crim LR 710, where D’s girlfriend’s conduct caused D to lose his self-control and strike and kill the man she was with.
30 Above, p 126.
31 (1913) 23 Cox CC 455 (Darling J); and see Porritt [1961] 3 All ER 463, [1961] 1 WLR 1372.
32 23 Cox CC at 456.
33 Above, p 98.
34 But see Fisher (1837) 8 C & P 182 (Park J, obiter) (D coming upon V raping D’s son) and Harrington (1866) 10 Cox CC 370 (Cockburn C) contemplating the possibility of a defence where D found his daughter being violently assaulted by her husband.
36 The Law Commission’s proposals discussed below recommend a move away from a defence based on this requirement.
who endure the provoking circumstances before responding with lethal force (often women who kill abusive partners). The acute difficulties arising when the defence of provocation is pleaded in cases of killing in abusive relationships has called into question the appropriateness of this ‘sudden and temporary loss of self control’ requirement.

Evaluating the evidence of loss of control

In their evaluation of the defence as a whole, the jury should be directed to consider the subjective condition first. In deciding this question of fact they are, naturally, entitled to take into account all the relevant circumstances; the nature of the provocative act and all the relevant conditions in which it took place, the sensitivity or otherwise of D, and the time, if any, which elapsed between the provocation and the act which caused death. D’s failure to testify to his loss of self-control is not necessarily fatal to his case.

Provocation is commonly set up as an alternative to the complete defence of self-defence. The admission of loss of self-control would weaken or destroy a self-defence plea; and the courts recognize that D has a tactical reason for not expressly asserting what may be the truth. Although D firmly denies that he lost self-control, the judge must direct the jury to consider that possibility, if it is a possibility, should they reject the defences raised. It is the duty of counsel for both sides at the trial to draw the attention of the judge to any evidence of provocation. It is for the judge to decide whether it is sufficient to leave to the jury. The Court of Appeal has shown considerable generosity in discerning evidence of provocation where that defence has not been raised at the trial and even where the defence raised was inconsistent with provocation and D’s counsel has given the judge his opinion that it would not be appropriate for him to raise the issue. Arguably, reform should be made to allow D (after legal advice) to waive the right to have the defence left to the jury.

Question is entirely subjective

If D is of an unusually phlegmatic temperament and it appears that he did not lose his self-control, the fact that a reasonable person in like circumstances would have done so will not assist D in the least. A traditional example of extreme provocation is finding a spouse in the act of adultery; but if D, on so finding his wife, were to read her a lecture on the enormity

37 For a broader ranging critique of the defence for its ‘gendered and heterosexualist’ nature and of measuring the reasonableness of killing across cultures, see H Power, ‘Provocation and Culture’ [2006] Crim LR 871.
39 Brown [1972] 2 All ER 1328 at 1333.
40 See, recently, Gregson [2006] EWCA Crim 3364 (epileptic and mentally abnormal).
41 In an interesting article based on empirical work B Mitchell, ‘Distinguishing between Murder and Manslaughter in Practice’ (2006) JCL 318, reveals that 75% of provocation pleas are accompanied by one or more other defence. Difficulties are created for the judge where a jury returns a verdict in these cases.
44 Scott [1997] Crim LR 597, where the defences were accident and self-defence.
46 Cambridge [1994] 2 All ER 768, [1994] Crim LR 690. See S Doran, ‘Alternative Defences: The Invisible Burden’ [1991] Crim LR 878. Arguably there is no inconsistency in pleading provocation and alibi – effectively D is saying it was not me, but whoever it was would have been provoked.
48 Killing, in such a case, ‘is of the lowest degree of [manslaughter]; and therefore… the court directed the burning in the hand to be gently inflicted, because there could not be a greater provocation’: Blackstone, Commentaries, iv, 192. See also the case of Manning (1671) T Raym 212. For a recent case of exactly these facts, see Christie [2004] EWCA Crim 1338, D was convicted of murder.
of her sin and then methodically to load a gun and shoot her, it is probable (for it remains a question of fact) either that the judge would rule that there was no evidence that D lost his self-control or that the jury would find that he did not. In that case, D would be guilty of murder and it would be irrelevant that the jury may think that a reasonable person in like circumstances would lose his self-control. The requirement that there must be a loss of control is not satisfied by evidence that D acted ‘instinctively’, for example where a boxer punched V who had provoked him.49

Loss of self-control must be sudden and temporary

Although in Camplin, the House of Lords stated that the 1957 Act ‘abolishes all previous rules as to what can or cannot amount to provocation’50 it appears that the subjective condition is unchanged. Defining what is a loss of control has been acknowledged to be almost impossible.51 In the more recent decisions of Ibrams,52 Thornton53 and Ahluwalia54 the Court of Appeal has reaffirmed that there must be a ‘sudden and temporary loss of self-control’, as Devlin J put it in Duffy,55 and approved that judge’s further words:

Indeed, circumstances which induce a desire for revenge are inconsistent with provocation, since the conscious formulation of a desire for revenge means that a person has had time to think, to reflect, and that would negative a sudden temporary loss of self-control, which is of the essence of provocation.56

In Thornton,57 the court rejected an argument that the words ‘sudden and temporary’ are no longer appropriate. However, provocation is not ruled out as a matter of law either because the provocative conduct has extended over a long period or because there was a delayed (‘slow burn’) reaction.58

It seems that the words, ‘sudden and temporary’, imply only that the act must not be premeditated or calculated. It is the loss of control which must be ‘sudden’, which does not mean ‘immediate’. However, in Ahluwalia the Lord Chief Justice confirmed that ‘the longer the delay and the stronger the evidence of deliberation on the part of the defendant, the more likely it will be that the prosecution will negative provocation’.59 The prolonged nature of the provocation (say, in an abusive relationship) may explain why an incident, trivial when considered in isolation, caused a loss of self-control. The jury are bound by the Act to take into account everything both done and said according to the effect which in their opinion it would have on a reasonable person; and a jury may well think provocative behaviour over a long period would have a cumulative effect on a reasonable person and had such an effect on the defendant. In Davies,60 the Court of Appeal criticized the judge’s direction as too generous.

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49 Serrano [2006] EWCA Crim 3182.
51 See Mohammed (Faqir) [2005] EWCA Crim 1880.
55 [1949] 1 All ER 932n.
56 The test provided by Devlin J suggests that the longer the period to cool off and calm down the more likely the killing is not a revenge killing. But this assumption is not borne out by psychological/physiological evidence see P Brett, ‘The Physiology of Provocation’ [1970] Crim LR 634. The requirement of suddenness is criticized for restricting the defence and removing from its ambit the cases of outraged retaliation: Horder, Excusing Crime, 69–71.
57 Above, n 53.
58 Ahluwalia, above.
59 Per Lord Taylor C J at 139.
60 (1975) 60 Cr App R 253 at 259.
in allowing the jury to take account of ‘the whole course of conduct of [V] right through that turbulent year of 1972’. The Court of Appeal’s position is hard to justify. The whole course of conduct should only be ignored if no reasonable jury could have thought it had an effect on the accused at the flashpoint. ‘Everything both done and said’ must be limited to what is relevant; but everything which may in fact have contributed to the accused’s loss of self-control is relevant. If a matter so contributed, it is not open to the judge to rule that it would not have affected a reasonable person.

The ‘temporary’ nature of the loss of self-control seems irrelevant, provided only that it extended to the fatal act. D should not be deprived of defence because he continued berserk for days thereafter – but sudden losses of self-control are, in practice, temporary. The term ‘loss of control’ is of course not one founded on medical or psychological learning; it is a legal invention which lacks precision.

Delay and cooling off
The sudden and temporariness requirement was designed to exclude pre-meditated killing from the ambit of the defence. Evidence that D had an opportunity to regain control and kill in a calculated fashion is therefore important. In *Ibrams*, 61 D had received gross provocation but the last of it occurred on 7 October. The attack was carefully planned on 10 October and carried out on 12 October. It was held that the judge was right to rule that there was no evidence of loss of self-control. The case should be approached with care. The question of delay and potential cooling period is evidence relating to the substantive law question whether D had lost his self-control at the time.

Recent cases have given a generous interpretation to this element of the defence. There was held to be sufficient evidence to go to the jury in *Thornton*62 where a wife had previously declared an intention to kill her brutally abusive husband, and after a fresh provocation she went to the kitchen, took and sharpened a carving knife and returned to another room where she fatally stabbed him. In *Pearson*, 63 although DD had armed themselves in advance with the fatal weapon and the killing was a joint enterprise provocation was left. In *Baillie*, 64 where D, being greatly enraged, fetched a gun from an attic and drove his car to V’s house (stopping for petrol on the way) before shooting him provocation was left. ‘Cooling time’ no longer seems to play the vital role it once did in negating the defence.

Loss of self-control in doing what?
The section does not say what act D must have performed when his self-control was lost for the defence to apply, but it seems obvious that it must be the act which causes death. The question is whether D’s responsibility for homicide – that is, causing death – should be mitigated. 65 If D has lost control in doing the act which caused death, it is quite immaterial, it is submitted, that he regains it immediately afterwards. In *Clarke*, 66 D, under some provocation, head-butted and strangled V, and, then, panicking, placed live wires into her mouth electrocuting her. She may, however, have been dead before the electrocution. It was held that the judge had rightly declined to tell the jury to ignore the circumstances of the electrocution in considering...
provocation. The jury must take into account the whole course of D’s conduct, ‘although some factors (for example, disposal of the body) might be too remote’. But if V was already dead when D put the wires in her mouth, the fact that he had now regained his self-control was surely irrelevant. The only possible relevance of acts done after death (or after the infliction of a fatal injury) could be to show that self-control had not been lost when the earlier acts causing death were done – for example, suggesting that the whole course of conduct was premeditated; but there was no hint of relevance of that kind in Clarke. Of course, if the electrocution was a contributory cause of V’s death and was done after D had regained his self-control, he was guilty of murder; but the onus was on the Crown to prove this.

One qualification to this might arise where D, under provocation, causes potentially fatal injury to V but, while V is still alive, regains his self-control and deliberately omits to take steps which he knows might save or prolong her life. D would have a duty to act67 and, if his omission, being unprovoked, resulted in V’s death, he might be convicted of murder.

15.1.1.3 D’s response – ‘would the reasonable man have done as D did?’

The objective condition at common law68

In the older cases, the courts laid down as a matter of law what was, and what was not, capable of amounting to provocation.69 It usually consisted of a violent act against the defendant, though two other instances were well recognized, that where a husband discovered his wife in the act of adultery and killed either or both of the guilty pair, and that where a father found and promptly killed a man raping his son.70 In Holmes v DPP,71 the House of Lords held that, as a matter of law, a confession of adultery was insufficient provocation where a husband killed his wife; and added that ‘in no case could words alone, save in circumstances of a most extreme and exceptional character’, reduce the crime to manslaughter. The reasonable man did not make his appearance until Welsh72 in 1869. Thereafter, even when an act was recognized as capable of amounting to provocation, it probably had to pass the reasonable man test.

The test was applied by the Court of Criminal Appeal in Lesbini.73 The girl in charge of a firing range in an amusement arcade made some impertinent personal remarks about D. He asked for a revolver, ostensibly to shoot at the range, and shot her dead. At his trial for murder, his defences of accident and insanity were rejected by the jury. On appeal, it was argued that the jury should have been directed on provocation and Welsh did not apply where, as in the present case, D suffered from defective control and want of mental balance. Avory J interjected that it would seem to follow from this that a bad-tempered man would be entitled to a verdict of manslaughter where a good-tempered one would be liable to be convicted of murder74 and the court held that, to afford a defence, the provocation must be such as would affect the mind of a reasonable man, which was manifestly not so in the present case.

Before the Homicide Act the judges took it upon themselves to instruct the jury as to the characteristics of the reasonable man. The defendant might be mentally deficient75 but the
jury still had to consider the effects of the provocation on a normal person. Moreover, he (or she) was normal in body as well as mind. The fact the defendant was seven months’ pregnant was irrelevant to the application of the objective test. In *Bedder v DPP*, a youth of 18 who was sexually impotent killed V, a prostitute, after attempting in vain to have sexual intercourse with her. The court found she had jeered at him and attempted to get away. He tried to hold her and she slapped him in the face, punched him in the stomach and kicked him in the genitals. D knew of his impotence and had allowed it to prey on his mind. The House of Lords held that the jury had been correctly directed to consider what effect V’s acts would have had on an ordinary person, not a man who is sexually impotent. Mental and physical characteristics were, in the view of the House of Lords, inseparable.

The objective condition under s 3 of the 1957 Act

The Homicide Act, s 3 made three changes in the law:

1. It made it clear that ‘things said’ alone may be sufficient provocation, if the jury should be of the opinion that they would have provoked a reasonable person, thus reversing *Holmes v DPP*.

2. It took away the power of the judge to withdraw the defence from the jury on the ground that there was no evidence on which the jury could find that a reasonable person would have been provoked to do as D did, reversing *Mancini*.

3. It removed the power of the judge to dictate to the jury what amounted to the characteristics of the reasonable person, reversing *Bedder*.

It was not until the decision of the House of Lords in *Camplin*, more than 20 years after the Act, that the second and third effects were fully recognized. The Court of Appeal in that case was of the opinion that *Bedder* was binding on them. However, the House of Lords decided that the effect of s 3 is to overrule *Bedder* and all other cases which defined any characteristic of the reasonable person except for his power of self-control and the fact that he is sober.

In *Camplin*, D, a 15-year-old boy, killed the victim with a chapatti pan. D’s story was that V had raped him and then laughed at him when he was overcome by shame, whereupon he lost his self-control and made the fatal attack. The trial judge declined the invitation of D’s counsel to instruct the jury to consider the effect of the provocation on a boy of 15. He directed that the test was the effect of the provocation, not on a reasonable boy, but on a reasonable man. The Court of Appeal held that this was a misdirection and distinguished *Bedder* on the grounds that youth, and the immaturity which naturally accompanies youth, are not deviations from the norm, but norms through which everyone must pass. Youth is not a personal idiosyncrasy and certainly not a physical infirmity or disability like Bedder’s impotence. In *Camplin*, the House of Lords dismissed the prosecution’s appeal on the broader ground that *Bedder* is, in effect, overruled by s 3 of the 1957 Act. Their lordships were influenced by the fact that, under the 1957 Act, words alone may be a sufficient provocation. This accentuates the anomalies, inconveniences and injustices which would flow from continued application of the *Bedder* principle, for the gravity of verbal provocation will frequently depend on the particular characteristics or circumstances of the person to whom a taunt or insult is addressed. In a case

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76 Smith (1915) 11 Cr App R 81.
79 [1942] AC 1, [1941] 3 All ER 272.
81 [1978] 1 All ER at 1241.
82 Such as D’s emotional attachment to a person attacked by V: Horrex [1999] Crim LR 500.
of provocation by words, personal characteristics could not be ignored without absurdity. If
the alleged provocation was the shout ‘go away shorty’, it would be impossible to evaluate the
reasonableness of the response without taking account of D’s stature. To allow such charac-
teristics to be taken into account where the provocation was verbal so undermined the Bedder
principle that it should no longer be followed, whatever the nature of the provocation.

This conclusion, it is submitted, is well justified by the words of the Act. Section 3 is to be
given its natural meaning and tells us that the question for the jury is ‘whether the provoca-
tion was enough to make a reasonable man do as [D] did’. What is ‘the provocation’? It seems
obviously to be the things done or things said – which may or may not have been a sufficient
provocation at common law – which the jury have found to have provoked the accused. The
section goes on to direct that 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.

The words italicized are inconsistent with the continuance of Bedder as a rule of law.

The relevant ‘characteristics’

In Camplin, Lord Diplock stated how a jury should be directed:

The judge should state what the question is using the very terms of the section. He should then explain
to them that the reasonable man referred to in the question 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 would react to the provocation as the accused did.

It will be noted that age and sex – characteristics which everyone possesses – are to be taken
into account in determining the degree of self-restraint required of D; but his other character-
istics are said to be relevant only in so far as they affect the gravity of the provocation, not in
their impact on the ability of D to exercise self-control. This line of reasoning accords with the
argument made earlier by Ashworth in a seminal article:

The proper distinction is that individual peculiarities which bear on the gravity of the provocation
should be taken into account, whereas individual peculiarities bearing on the accused’s level of self-
control should not.

The same distinction appears in s 169(2) of the New Zealand Crimes Act 1961 with which, as
Lord Simon pointed out, English law was brought into line by Camplin:

Anything done or said may be provocation if –

(a) in the circumstances of the case it was sufficient to deprive a person having the power of self-
control of an ordinary person, but otherwise having the characteristics of the offender, of the
power of self-control; and

84 [1978] 2 All ER 168, per Lord Diplock at 175.
85 ‘The Doctrine of Provocation’ [1976] CLJ 292. cf the distinction made between provocativeness and provo-
cability made in the commentary on Morhall [1995] Crim LR 890. For consideration of whether the questions can
be kept separate see A Norrie, ‘From Criminal law to Legal Theory: The Mysterious Case of the Reasonable Glue
(b) it did in fact deprive the offender of the power of self-control and thereby induced him to commit the act of homicide.

Plainly, the characteristics of the accused were not to be taken into account in assessing the 'ordinary person's' power of self-control. On the contrary, as Lord Simon said, the judge may tell the jury that a person is not entitled to rely on 'his exceptional excitability (whether idiosyncratic or by cultural environment or ethnic origin) or pugnacity or ill-temper or on his drunkenness'.

This distinction was also central to the decision of the House in Morhall, where it was held that a characteristic of the defendant affecting the gravity of the provocation is material even though it is discreditable. D, a drug addict, was taunted about his addiction. The Court of Appeal held that the reasonable man is not a drug addict and this was a characteristic which could not be taken into account. However, the term 'reasonable man' in s 3 of the Homicide Act is only concerned with reasonable self-restraint. The House held that the addiction should have been taken into account. If a paedophile is taunted with his proclivity, the jury must consider the provocative effect of such taunts on a person with that characteristic. As Lord Goff agreed, if an old lag, now trying to go straight, were taunted with being 'a jailbird', it would not make much sense to tell the jury to consider the effect of such provocation on a man of good character.

In line with these three decisions of the House was that of the Privy Council in Luc Thiet Thuan v R, holding that D's mental abnormality, unless it formed the subject of the taunts, is not a relevant characteristic for the purposes of the objective test. D, charged with murder in Hong Kong, unsuccessfully raised defences of diminished responsibility and provocation. There was medical evidence that he had suffered organic brain damage of a kind which often results in difficulty controlling impulses. The judge directed the jury that this evidence was relevant to diminished responsibility but did not refer to it when dealing with provocation. D was convicted of murder. The Court of Appeal of Hong Kong dismissed D's appeal. The condition went to D's power of self-control, not to the gravity of the provocation. The Privy Council, Lord Steyn dissenting, dismissed D's appeal.

Against this view, there stood a series of Court of Appeal cases which took a more generous approach, accepting that the reasonable man might be endowed with the defendant's mental characteristics. In Ahluwalia, where the appeal was allowed on the ground of fresh evidence of diminished responsibility the court said, obiter, that post-traumatic stress disorder or battered woman syndrome might be a relevant characteristic for the purpose of the objective test in provocation. In Dryden and in Humphreys, where the defence was provocation, the courts held that 'eccentric and obsessional personality traits', and abnormal immaturity and attention-seeking by wrist slashing were mental characteristics which ought to have been left specifically to the jury. These cases were disapproved by the majority in Luc but found favour with the dissentient Lord Steyn. After Luc, the Court of Appeal continued to adopt the broader approach.

86 Lord Simon did not think this list necessarily exhaustive. McCarthy [1954] 2 QB 105, [1954] 2 All ER 262 (D's intoxication is to be ignored) remains good law.
90 [1995] 4 All ER 828.
91 [1995] 4 All ER 1008.
This division of opinion came to a head in the controversial House of Lords’ decision in *Smith (Morgan)*. The House held, Lords Hobhouse and Millett dissenting, that the jury may take into account, in addition to age and sex, other characteristics of the defendant which affect powers of self-control, whether or not they are also relevant to the gravity of the provocation. Smith and his friend, V, both alcoholics, had a petty row. Smith, who was suffering from a serious clinical depression, took a kitchen knife and stabbed V to death. Pleas of no *mens rea*, diminished responsibility and provocation were all rejected by the jury. The majority of the House held that the jury ought to have been told that the question was whether the provocation was sufficient to make a man, suffering from that depression, lose his self-control.

The problems with *Morgan Smith*

The decision met with strident criticism. First, it failed to respect the language of s 3. Notwithstanding the clear words of s 3, the reasonable man seemed to have been virtually eliminated from the law. According to Lord Hoffmann, the judge should be able simply to tell the jury that the question of whether D’s behaviour fell below the standard which should reasonably have been expected of him was entirely a matter for them. As the Court of Appeal subsequently put it, the ‘reasonable man’ became ‘an archetype . . . left lurking in the statutory undergrowth’. Secondly, it created considerable and confusing overlap with the defence of diminished responsibility under s 2. However, where in diminished responsibility the onus of proof is on the defendant, in provocation it remains on the prosecution — a difficult, if not impossible, task for the jury and one which can hardly have been intended by the authors of the Homicide Act 1957. The overlap with s 2 is considered further in the next part of this chapter. Thirdly, it provided an opportunity for an evaluative free-for-all of the defendant’s characteristics, including not only those which would have affected the gravity of the provocation, but those which affected the accused’s ability to exercise self-control. In short, it left the jury with no benchmark against which to assess the defendant’s conduct in killing when out of control. Fourthly, by relaxing the objective criterion it more readily allowed for the mental characteristics resulting from physical and emotional abuse to be considered by the jury. This was a positive consequence for victims of domestic abuse who kill. However, the relaxation applied equally to the mental characteristics often found in domestic abusers who kill — obsessiveness and jealousy. Finally, it created widespread confusion in the trial courts, trial judges were faced with the prospect of directing juries with practically no guidance as to which characteristics, if any, ought not to be drawn to the attention of the jury. The Court of Appeal was forced to adopt an approach of ‘anything goes’.

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95 *Rowland* [2003] EWCA Crim 3636, para 41.
97 Professor Ashworth’s commentary on *Weller* [2003] Crim LR 724 at 725–727, and see *Rowland* [2003] EWCA Crim 3636.
98 See Part 2 of LC 173, especially paras 21–22; LC 304, para 5.41.
99 *Weller* [2004] 1 Cr App R 1, it was held that the trial judge’s failure to direct the jury to consider W’s ‘unduly possessive and jealous nature’ did not render the conviction for murder unsafe provided the characteristics were not specifically removed from the jury’s consideration; see also *R (Farnell) v CCRC* [2003] EWHC 835 (Admin).
**Holley**

In *A-G for Jersey v Holley*, a specially convened nine-member Board of the Privy Council concluded, by a majority of 6 to 3, that *Smith* was wrongly decided. H and his victim were alcoholics with a history of violence against each other with H having been imprisoned for such conduct on one occasion. On the day of the killing, H was chopping wood with an axe and drinking heavily. When V returned home, also drunk, H claimed that V had just had sex with another man. When V said ‘You haven’t got the guts’, H struck V seven or eight times with the axe killing her. The judge directed the jury to ignore H’s alcoholism as a factor in considering whether a ‘reasonable’ or ordinary person would have lost his self-control. The Court of Appeal of Jersey held that the judge had misdirected the jury and substituted a verdict of manslaughter (provocation), following the majority view in *Smith*(Morgan). The Privy Council allowed the appeal.

It was held that the House in *Smith* had sought to apply a more flexible standard, but that was not an accurate statement of English law, and it was not open to judges to depart from the common law as declared in s 3 of the 1957 Act. Whether the provocative act or words and the defendant’s response met the ‘ordinary person’ standard was the question the jury must consider, not the looser question of whether, having regard to all the circumstances, the jury considered the loss of self-control was sufficiently excusable.

The majority in the Privy Council accepted that within the second limb of the provocation defence, the ‘objective limb’, a distinction should be drawn between characteristics of the accused that were to be taken into account because they affected the gravity of the provocation and those relating to the ability to exercise self-control which were not to be taken into account. The minority disagreed. Lords Bingham and Hoffmann suggest that it is not rationally possible to consider the two in isolation. The majority regarded any difficulties of ‘mental gymnastics’ required of jurors in having regard to a defendant’s ‘characteristics’ for one purpose of the law of provocation but not another as having been exaggerated. It is unclear, because the jury cannot be asked, to what extent this overstates the problem the jury faces.

Lords Bingham and Hoffmann, dissenting, undertook a detailed review of the history of the offence, concluding that it was ‘a humane concession to human infirmity and imperfection’. The appropriate question in their view – whether the provocation was enough to make a reasonable man do as the defendant did – was to be left to be determined by a jury, and in determining that question the jury were to take into account everything both done and said according to the effect which, in the jury’s opinion, it would have on a reasonable man. The minority regarded the cases as providing clear authority that the question was not whether the defendant showed such self-control as an abstract hypothetical person would have done, but such self-control as would reasonably be expected of a person having such of his attributes as the jury thought relevant in the factual situation in which the defendant actually found himself at the relevant time. All members agreed that the present state of the law was unsatisfactory. All endorsed the need for an urgent review of all aspects of the law of murder.

Technically, the decisions of the Privy Council are not binding on the English courts. Nevertheless, it was immediately obvious that the Court of Appeal would follow *Holley.*

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101 See the influential article by Ashworth [1976] CLJ 292.
102 [26]. Lord Carswell in dissent challenged that view, at [73].
103 See LC 290, Cm 6301, para 2.10.
104 See *Mohammed (Faqir)* [2005] EWCA Crim 1880 (D, a devout Muslim, killed his daughter on returning from the mosque to find his daughter and a young man in her bedroom) and *Van Dongen* [2005] EWCA Crim 1728, [2005] Crim LR 971 (D claimed V had attacked him with a road sign, but the judge had, despite evidence of that, failed to give a provocation direction).
and in *James and Karimi*, the Court of Appeal took the radical and controversial step of endorsing the Privy Council decision in *Holley* over that of the House of Lords (in *Smith*).

The number of Law Lords who had endorsed the approach in *Holley* led the court to conclude that an appeal to the House of Lords to resolve the matter was a waste of time.

**Intoxication as a characteristic**

The majority in the Privy Council in *Holley* held that an intoxicated state was not a matter to be taken into account by the jury when considering whether the defendant exercised ordinary self-control. Equally, evidence that the defendant was suffering from chronic alcoholism was not a matter to be taken into account by the jury when considering whether, having regard to the actual provocation (unless it relates to D’s alcoholism) and their view of its gravity, a person having ordinary powers of self-control would have done what the defendant did.

Suppose that D, an alcoholic, is taunted by V with his addiction and instantly responds with a fatal blow. However drunk D may have been at the time, the jury must be instructed to consider the effect of the taunts on an alcoholic of (if relevant) D’s age, sex, etc who, at the time, is sober. Similarly, with a drug addict, ‘high’ on drugs; the question is whether a drug addict, for the time being free of the effect of the drugs, would have reacted as D did. Suppose that V taunts D, a prominent member of a temperance society, with being ‘pissed as a newt’ and threatens to report him to his brethren. This is obviously provocative – and the more so if D is indeed in the condition described. If to be taunted with being an alcoholic is relevant, so, surely, is this. It seems that the jury must be told to consider the effect of the provocation on a tipsy temperance society member, displaying the self-control to be expected of a sober person who is otherwise in D’s position.

In *McCarthy*, the New Zealand Court of Appeal treated the effect of alcohol, ‘being transitory and not a characteristic’, as a unique exception to the characteristics to be considered. In *Morhall*, Lord Goff doubted whether the transitory nature of intoxication is the explanation for any special treatment which it receives, pointing out that a physical condition like eczema may be transitory but should be taken into account if the subject of taunts. Lord Goff suggests that intoxication is exceptional because it is the policy of the law that drunkenness should not be used to excuse crime. While this is certainly a factor in the decisions, there may also be a distinction in principle. Alcohol tends to reduce inhibitions and restraints and to make a person more volatile when drunk than when sober, whatever the nature of the provocation. Lord Goff observes that a physical condition such as eczema can surely be taken into consideration if it is the subject of taunts. But let it be supposed that the irritation caused by eczema results in general irascibility in the sufferer; and that on being taunted with the dismal performance of the football club of which he is a fanatical supporter he kills his tormentor. Under *Morhall* principles, his affliction could not be taken into account in applying the objective test. The taunts are no more provocative to the eczema sufferer than to the equally ardent fan who has a perfect skin.

**The relationship between the provocation and the mode of resentment**

In *Mancini v DPP*, D was charged with the murder of V who had been stabbed to death by an instrument with a two-edged blade, a sharp point and sharp sides, at least five inches long.

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106 On the precedent issue, see J Elvin, 'The Doctrine of Precedent and the Provocation Defence' (2006) 69 MLR 819. Numerous convictions from trials pre-*Smith* were, in light of the more generous approach that case applied, referred to the Court of Appeal by the CCRC. By the time they got to be heard, *Holley* had been decided and the law was as when the appellant’s were convicted: Moses [2006] EWCA Crim 1721; Hill [2008] EWCA Crim 76.

107 See also the post-*Smith* case law supporting this position: Keaveney [2004] EWCA Crim 1091 and Rowland, above.


109 [1942] AC 1, [1941] 3 All ER 272, HL.
D's story was that V was attacking him with an open penknife and MacNaughten J told the jury that, if they believed this story, they should return a verdict of not guilty (on the ground of self-defence). He did not direct them that, if they rejected the defence of self-defence, they still might find D guilty of manslaughter on the ground of provocation. D appealed on the ground that he ought to have done so. His conviction was affirmed. By their verdict, the jury had rejected his story of the attack with the penknife; and the case had, therefore, to be treated as one in which, at the most, V made an unarmed attack on D. If there had been evidence of provocation, it would have been the judge's duty to direct the jury on it, even though the defence had not been argued; but here there was no evidence. An attack by hand or fist 'would not constitute provocation of a kind which could extenuate the sudden introduction and use of a lethal weapon like this dagger, and there was, therefore, ... no adequate material to raise the issue of provocation'.

The House stated the law in general terms as follows:

it is of particular importance ... to take into account the instrument with which the homicide was effected, for to retort, in the heat of passion induced by provocation, by a simple blow, is a very different thing from making use of a deadly instrument like a concealed dagger. In short, the mode of resentment must bear a reasonable relationship to the provocation if the offence is to be reduced to manslaughter.

Clearly, such a case could not be decided in this way today. If there was evidence that D was provoked to lose his self-control, the judge could not decline to leave the defence to the jury because the response did not bear a reasonable relationship to the provocation. It was in this respect, no doubt, that Lord Diplock in *Camplin* said that *Mancini* is no longer to be treated as an authority on the law of provocation. It would now be wrong to tell the jury, 'fists might be answered with fists but not with a deadly weapon', because if fists were answered with a deadly weapon, such a direction would take out of the jury's hands a question which is exclusively for them and on which their opinion is decisive. So it has been said that the 'reasonable relationship rule' is not a rule of law and that it is wrong for the judge, who has directed them on the subjective and objective conditions, to go on to tell them that there is a third condition, viz that the retaliation must be proportionate to the provocation. Yet in a sense, the reasonable relationship rule still is a rule of law because the defence is made out only if the provocation was enough to make the reasonable person 'do as he did'. Thus, it would be right for the judge to direct the jury: 'If you are satisfied that a reasonable person, though he might have answered with fists, would not have answered with the deadly weapon used by D, then you must reject the defence of provocation.' This is no more than the application of the words of the section to the facts. The difference, since the Act, is that it is for the jury, not the judge, to decide whether the answer with a deadly weapon was the act of a reasonable person.

It will be noted that, under s 3 of the Homicide Act, the subjective and objective tests differ. The questions are: (i) did D lose his self-control? and (ii) was the provocation enough to make the ordinary person in D's shoes do as D did? It can hardly have been intended, however, that the jury should consider whether a reasonable person in full control of himself would have...
done what D did for the logical effect of that would be to eliminate the defence from the law. The objective test must be construed as it was in Phillips v R.\textsuperscript{116}

the question . . . is not merely whether in their opinion the provocation would have made a reasonable man lose his self-control but also whether, having lost his self-control, he would have retaliated in the same way as the person charged in fact did.

This assumed that a person who has lost his self-control acts with more or less ferocity according to the degree of provocation which caused the loss of self-control. The Privy Council has rejected the argument:

that loss of self-control is not a matter of degree but is absolute; there is no intermediate stage between icy detachment and going berserk. This premise, unless the argument is purely semantic, must be based upon human experience and is, in their Lordships’ view, false. The average man reacts to provocation according to its degree with angry words, with a blow of the hand, possibly, if the provocation is gross and there is a dangerous weapon to hand, with that weapon.\textsuperscript{117}

Whatever scientific opinion may be,\textsuperscript{118} this certainly seems to be the view of human conduct on which the section is based; and the objective condition requires affirmative answers to two questions: (i) would the ordinary person in D’s position have lost his self-control? and (ii) would he then have retaliated as D did?

**Provocation arising from a mistake of fact**

The authorities suggest that, where D is provoked partly as the result of a mistake of fact he is entitled to be treated as if the facts were as he mistakenly supposed them to be. This line of reasoning accords with the approach to other defences. The view seems to be further reinforced by the decisions in B (A Minor) and K,\textsuperscript{119} confirming the subjective nature of mistake.

In Brown,\textsuperscript{120} D, a soldier, wrongly, but apparently reasonably, supposed that V was a member of a gang who were attacking him and his comrade. He struck V with a sword and killed him. The judges were clearly of the opinion that this was only manslaughter. In the other cases the mistake arose from drunkenness. In Letenock,\textsuperscript{121} the Court of Criminal Appeal substituted a verdict of manslaughter in the case of a solider who had stabbed a corporal, where the ‘only element of doubt in the case is whether or not there was anything which might have caused the applicant, in his drunken condition, to believe that he was going to be struck’.\textsuperscript{122} This decision is unaffected by McCarthy,\textsuperscript{123} which was not concerned with a mistake of fact but with the effect of the alcohol on D’s self-restraint.

It is established that a drunken mistake may negative the \textit{mens rea} of murder\textsuperscript{124} and it is consistent that such a mistake should be relevant in determining whether the killing should be reduced to manslaughter on the ground of provocation. A drunken mistake is almost

\textsuperscript{116} [1969] 2 AC 130 at 137, PC.

\textsuperscript{117} ibid, at 137. See S White, ‘A Note on Provocation’ [1970] Crim LR 446; but note Van Dongen [2005] EWCA Crim 1728 where having concluded that there was a misdirection, the CA nevertheless upheld the conviction on the basis that even if there had been provocation and a loss of control, ‘no reasonable man could have been provoked by the assumed acts to do what [D] surely did’. As Professor Ashworth notes in his commentary, this would seem to introduce a ‘reasonable relationship rule’ between the degree of provocation and the force used in response rejected in Phillips [2005] Crim LR 971.

\textsuperscript{118} P Brett, ‘The Physiology of Provocation’ [1970] Crim LR 634.

\textsuperscript{119} See above, p 158.

\textsuperscript{120} (1776) 1 Leach 148.

\textsuperscript{121} (1917) 12 Cr App R 221, CCA. cf p 502, above.

\textsuperscript{122} ibid, at 224.

\textsuperscript{123} [1954] 2 QB 105, [1954] 2 All ER 262.

\textsuperscript{124} Above, p 480.
inevitably an unreasonable one; and it seems clear that it is immaterial whether the mistake is reasonable or not for this purpose. The jury must look at the reactions of the sober reasonable person in the circumstances which the drunken one supposed to exist.

Self-induced provocation

The jury must be told to take into account everything both done and said according to the effect which, in their opinion, it would have on a reasonable person, even where that which was done and said was a predictable result of D’s own conduct. It was so held in Johnson, not following dicta of the Privy Council in Edwards v R. D’s unpleasant behaviour in a nightclub resulted in an attack on him in response to which he killed. He was not precluded from relying on provocation even if the attack was a predictable result of his behaviour. This might be regarded as a generous approach to the defendant.

It has been suggested that such a decision might open a defence for one who deliberately induces provocation – D provokes V to do a provocative act so that D may kill him and rely on the defence of provocation. Such a situation seems far-fetched. If it did occur, it should, it is submitted, be decided on the same lines as A-G for Northern Ireland v Gallagher – D should be held liable for the acts which, when unprovoked, he intended to do under provocation. The judge should find there is no evidence that D was provoked.

Provocation by a lawful act

It has been argued that, ‘the law would be self-contradictory if a lawful act could amount to provocation’, but it is submitted that this proposition will not bear examination. To taunt a man with his impotence or his wife’s adultery may be cruel and immoral, but it is not unlawful and it may, surely, amount to provocation, and, we now know, may the crying of a baby. Where V’s act is one which he is not merely at liberty to do but which is positively praiseworthy, it is scarcely conceivable that a jury would find that it would provoke a reasonable man to lose his self-control; but under the terms of s 3 it must be a question for the jury in each case. It is impossible, as a matter of law, to divide acts which V is at liberty to do into classes of ‘good’ and ‘bad’.

15.1.1.4 Reform

There is considerable debate as to the scope of the present law. It remains unclear in theoretical terms whether the defence is properly regarded as one of partial justification (D has gone beyond what would be an acceptable response to the provoking conduct, or that the deceased deserved it) or of partial excuse (D’s loss of self-control is uncharacteristic, the bad character exhibited exceeds that to be expected in the circumstances). In practical terms, when applying the defence courts have faced increasing difficulty with each of its elements, exacerbated by attempts to do justice in hard cases made harder still by the mandatory sentence for murder.

126 [1973] AC 648, [1973] 1 All ER 152, PC.
128 Above, p 295.
129 S Howard, Australian Criminal Law (2nd edn, 1970) at 93.
130 See Browne [1973] N1 96 at 108, per Lowry LCJ: ‘I should prefer to say that provocation is something unwarranted which is likely to make a reasonable man angry or indignant’, emphasis in original.
As for reform, key issues of principle have been debated at length in recent Law Commission papers, including whether it is even necessary or desirable to retain the defence if the mandatory sentence were to be abolished. Is the purpose of the defence to unshackle the judge from imposing the mandatory sentence? Is the purpose to label distinctly those killers whose conduct might be regarded as morally different, despite their malice aforethought, owing to some mitigating feature of the killing? The unique stigmas and heightened emotions aroused by the stark fact of death generate strong views on these issues. Many other jurisdictions have faced similar difficulties where defence and reform proposals have been widely canvassed.

Battered woman syndrome

One of the most compelling influences for reform has been the realization that the defence operates in a discriminatory fashion, which is hardly surprising given its historical origins. Women who kill abusive partners are disadvantaged if they do not act in a state which can legally be described as one of ‘sudden and temporary loss of control’. In addition, until relatively recently, the cumulative effect of years of abuse was not considered. Further, the mental characteristics arising from an abusive relationship (including what some recognize as battered woman syndrome) can only be taken into account if relevant to the gravity of the provocation, but not D’s ability to exercise self-control. The abused woman is unlikely as a matter of fact, to kill in self-defence (as that term is understood in law). Owing to relative limited physical strength, it is uncommon for women to respond lethally when facing an immediate attack by an abusive male partner. Women charged with murder are forced to rely on diminished responsibility, which aside from requiring expert evidence and imposing a burden of proof on the accused, stigmatizes them. Not surprisingly, this has led many to call for the abolition of the defence of provocation and wholesale review of the partial defences to murder.

Adopting a more subjective test

There have been recommendations for the defence to be put on an excusatory basis, focused on the more subjective question of D’s loss of control. The CLRC recommended that the question for the jury should be whether, on the facts as they appeared to the defendant, the provocation can reasonably be regarded as a sufficient ground for the loss of self-control leading the defendant to react against the victim with murderous intent, and that, in answering this question, the defendant should be judged with due regard to all the circumstances, including

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133 See LC 290, Ch 2 and para 3.35 et seq and the responses discussed to the Consultation Paper No 173. Horder considers the arguments for abolition in *Provocation and Responsibility*, Ch 9.
141 Fourteenth Report, para 81.
any disability, physical or mental, from which he suffered.\textsuperscript{142} This proposal would remove the objective test and, with it, much unnecessary technicality from the law. It is close to the opinion of the majority in the House of Lords in \textit{Smith (Morgan)} with the vital difference that it assumes the abolition of s 3 of the Homicide Act and all the baggage which goes with it.

Extreme emotional disturbance defences

A second alternative, considered recently by the Law Commission and one which reflected the judicial shift in \textit{Smith} towards a broad excuseatory defence, would be to adopt a defence similar to that in the US Model Penal Code, s 210(3)(1)(b).\textsuperscript{143} This defence merges diminished responsibility and provocation and also accommodates other defendants who kill in circumstances of extreme emotional pressure. It provides that a ‘homicide which would otherwise be murder [is manslaughter when it] is committed under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse.\textsuperscript{144} The reasonableness of such explanation or excuse shall be determined from the viewpoint of a person in the actor’s situation under the circumstances as he believes them to be.\textsuperscript{144} The defence has not been universally welcomed in the USA\textsuperscript{145} and has been cogently criticized by academics.\textsuperscript{146} It is inherently vague.

The Law Commission’s latest proposals

The Law Commission’s most recent proposals were drafted against a reform agenda dealing not just with provocation but with partial defences to murder more generally,\textsuperscript{147} and subsequently these were amended in the review of the law of homicide generally. The final proposals represent a radical shift to a defence which also incorporates a partial defence to murder for excessive self-defence.\textsuperscript{148} The trial judge would regain a power to remove the defence from the jury if no reasonable jury properly directed could conclude that the conduct was provocative: the crying of a baby would not trigger the defence, nor would the innocent conduct of a black man which angers a racist.\textsuperscript{149}

Unlawful homicide that would otherwise be first-degree murder should instead be second-degree murder if:

(a) the defendant acted in response to:

(i) gross provocation (meaning words or conduct or a combination of words and conduct) which caused the defendant to have a justifiable sense of being seriously wronged; or

(ii) fear of serious violence towards the defendant or another; or

(iii) a combination of both (i) and (ii); and

(b) a person of the defendant’s age and of ordinary temperament, ie, ordinary tolerance and self-restraint, in the circumstances of the defendant might have reacted in the same or in a similar way.

\textsuperscript{142} ibid, para 83.
\textsuperscript{143} See also Law Com 304, para 5.22.
\textsuperscript{144} For further consideration, see Mackay and Mitchell [2003] Crim LR 745; [2004] Crim LR 219.
\textsuperscript{145} See the report of Professor Kadish published as an Appendix to LC 290; and J Chalmers, ‘Merging Provocation and Diminished Responsibility: Some Reasons for Scepticism’ [2004] Crim LR 198.
\textsuperscript{146} See Gardner and Macklem [2004] Crim LR 213.
\textsuperscript{147} See LCCP 173 (2003).
\textsuperscript{148} For criticism, see RD Mackay and B Mitchell, ‘But is this Provocation? Some Thoughts on Law Commission Report No 290’ [2005] Crim LR 44.
\textsuperscript{149} See LC 304, para 5.11.
In deciding whether a person of the defendant’s age and of ordinary temperament, ie ordinary tolerance and self-restraint, in the circumstances of the defendant, might have reacted in the same or in a similar way, the court should take into account the defendant’s age and all the circumstances of the defendant other than matters whose only relevance to the defendant’s conduct is that they bear simply on his or her general capacity for self-control.

The partial defence should not apply where:

(a) the provocation was incited by the defendant for the purpose of providing an excuse to use violence; or

(b) the defendant acted in considered desire for revenge.

A person should not be treated as having acted in considered desire for revenge if he or she acted in fear of serious violence, merely because he or she was also angry towards the deceased for the conduct which engendered that fear.

A judge should not be required to leave the defence to the jury unless there is evidence on which a reasonable jury, properly directed, could conclude that it might apply.

The partial defence currently reduces the conviction to one of manslaughter, but significantly the Law Commission proposal would reduce it to second degree murder. This will be important in terms of labelling and also possibly in respect of the likely sentencing bracket into which provocation cases will fall. It would be a marked improvement.

15.1.2 Diminished responsibility

The Homicide Act 1957, s 2, introduced a new defence to murder: 'diminished responsibility'. If successful, the defence does not lead to an acquittal, but allows D to be found guilty only of manslaughter.151 By s 2(2), the Act expressly puts the burden of proof on the defendant and it has been held that, as in the case of insanity, the standard of proof required is not beyond reasonable doubt but on a balance of probabilities.152 It is not a general defence, but applies only to murder. It is not available as a defence to attempted murder,153 nor can it be raised on a finding of unfitness to plead.154

Professor Mackay conducted empirical research for the Law Commission155 in which of the 157 cases studied, the prosecution accepted a diminished responsibility plea in 77.1 per cent


155 LC 290.
of cases.\textsuperscript{156} Statistics reveal that the total number of successful diminished responsibility pleas is now around 20 per year.\textsuperscript{157}

\subsection{15.1.2.1 Procedural relationship with insanity}
Most defendants would prefer a conviction for manslaughter on the ground of diminished responsibility to an acquittal by reason of insanity, so reliance on the M’Naghten Rules has been greatly reduced since 1957 (see Chapter 11 above). Where D, being charged with murder, raises the defence of diminished responsibility and the Crown have evidence that he is insane within the M’Naghten Rules, they may adduce or elicit evidence tending to show that this is so. This is now settled by the Criminal Procedure (Insanity and Unfitness To Plead) Act 1964, s 6 – resolving a conflict in the cases. That Act also provides for the converse situation: where D sets up insanity, the prosecution may contend that he was suffering only from diminished responsibility.\textsuperscript{158} The roles of the prosecution and defence may be strangely reversed, according to which of them is contending that D is insane. It seems clear in principle that the Crown must establish whichever contention it puts forward beyond reasonable doubt.\textsuperscript{159} It must follow that D rebuts the Crown’s case if he can raise a doubt. Where D relies on some other defence, such as provocation, and evidence of diminished responsibility emerges, it seems that the most the judge should do is to draw the attention of D’s counsel to it.\textsuperscript{160} Diminished responsibility is an ‘optional defence’. The defences of provocation and diminished responsibility overlap in some respects,\textsuperscript{161} and this can lead to a complex decision regarding trial tactics since the defences carry differing burdens. Similarly, a jury will have to be directed carefully on the respective burdens.

The 1957 Act does not deal with the situation where D’s abnormality of mind is put in issue otherwise than by pleading insanity or diminished responsibility – for example, by raising the defence of automatism. However, the CLRC\textsuperscript{162} did not think that the limited provision in the Act should throw any doubt on the right of the prosecution to call evidence in cases such as \textit{Kemp}.\textsuperscript{163} The prosecution may not, however, lead evidence of D’s insanity where the defence have not put the abnormality of D’s mind in issue,\textsuperscript{164} even though this course is desired by the defence. The position would seem to be that, where the defence rely on the abnormality of mind of any kind, it is open to the prosecution to allege, and to call evidence to prove,\textsuperscript{165} that the abnormality amounts to insanity or diminished responsibility.

\subsection{15.1.2.2 The nature of the defence}
The Homicide Act 1957, s 2, enacts:

\begin{enumerate}
\item 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
\end{enumerate}

\textsuperscript{156} Para 5.34. Available from www.lawcom.gov.uk/docs/lc290.pdf.
\textsuperscript{157} See LC 290; LC 304, para 5.84.
\textsuperscript{158} It had been so held at common law by Elwes J in \textit{Nott} (1958) 43 Cr App R 8.
\textsuperscript{159} \textit{Grant} [1960] Crim LR 424, per Paull J.
\textsuperscript{162} Cmdnd 2149, para 41.
\textsuperscript{163} Above, p 290.
\textsuperscript{164} \textit{Dixon} [1961] 3 All ER 460n, [1961] 1 WLR 337, per Jones J.
\textsuperscript{165} The prosecution should supply the defence with a copy of any statement or report which a prison medical officer may have made on that crime and should make him available as a defence witness: \textit{Casey} (1947) 32 Cr App R 91, CCA. See A Samuels, ‘Can the Prosecution Alleged that the Accused is Insane?’ [1960] Crim LR 453, [1961] Crim LR 308.
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.

(2) …

(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.

In early cases where the defence was raised, judges had simply to read the section to the jury in summing up and invited them to apply the tests stated without further explanation. However, it is now clear that it is the duty of the judge to direct the jury as to the meaning to be attached to s 2.

Abnormality of mind

In Byrne, the judge directed the jury as to the meaning of s 2, telling them that difficulty or even inability of D to exercise will-power to control his physical acts could not amount to such abnormality of mind as substantially impaired his mental responsibilities. The Court of Criminal Appeal held that this was a wrong direction and that Byrne’s conviction of murder must be quashed. Subsequently, in Terry, the court expressly stated that:

in the light of [the interpretation that this court put on the section in Byrne] it seems to this court that it would no longer be proper merely to put the section before the jury but that a proper explanation of the terms of the section as interpreted in Byrne ought to be put before the jury.

The facts of Byrne were that D strangled a young woman in a YWCA hostel and mutilated her corpse. Evidence was tendered that from an early age D had been subject to perverted violent desires; that the impulse or urge of those desires was stronger than the normal impulse or urge of sex, that D found it very difficult or, perhaps, impossible in some cases to resist putting the desire into practice and that the act of killing the girl was done under such an impulse or urge. The court held that it was wrong to say that these facts did not constitute evidence which would bring a case within the section. Lord Parker CJ said:

‘Abnormality of mind’, which has to be contrasted with the time-honoured expression in the M’Naghten Rules, ‘defect of reason’, means a state of mind so different from that of ordinary human beings that the reasonable man would term it abnormal. It appears to us to be wide enough to cover the mind’s activities in all its aspects, not only the perception of physical acts and matters and the ability to form a rational judgment whether an act is right or wrong, but also the ability to exercise will-power to control physical acts in accordance with that rational judgement.

Thus, the defence of irresistible impulse, which is not within the defence of insanity, is included into the law (but only of murder) by way of diminished responsibility. The difficulties of proof, which deterred the judges from allowing the defence under the M’Naghten Rules, remain:

[T]he step between ‘he did not resist his impulse’ and ‘he could not resist his impulse’ is, as the evidence in this case shows, one which is incapable of scientific proof. A fortiori, there is no scientific measurement of the degree of difficulty which an abnormal person finds in controlling his impulses.

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170 [1961] 2 All ER at 574.
The only way to deal with the problem is for the jury to approach it ‘in a broad common-sense way’. They are entitled to take into account not only the medical evidence but also the acts or statements of D and his demeanour and other relevant material. Even when they are satisfied that D was suffering from abnormality of mind there remains the question whether the abnormality was such as substantially to impair his mental responsibility – a moral question of degree and essentially one for the jury. The jury may address these questions in any order. The defence raises interesting questions about the respective roles of the expert and the jury in evaluating the blameworthiness of killers.

It seems that the courts are complicit in the conspiracy with medical and legal practitioners to avoid defining any of the key terms with precision. This allows maximum flexibility in the defence so that it provides the broadest opportunity to avoid the mandatory sentence in deserving cases. The Law Commission has recently recommended modernizing the definition so that it is not bound by the requirement that the abnormality arises from a specified cause. Removing that restriction will free the defence to develop in line with medical diagnostic practice.

**Substantial impairment of mental responsibility**

It is not necessary that the impulse on which D acted should be found by the jury to be irresistible; it is sufficient that the difficulty which D experienced in controlling it (or, rather, failing to control it) was substantially greater than would be experienced in like circumstances by an ordinary person, not suffering from mental abnormality. The impairment need not be total, but it must be more than trivial or minimal. Where a doctor testified that an epileptic defendant could be ‘vulnerable to an impulsive tendency and therefore occasional impulsive acts’, it was held that there was no evidence of diminished responsibility because (inter alia) the witness had not said that the impulse would substantially impair responsibility. The test appears to be one of moral responsibility. A person whose impulse is irresistible bears no moral responsibility for his act, for he has no choice; a person whose impulse is much more difficult to resist than that of an ordinary person bears a diminished degree of moral responsibility for his act. It is focus on morality that provides the opportunity to apply the defence in cases of mercy killing, etc. The Law Commission recently recommended replacing this aspect of the defence with an explicit test focused on whether D’s substantially impaired capacity to understand, etc provided ‘an explanation for’ the defendant’s act in carrying out or taking part in the killing. The Commission equivocates as to whether the impairment must cause the killing. The proposal will however provide a clearer test of what impact on D’s capacity the abnormality must have if it is to found a diminished responsibility plea. The abnormality must impair capacity to understand or form a rational judgement.

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174 See LCCP 177, para 6.24 discussing whether it is important that the general public knows that the jury had involvement in determining the killer’s fate.
177 Lloyd [1967] 1 QB 175, [1966] 1 All ER 107n.
178 Campbell (1966) 84 Cr App R 255 at 259.
179 LC 304, para 5.112. cf the earlier proposal in LC 290, para 5.95.
180 LC 304, para 5.121.
Test not borderline insanity

The court has from time to time approved directions following those given in Scottish cases and which, in effect, tell the jury what must be proved is a mental state ‘bordering on, though not amounting to insanity’ or ‘not quite mad but a border-line case’. Care must be taken in giving such a direction to avoid any suggestion that ‘insanity’ in this context bears the very narrow meaning of that form of insanity which is a defence under the M’Naghten Rules. If the word is used at all it must be used in ‘its broad popular sense’. A depressive illness may found diminished responsibility, although it is by no means on the borderline of insanity. To tell the jury in such a case that D must be on that borderline is a material misdirection. In such a case, reference to insanity is best avoided altogether.

Under English law, persons who are actually insane in the ‘broad popular sense’ may well be outside the scope of the M’Naghten Rules and have to rely on diminished responsibility.

Role of experts

As with insanity, the decision is to be made by the jury, not the medical experts. They may reject unanimous medical evidence that D is suffering from diminished responsibility if there is anything in the circumstances of the case to justify them in doing so. There is no statutory requirement of medical evidence, such as is now a condition of an insanity verdict, but it has been held that the jury may not find that D is suffering from diminished responsibility unless there is medical evidence of an abnormality arising from one of the causes specified in the parentheses in s 2(1) of the Act. An abnormality arising from some other cause will not suffice. So the words ‘disease’ and ‘injury’ are important. Battered women’s syndrome, having been included in 1992 in the standard British classification of mental diseases, is – and presumably always was, though not previously recognized as such – a relevant condition. Alcoholism is enough if it injures the brain, causing gross impairment of judgement and emotional responses, or causes the drinking to be involuntary; but the transient effect of alcohol or other drugs is not an ‘injury’ under the section. Alcoholism only rarely falls within the defence since it must be at such a level that D’s brain has been injured by the repeated drinking such that the drinking was involuntary because D lost the ability to resist the impulse to drink.

Medical evidence is ‘a practical necessity if the defence is to begin to run at all’. Where no medical evidence is called, there will always be the suspicion that medical opinion has been sought and found unfavourable. It was recognized by the Law Commission that the psychiatric experts were unhappy with the mismatch between law and medicine regarding these central elements of the defence on which they were called to testify.

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181 HM Advocate v Braithwaite 1945 JC 55, per Lord Cooper.
182 Spriggs [1958] 1 QB 270 at 276, [1958] 1 All ER 300 at 304, per Lord Goddard CJ.
185 Above, p 280.
191 Dix, above, n 187, at 311.
192 LC 290, para 5.28. LCCP 177, para 6.99; LC 304, para 5.90. See also A Norrie, Crime, Reason and History (2nd edn, 2000) Ch 9, for a powerful critique of the conflict between the two discourses.
Disease or injury
It seems that ‘disease or injury’ probably refers to organic or physical injury or disease of the body, including the brain, and ‘any inherent cause’ covers functional mental illness. The elements have never been satisfactorily defined. The Law Commission recently proposed substituting a test of ‘abnormality of mental function arising from a recognized medical condition, developmental immaturity (for under 18-year-olds) or both’.194

Intoxication and diminished responsibility
In cases where D’s intoxication was one cause of the substantial impairment it had been held195 that D could successfully rely on diminished responsibility only if he could satisfy the jury that the killing would still have occurred even if he had not taken the drink or drugs. This approach was rejected by the House of Lords in Dietschmann.196 D killed the victim while he (D) was heavily intoxicated. He was also suffering from a mental abnormality which all the medical witnesses described as an adjustment disorder arising from a ‘depressed grief reaction’ to the death of his aunt with whom he had a close physical and emotional relationship. Lord Hutton stressed that this case did not involve alcohol dependence syndrome. As such, his lordship was confident that:

the meaning to be given to the subsection would appear on first consideration to be reasonably clear….[I]f the defendant satisfies the jury that, notwithstanding the alcohol he had consumed and its effect on him, his abnormality of mind substantially impaired his mental responsibility for his acts in doing the killing, the jury should find him… guilty of manslaughter. I take this view because I think that in referring to substantial impairment of mental responsibility, the subsection does not require the abnormality of mind to be the sole cause of the defendant’s acts in doing the killing. In my opinion, even if the defendant would not have killed if he had not taken drink, the causative effect of the drink does not necessarily prevent an abnormality of mind suffered by the defendant from substantially impairing his mental responsibility for his fatal acts.

Lord Hutton addressed the policy arguments against this interpretation, and concluded that a brain-damaged person who is intoxicated and who kills is not in the same position as a person who is intoxicated, but not brain-damaged, and who kills. The test is now appropriately focused on the overriding question whether the defendant would have killed and had a substantial impairment of his mental responsibility at that time. The test has been readily applied,197 but cannot be easy for a jury. Dietschmann was not new law but simply explained what the law had been since 1957.198

If an alcoholic’s craving for drink is proved to be irresistible, the resulting abnormality at the time of the killing may substantiate the defence.199

15.1.2.3 Reform
Numerous proposals have been put forward over the years. The Butler Report recommended that:

Where a person kills or is party to the killing of another, he shall not be convicted of murder if there is medical or other evidence that he was suffering from a form of mental disorder as defined in [section

194 LC 304, para 5.112.
of the Mental Health Act 1983, that is, ‘mental illness, arrested or incomplete development of mind, psychopathic disorder and any other disorder or disability of mind’] and if, in the opinion of the jury, the mental disorder was such as to be an extenuating circumstance which ought to reduce the offence to manslaughter.

More recently, the Law Commission in its Report No 290 on Partial Defences to Murder, concluded that there was ‘overwhelming support from those consultees who addressed the issue for the retention of a partial defence of diminished responsibility for as long as there is the mandatory life sentence for murder’. The Commission identified the principal rationale for retention of the diminished defence as being ‘fair and just labelling’. Other justifications for a defence of diminished responsibility included the ‘out-dated nature of the insanity defence’ and its unsatisfactory scope and operation; the stigmatization of the label ‘insanity’; the need to prevent jurors being faced with only the option of murder or acquittal lest they perversely acquit; allowing the central issue of culpability to be determined by a jury and not by the judge as part of the sentencing process; the need to ensure public confidence in sentencing which is more likely on a diminished verdict than on murder; the need for a jury, to evaluate the expert evidence; the need to retain the defence for abused women ‘driven to kill’; and the opportunity for the defence to provide a merciful but just disposition of mercy killing cases.

If the mandatory life sentence were to be abolished, there would be a strong argument for abolition of the defence. The key arguments identified for abolition in such circumstances were that ‘logically, as diminished responsibility reduces the defendant’s responsibility for the killing, it ought to be viewed as a mitigating factor rather than a partial defence in a case where, by definition, the defendant’s level of culpability is established by reference to the traditional concepts of conduct and mens rea’; the issues addressed by the defence are matters of mitigation, which go to sentence; abolition is the only appropriate response to the ‘insuperable definitional problems’. The present law was regarded by many as ‘chaotic’ and a rational sentencing exercise would be a better response for meeting the needs of the mentally ill defendants; finally, it was noted that the defence is “grossly abused” and whether a defendant finds a psychiatrist who will be prepared to testify that, for example, depression was responsible for his behaviour is “a lottery”.

The Law Commission returned to the topic in its Murder project. The final proposal developed and refined that from the Partial Defences Project. It was recommended that the defence be retained, with the burden of proof remaining on the defendant and that it provide a partial defence to reduce a charge of first degree murder to one of second degree murder. That in itself gave rise to some criticism since the person who has proved that he has the abnormality of mind which explains his actions is still labelled as a murderer.

The Law Commission made valuable improvements to the earlier proposal addressing in particular the potential for a partial defence of developmental immaturity for young killers (those under 18). In general the proposed defence should be welcomed for its attempts to ensure a better coherence with medical diagnoses. The proposal is that:

(a) a person who would otherwise be guilty of first degree murder is guilty of second degree murder if, at the time he or she played his or her part in the killing, his or her capacity to:

(i) understand the nature of his or her conduct; or

200 LC 290, para 5.10 and see the Scottish Law Commission, Insanity and Diminished Responsibility Report, No 195 (2004).
201 ibid, para 5.18.
203 LC 304, para 5.112.
(ii) form a rational judgement; or
(iii) control him or herself.
was substantially impaired by an abnormality of mental functioning arising from a recognised
medical condition, developmental immaturity in a defendant under the age of eighteen, or a
combination of both; and
(b) the abnormality, the developmental immaturity, or the combination of both provides an
explanation for the defendant’s conduct in carrying out or taking part in the killing.

15.2 Involuntary manslaughter

This category includes all varieties of homicide which are unlawful at common law but com-
mitted without the mens rea for murder. It is not surprising, therefore, that the fault required
takes more than one form. And, as the limits of the mens rea for murder are uncertain, it fol-
lows inevitably that there is a corresponding uncertainty at the boundary between murder and
manslaughter. The Law Commission recently concluded that the offence of manslaughter was
at risk of being devalued by being left as a ‘residual amorphous, catch all homicide offence’,204
To avoid drawing an arbitrary line between murder and manslaughter, the Commission has
recommended a middle tier of second degree murder.205

The difficulties do not end there, for there is another vague borderline between manslaughter
and accidental death. Indeed, Lord Atkin said that:206
of all crimes manslaughter appears to afford most difficulties of definition, for it concerns homo-
cide in so many and so varying conditions...the law...recognizes murder on the one hand based
mainly, though not exclusively,[207] on an intention to kill, and manslaughter on the other hand,
based mainly, though not exclusively,[208] on the absence of intent to kill, but with the presence of an
element of ‘unlawfulness’ which is the elusive factor.
The element of ‘unlawfulness’ is a little less elusive today than when Lord Atkin spoke. This
is unfortunate, since the offence is one of the most serious in the criminal calendar and car-
rries a maximum life sentence. The outer limits of the offence remain obscure, and there is
little internal coherence between the forms of manslaughter currently recognized – other
than the fact that D causes a death. Lumping together the many different types of behav-
ior that give rise to an unintentional unlawful killing under one label is unsatisfactory in
principle, and can engender disparities in sentencing.209 The forms of the offence overlap
considerably.

There are four broad categories of involuntary manslaughter:

(1) manslaughter by an unlawful and dangerous act;
(2) manslaughter by gross negligence;
(3) manslaughter by subjective recklessness;
(4) corporate manslaughter.

The constituents of each of these categories require some degree of analysis.

204 LC 304, para 2.19.
205 See Ch 14 above.
207 See above, p 480
208 See above, p 488.
15.2.1 Manslaughter by an unlawful and dangerous act

Coke laid down that an intention to commit any unlawful act was a sufficient mens rea for murder,\(^\text{210}\) so that if D shot at V’s hen with intent to kill it and accidentally killed V, this was murder, ‘for the act was unlawful’. This savage doctrine was criticized by Holt CJ\(^\text{211}\) and by the time Foster wrote his *Crown Law*,\(^\text{212}\) it appears to have been modified by the proviso that the unlawful act must be a felony (and not merely a misdemeanour or civil law wrong such as a tort). Thus, if D shot at the hen intending to steal it, the killing of V was murder. This was the doctrine of constructive murder, which survived until the Homicide Act 1957. Alongside this doctrine of constructive murder, from Foster’s time there existed a parallel doctrine of constructive manslaughter: any death caused while in the course of committing an unlawful act, other than a felony, was manslaughter. An act was unlawful for this purpose even if it was only a tort, so that the only mens rea which needed to be proved was an intention to commit the tort.

The present law is that D is guilty of manslaughter if he kills by an unlawful and dangerous act. The only mens rea required is an intention to do that act and any fault required to render it unlawful. It is irrelevant that D is unaware that it is unlawful or that it is dangerous,\(^\text{213}\) or that he is unaware of the circumstances which make it dangerous, or whether D himself ought to have been aware of those circumstances if a reasonable and sober person would have been aware of them.\(^\text{214}\) The offence is heavily and cogently criticized because of this constructive element by which D’s liability for manslaughter turns on the consequence of death, which will often be unforeseen by D and indeed be regarded as a matter of ‘bad luck’ beyond his control.\(^\text{215}\) The offender is labelled as a manslaughterer when he might only have foreseen, if at all, a risk of some minor harm being caused.\(^\text{216}\)

The crime comprises:\(^\text{217}\)

1. an unlawful act, intentionally performed;
2. in circumstances rendering it dangerous;
3. causing death.

Several elements require further examination.

15.2.1.1 The unlawfulness

Issues requiring elaboration are whether the unlawful act must: (i) be criminal, (ii) involve a completed crime, (iii) be a crime of mens rea, (iv) be one dependent on proof of an act, or whether an omission will suffice, (v) be a crime involving an offence against the person.

A crime

At one time it was thought that the act was sufficiently unlawful if it was a civil wrong, a tort. Thus in *Fenton*,\(^\text{218}\) where D threw stones down a mine and broke some scaffolding which

\(^{210}\) 3 Inst 56. See Turner, MACL, 195 at 212 et seq for a discussion of the historical development.

\(^{211}\) Keate (1697) Comb 406 at 409.

\(^{212}\) 1(1762) – see p 370.


\(^{218}\) 1830 1 Lew CC 179.
caused a corf to overturn with fatal results, Tindal CJ told the jury that D’s act was a trespass and the only question was whether it caused V’s death. Even in the nineteenth century this doctrine was not accepted without reservation by the judges. A notable refusal to follow it is the direction of Field J in Franklin.219 D, walking on Brighton pier, took up ‘a good sized box’ from a refreshment stall and threw it into the sea where it struck a swimmer, V, and killed him. The prosecution argued that, apart from any question of negligence, it was manslaughter if the commission of the tort of trespass against the stall-keeper had caused death. Field J, after consulting Mathew J who agreed, held that the case must go to the jury ‘on the broad ground of negligence’. Expressing his ‘great abhorrence of constructive crime’, Field J asserted that ‘[t]he mere fact of a civil wrong committed by one person against another ought not to be used as an incident which is a necessary step to a criminal case’. The ‘act’ must be a crime.

In Kennedy (No 2),220 the House of Lords recently affirmed that to establish the crime of unlawful act manslaughter it must be shown (i) that the defendant committed an unlawful act; (ii) that such unlawful act was a crime; and (iii) that the defendant’s unlawful act was a significant cause of the death of the deceased.

In Lamb,221 D pointed a loaded gun at his friend, V, in jest. He did not intend to injure or alarm V and V was not alarmed. Because they did not understand how a revolver works, both thought there was no danger in pulling the trigger; but, when D did so, he shot V dead. D was not guilty of a criminal assault or battery because he did not foresee that V would be alarmed or injured. It was, therefore, a misdirection to tell the jury that this was ‘an unlawful and dangerous act’. It was not, said Sachs LJ, ‘unlawful in the criminal sense of the word’; and, referring to Franklin, ‘it is not in point to consider whether an act is unlawful merely from the angle of civil liabilities’. This was confirmed by Scarlett.222 D, a licensee, caused death by using excessive force while lawfully expelling a trespasser from his pub. His conviction for manslaughter was quashed because the judge had directed that D was guilty if he had used unnecessary and unreasonable force – which would have been the tort of battery. It was necessary to prove that the force used was excessive in the circumstances which D believed to exist223 – that is, not merely that he had committed the tort but that he had the mens rea of the crime of battery.

Some doubt might appear to be cast on these cases by the House of Lords in DPP v Newbury,224 in which their lordships failed to identify any crime rendering the act unlawful. The ‘unlawful’ act was throwing a piece of paving stone from the parapet of a bridge as a train approached. This certainly has every appearance of a criminal act, which is perhaps why it was not and, the House thought, could not be, argued that the act was lawful.225 But the question for the House was whether D could properly be convicted if he did not foresee that his act might cause harm to another. So, despite appearances, the act could not be regarded as an assault or any of the usual offences against the person, all of which require mens rea. Unless resort is to be had to the tort of trespass, this leaves as possibilities the offence of endangering passengers contrary to s 34 of the Offences Against the Person Act 1861 or an offence of criminal damage – but an offence against property seems almost as objectionable a basis for convicting of manslaughter as a tort (see below).

219 (1883) 15 Cox CC 163.
220 [2007] UKHL 38.
221 [1967] 2 QB 981, [1967] 2 All ER 1282. The case is a controversial one. Glanville Williams wrote that ‘Lamb was a fool but there is no need to punish fools to that degree. There is no need to punish Lamb at all. He had killed his friend and that was punishment enough’ – ‘Recklessness Redefined’ [1982] CLJ 252 at 281.
223 Gladstone Williams, above, p 359.
225 ‘...no question arose whether [Newbury’s] actions were or were not unlawful’: Scarlett [1993] 4 All ER at 635, per Beldam LJ.
The better view, it is submitted, is that in *Lamb* and *Scarlett*, that is, that a criminal act must be identified and proved. *Kennedy (No 2)* supports this requirement. The ambiguity of the concept of an ‘unlawful’ act has, on some occasions, led the courts to gloss over the requirement for proof of a criminal offence. In *Cato*, D caused V’s death by injecting him with heroin with his consent. The court accepted that this was not an offence under the Misuse of Drugs Act and assumed for this purpose that it was not an offence under s 23 of the Offences Against the Person Act 1861 but said ‘the unlawful act would be described as injecting the deceased with a mixture of heroin and water which at the time of the injection and for the purposes of the injection Cato had unlawfully taken into his possession’. The act was thus closely associated with other acts which are offences but it is submitted that neither this nor any moral condemnation attaching to that act should be enough to found liability for manslaughter. In the light of the House of Lords decision in *Kennedy (No 2)* such reasoning is untenable.

The ‘base’ crime must be proved in full

The requirement of a criminal offence prompts a further question: whether it is necessary for the prosecution to establish all of the elements of the crime that would have been charged had no one died – that is, the ‘base’ crime on which the unlawful act manslaughter charge is constructed. In principled terms the element of ‘unlawfulness’ should require the prosecution to prove all the elements (*mens rea* and *actus reus* with no defence) of the base offence. Unfortunately, this apparently obvious interpretation of ‘unlawful’ has not been put completely beyond doubt by the case law.

It seems clear that the prosecution must prove the full *mens rea* of the base offence. In *Lamb*, the trial judge, Glyn-Jones J had directed the jury that it is an unlawful act ‘whether or not it falls within any recognized category of crime’. The Court of Appeal found this to be a misdirection because ‘*mens rea* is now an essential element of the offence’. The courts all too often gloss over this aspect, using language that implies that a mere voluntary act might suffice, as, for example, in *A-G’s Reference (No 3 of 1994)*, where Lord Hope referred to the requirement merely that D ‘did what he did intentionally’. Confusion was also caused by Lord Denning’s *dictum* in the civil case of *Gray v Barr*, which was criticized by Lord Salmon in *Newbury*. Lord Denning said: ‘the accused must do a dangerous act with the intention of frightening or harming someone or with realisation that it is likely to frighten or harm someone’. This is simply to require the *mens rea* of assault or battery as in *Scarlett*. However, an act which is intended or known to be likely to frighten is not necessarily a ‘dangerous’ act; and whether it is dangerous, as appears below, is a question to be answered by an objective test. The *dictum* is correct if it is confined to the case where the unlawful act relied on is assault or battery.

The proof of *mens rea* of the base offence is a necessary but not sufficient condition of unlawful act manslaughter. Where D, as on facts similar to *Lamb*, thinks that the revolver is loaded and dangerous and he only intends to cause V to be frightened, but V does not apprehend violence because he does not believe the gun to be loaded, there is no complete assault. D has the *mens rea*, but the *actus reus* is not satisfied. Again, it is submitted that a charge

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226 [1976] 1 All ER 260.
227 Below, p 632. In fact D was convicted of the s 23 offence so the remarks discussed in the text may be *obiter*.
228 At 986. See also *Reid* (1975) 62 Cr App R 109 (fright by threat to use firearm was sufficient).
230 Per Lord Hope, at 274.
233 It may be possible to charge a battery. There is no crime of attempted assault since it is a summary only offence.
of unlawful act manslaughter cannot be maintained. Lam's conduct did not constitute an assault both because he lacked the mens rea (he had no intention to frighten, nor because of his common lack of understanding of the operation of the firearm was he reckless as to causing apprehension in his victim), and there was no actus reus because his friend, believing that the whole thing was a joke, had no apprehension of immediate unlawful violence. The court was categorical that 'mens rea being now an essential element of the offence', and also accepted that counsel had put forward the correct view that for the 'act to be unlawful it must constitute at least what he then termed a technical assault'. Support also derives from Arobieke. D pursued V onto railway lines 'looking for him'. V was killed. There was no evidence that D had actually threatened V, so no actus reus of assault could be established. The conviction was quashed.

In addition to proving the mens rea and actus reus of the base offence, the prosecution must disprove any excuses or justifications to the base offence raised by D. If the defence itself is clearly defined, there is little difficulty in applying it in the unlawful act manslaughter context. Two particular problems fall for further discussion.

Problems of consent and unlawful act manslaughter

It is a matter of policy whether the factual consent of an individual, which leads to conduct where harm is intended or foreseen, will be legally recognized: Brown. Pleas that V consented to the base crime will be accepted where the conduct falls within an established category; for example, boxing, surgery or horseplay; and these will operate to preclude unlawful act manslaughter liability. Similarly, where D has not intended that a consensual assault would lead to any greater degree of harm than the mere assault consented to by V there is no base offence and can be no manslaughter conviction: Slingsby. In A, D's post-exam celebrations included pushing V into a river where he drowned. D claimed that he was entitled to a defence of belief in consent, his actions being mere horseplay. The Court of Appeal confirmed that if D had caused V to fall in the river by a non-accidental act and D did not have a genuine belief in V's consent to the assault, D would be liable if all sober and reasonable people realized it was dangerous in the sense discussed below.

Problems of intoxication and the unlawful act

Where the prosecution rely on an unlawful act which does not require a specific intent and D was intoxicated at the time, it is immaterial that he lacked the mens rea of the crime in question and even that he was unconscious: Lipman. In this memorable case D killed V by cramming a sheet into her mouth and striking her while he was on an LSD 'trip' and believed

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234 If these fractions of crimes are sufficient to form the basis for a UAM charge, that may tell us something about the underlying purpose of UAM. It would be clear that the punishment is based on the 'dangerousness' of the activity rather than on the technical 'unlawfulness'.
235 Bruce (1847), Erle J supports this – on the facts no assault as no apprehension by V nor intent by D.
239 eg Bruce (1847) Cox CC 262 (no assault where D spun boy round in jest and killed V), and see Lord Mustill's speech in Brown [1994] AC 212 at 264.
he was in the centre of the earth being attacked by serpents. Though the jury convicted on the
grounds that D was reckless or grossly negligent when, quite consciously, he took the drugs,
the Court of Appeal upheld the conviction by applying the Church doctrine. The unlawful
act – the base crime – was the battery committed on V while D was unconscious. That battery
required only the mens rea of recklessness, it was therefore a crime of basic intent, and D’s self-
induced intoxication provided no excuse.

A crime of mens rea?

It is implicit in the rule in Church\(^{243}\) that the base crime must be one of more than mere neg-
ligence. An act which all sober and reasonable people would realize entailed the risk (sc, an
unjustifiable risk) of harm to others almost certainly becomes the tort of negligence when
harm results and therefore the reference to ‘an unlawful act’ would be otiose if it did not
mean unlawful in some other respect. This is in accordance with the well-established rule
that negligence sufficient to found civil liability is not necessarily enough for criminal guilt
and that death caused in the course of committing the tort of negligence is not necessarily
manslaughter. But the limitation goes further than this: there are degrees of negligence which
are criminally punishable, yet are not sufficient to found a charge of manslaughter. If, then,
the unlawfulness, whether civil or criminal, of the act arises solely from the negligent manner
in which it is performed, death caused by the act will not necessarily be manslaughter. This
follows from the decision of the House of Lords in Andrews v DPP.\(^{244}\)

In that case Du Parcq J told the jury that if D killed V in the course of dangerous driving
contrary to s 11 of the Road Traffic Act 1930 he was guilty of manslaughter. Lord Atkin (who
clearly regarded dangerous driving in the 1930 Act as a crime of negligence)\(^{245}\) said that, if the
summing up had rested there, there would have been misdirection:

There can be no doubt that this section covers driving with such a high degree of negligence as that,
if death were caused, the offender would have committed manslaughter. But the converse is not true,
and it is perfectly possible that a man may drive at a speed or in a manner dangerous to the public, and
cause death, and yet not be guilty of manslaughter.\(^{246}\)

Lord Atkin expressly distinguished\(^{247}\) between acts which are unlawful because of the negli-
gent manner in which they are performed and acts which are unlawful for some other reason:

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.

His lordship’s next sentence implies that killing in the course of unlawful acts generally was
manslaughter:

If it were otherwise a man who killed another while driving without due care and attention would ex
necessitate commit manslaughter.

This passage has been severely criticized\(^{248}\) and it is certainly unhappily phrased: ‘...doing
a lawful act with a degree of carelessness which the legislature makes criminal’ is a contra-
diction in terms, for the act so done is plainly not a lawful act. But the distinction evidently

\(^{243}\) Below, p 523.
\(^{244}\) [1937] AC 576, [1937] 2 All ER 552.
\(^{245}\) See above, p 515. The offence of dangerous driving was abolished by the Criminal Law Act 1977 but restored
\(^{246}\) [1937] AC at 584, [1937] 2 All ER at 556, 557.
\(^{247}\) [1937] AC at 585, [1937] 2 All ER at 557.
\(^{248}\) Turner, MACL, at 238. Referred to by Devlin as 'the only obscure speech the great Lord Atkin ever made':
intended, *viz*, between acts which are unlawful because of negligent performance and acts which are unlawful for some other reason, is at least intelligible and, in view of the established distinction between civil and criminal negligence, a necessary limitation.

There is a further issue which arises. If it is insufficient to construct a manslaughter charge on a base crime of mere negligence, presumably it is even less acceptable to construct such a charge on a base crime of strict liability. The natural reading of Lord Atkin’s opinion is that the distinction is between acts which are unlawful because of negligent performance and acts which are unlawful for some other reason. An alternative (strained, but more attractive) reading is that only crimes of more than mere negligence will suffice to ground an unlawful act manslaughter conviction. This is supported by the comments of Sachs LJ in *Lamb*: ‘*mens rea* being now an essential ingredient in manslaughter’.249 As a matter of principle, the offence should be read restrictively and should be based on offences that require *mens rea* proper. Gross negligence manslaughter is more than broad enough to prevent deserving cases going unpunished. The issue has not been directly addressed by the courts. In the recent case of *Andrews*,250 D gave V, with her consent, an injection of insulin in order to give her a ‘rush’. V, who was also voluntarily intoxicated at the time, died as a result of the injection of insulin. D appealed against his conviction on the basis that the judge was wrong to rule that he would direct the jury that V’s consent to the injection did not render D’s act lawful. The Court of Appeal upheld the conviction, holding that ss 58(2)(b) and 67 of the Medicines Act 1968 made D’s act unlawful because no consent could be pleaded to that offence. The fact that these offences are of strict liability was not challenged.

**Omissions as ‘unlawful acts’**

In *Lowe*,251 the Court of Appeal held that D is not guilty of manslaughter simply on the ground that he has committed the offence under s 1(1) of the Children and Young Persons Act 1933 of neglecting his child so as to cause unnecessary suffering or injury to its health, and that neglect has caused death. The court disapproved *Senior*,252 which, on similar facts, held that this was manslaughter. *Lowe* has now been overruled on its interpretation of the 1933 Act and *Senior* to some extent rehabilitated by *Sheppard*253 – but not on this point, on which, it is thought, *Lowe* and not *Senior* represents the law. Death had certainly been caused by unlawful and dangerous conduct, but the court distinguished between omission and commission:

> if I strike a child in a manner likely to cause harm it is right that if that child dies I may be charged with manslaughter. If, however, I omit to do something with the result that it suffers injury to its health which results in its death, we think that a charge of manslaughter should not be an inevitable consequence even if the omission is deliberate.

If the omission is no more than an act of negligence then it is right that the doctrine of the unlawful act does not apply and D is not guilty in the absence of gross negligence; but if the omission is truly *wilful* – a deliberate omission to summon medical aid, knowing it to be necessary, there seems to be no valid ground for the distinction.254

**Other limitations of the category of unlawfulness**

It has been questioned whether the base crime must be one involving an offence to the person, and whether an inchoate offence might suffice. As for inchoate offences, attempted offences

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249 [1967] 2 QB 981 at 988.
252 [1899] 1 QB 283.
254 See editorial comment in [1976] Crim LR 529, where Andrew Ashworth is heavily critical.
of violence would be the most obvious scenarios in which such an issue might arise. Consider D who thinks he is adding poison to V’s tea, but he has made a mistake and is simply adding a very concentrated sweetener. V is a diabetic and dies. There is probably no full crime under s 23 of the Offences Against the Person Act, but there is a possible attempted poisoning. The issue does not appear to have arisen in any reported case. In Willoughby, D had poured petrol around a building which he owned and which he planned to burn down to collect the insurance money. D claimed that he was absent from the premises when a spark ignited the petrol, his associate who was assisting in spreading the petrol was killed. The conviction for manslaughter was upheld by the court, with the conclusion that the base offence was one of causing criminal damage to property being reckless as to whether life was endangered thereby as the jury found. It is unclear whether the question was raised whether D pouring petrol was a completed act of criminal damage, or one that was merely preparatory.

Public order offences are capable of founding an unlawful act manslaughter charge. In Carey the Court of Appeal held that there might be circumstances in which a verdict of unlawful act manslaughter could properly be entered where the unlawful act was affray, on the evidence in this case that was not possible. On the facts the Court of Appeal quashed convictions where D1, D2 and D3 had committed an affray and D1 had hit V, a 15-year-old, apparently healthy, girl. V ran 109 metres away from DD. She died as a result of a heart condition which had not been diagnosed. The only sufficient dangerous act perpetrated on V had been the physical strike by D1 and that, it had seemed, had not caused her death. The other acts and threats used in the course of the affray were not dangerous in the relevant sense as against the deceased. The judge should therefore have withdrawn the charge of manslaughter from the jury. It would, it is submitted, have been easier for the Crown to argue that DD had assaulted V, that was an unlawful act, it was dangerous, and that her death arose from V’s flight and there was no break in the chain of causation since they must ‘take their victim’ as they find her.

Convictions have been upheld where D’s unlawful act constituted criminal damage (for example, Goodfellow) and burglary (for example, Watson (below) and Kennedy). In Ball, (below) the court distinguished some examples posed by D’s counsel on the ground that, unlike the case before the court, they were of acts ‘not directed at V’ (but that is irrelevant). The court therefore expressed no opinion on ‘the example of a person storing goods known to be stolen; if unknown to him the goods contain unstable explosive which explodes killing another, is that manslaughter?’ The answer must surely be no, unless the sober and reasonable observer would have known of the danger. There is something to be said in favour of imposing some limitation to the offence if it is to be retained. It does not seem appropriate that a person’s guilt for homicide should depend on whether he was handling stolen goods or committing criminal damage or burglary. Cases of this sort would be better left to the next category of killing by gross negligence.

255 Arguably D would not be liable not because of the unlawfulness element, but because there would be no objective risk of injury from the act.
257 In such cases, a gross negligence charge might be difficult to substantiate.
260 (1994) 15 Cr App R (S) 141 (burglar dropped a match used to illuminate search of house).
261 The point of law certified for the House of Lords postulated ‘an act [not directed against V] which is the substantial cause of the death’ and the court left open the question whether D was guilty of manslaughter by gross negligence which it could scarcely have done if it was deciding that D did not cause death.
262 For a suggestion that the offence ought to be restricted to cases of ‘attack’ on another person, see Clarkson, ‘Context and Culpability in Involuntary Manslaughter: Principle or Instinct’, in A Ashworth and B Mitchell (eds), Rethinking English Homicide Law (2000). The basis for this suggestion is that there is no wrong done by...
No requirement that the unlawful act be ‘directed at’ the victim?

In *Dalby*, Waller LJ said that, ‘where the charge of manslaughter is based on an unlawful and dangerous act, it must be an act directed at the victim and likely to cause immediate injury however slight’. D and V were drug addicts. D, who was lawfully in possession of diconal tablets, supplied some to V who took them in a highly dangerous form and quantity and died. D’s conviction was quashed apparently on the ground that the supply was not an act directed against the person of V and did not cause direct injury to him. But, in *Goodfellow*, D’s argument that he was not guilty of manslaughter because his act was not directed against V was rejected. D, wanting to move from his council house and seeing no prospect of exchanging it, set it on fire, attempting to make it appear that the cause was a petrol bomb. V died in the fire. The court said that in *Dalby*, Waller LJ was ‘intending to say that there must be no fresh intervening cause between the act and the death’. It is true that that case could, and probably should, have been decided on this ground, but it does not seem to have been the *ratio decidendi*. It is also true that the act of burglary which causes the death of the obviously frail householder is not directed at him, but it is accepted in *Watson* that it may be manslaughter.

15.2.1.2 Dangerousness

Until 1966, it was possible to argue that any unlawful act, other than a merely negligent act, causing death was manslaughter; but in that year in *Church* the Court of Criminal Appeal rejected such a view. Edmund Davies J said:

For such a verdict inexorably to follow, the unlawful act must be such as all sober and reasonable people would inevitably recognize must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm.

The test of dangerousness is objective. In *Newbury* Lord Salmon stressed, ‘… the test is not did the accused recognize that it was dangerous but would all sober and reasonable people recognize its danger’.

The test describes the kind of act which gives rise to liability for manslaughter, not the intention or foresight, real or assumed, of the accused. Hence, the enactment of s 8 of the Criminal Justice Act 1967 had no effect on the law as stated in *Church*. The question is whether the sober and reasonable person would have appreciated that the act was dangerous in the light, not only of the circumstances actually known to the accused, but also of any additional circumstances of which that hypothetical person would have been aware. There is, of course, a risk that in practice the fact that a death has occurred will be treated by the jury as

convicting D of a constructive crime of manslaughter because by attacking V, D has shifted his moral stance vis-à-vis V. Since the concept of ‘attack’ has no foundation in English law, the proposal may generate uncertainty. As Ashworth and Mitchell observe, asking whether it is enough to say that choosing to engage in violence means you make your own luck begs the question (at 13).

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263 [1982] 1 All ER 916.
264 (1986) 83 Cr App R 23. The conviction was upheld on the grounds of both unlawful act and reckless manslaughter.
265 *Kennedy (No 1)* [1999] 1 Cr App R 54, above, p 83. In *Kennedy (No 2)* [2005] EWCA Crim 685, it was accepted that there was no requirement that the act be ‘aimed’ at V.
266 Below, n 271.
268 The degree of risk entailed is not further elaborated. See R Sparks, ‘The Elusive Element of Unlawfulness’ (1965) 28 MLR 601.
269 [1966] 1 QB 59 at 70. cf R Buxton, ‘By Any Unlawful Act’ (1966) 82 LQR 174 suggesting that the law could return to a position whereby unlawful act manslaughter is restricted to cases where D intends to cause serious injury.
270 Above, p 137.
conclusive evidence of the fact that the activity was dangerous. Such *ex post facto* reasoning ought to be discouraged.

A peculiarity of the victim is relevant if it would have been known to the sober and reasonable observer of the event, even if it was not known to the accused. This principle can be explained by comparing two cases. The burglary of a house in which V, a frail 87-year-old man resides, becomes a ‘dangerous’ act as soon as V’s frailty and great age would be apparent to the reasonable observer. The unlawful act continues through the ‘whole of the burglarious intrusion’ so that if V dies of a heart attack caused by D’s continuing in the burglary after it has become a dangerous, as well as unlawful, act, he will be guilty of manslaughter.271 In contrast, where a petrol station attendant with a weak heart died in consequence of a robbery this was not manslaughter because the observer would not have known of his peculiar susceptibility – the act was not ‘dangerous’.272

It is worth underlining three aspects of the *Church* doctrine. First, that there must be a ‘likelihood’ of harm. This suggests more than a mere possibility, but not perhaps that it is more probable than not. Secondly, that the type of harm involved is only ‘some’ harm, not serious harm. This contrasts with the requirement in gross negligence manslaughter of a risk of death. Thirdly, that there is no requirement that the accused himself foresee any risk of harm. Historically, unlawful act manslaughter was limited to cases in which the accused had at least foreseen injury of his victim resulting from his crime.273 ‘The Fourth Report of HM Commissioners on Criminal Law’274 described the offence in terms of ‘death result[ing] from any unlawful act or omission done or omitted with intent to hurt the person’.275 The decision in *Church* may have marked a significant deviation from the historical position. Buxton, writing extra-judicially, described it as a ‘staggeringly severe ruling, and one which turns its back on the major part of the 19th century development of the law’.276 There have been many suggestions to limit the offence to cases where D has committed an unlawful act likely to cause at least serious personal injury, and to restrict it further, by a requirement that D intend or be reckless as to such.277

**Danger in crimes committed by multiple accused**

An interesting issue arose in *Carey* (above) as to whether in considering the ‘dangerousness of an act’ it is permissible to aggregate the conduct of the co-accused. It is submitted that there is no difficulty in aggregating the threats of violence offered by D1, D2 and D3 for the purposes of ascertaining whether there was a crime of a sufficiently dangerous nature to satisfy the *Church* test. If D1 is waving a machete around and D2 is shaking his fist at V, their affray comprises their combined conduct. Likewise, the dangerousness of the acts is properly assessed by looking at the combination of their conduct. Nor, it is submitted, is there a problem in aggregating the conduct of D1, D2 and D3 towards V1 and V2. Take a case where, in the course of

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271 *Watson* [1989] 2 All ER 865, [1989] Crim LR 733. D’s conviction was quashed because causation was not established. V’s death may have been caused by the arrival of the emergency services. But did this predictable event break the chain of causation? cf commentary [1989] Crim LR 734. If V has sustained a fatal shock before D has any opportunity to observe his frailty, D’s liability seems to depend on whether his acts after he had that opportunity (now ‘dangerous’ acts) contributed to the death.

272 *Dawson* (1985) 81 Cr App R 150. Yet, before the Homicide Act 1957, this would have been murder (killing in the course or furtherance of a violent felony) and, according to one theory, Parliament’s provision that it was not murder left it manslaughter. See the 1st edition of this book, at 19–20. The theory has not taken root.

273 The case law bears examples, including *Sullivan* (1836) 7 C & P 641, where removing the trap-stick from a cart was sufficient to ground liability as D foresaw the risk of some harm arising.

274 (1839); see Russell, 588.

275 ibid. at 589.

276 Above, n 269.

277 See also the Draft Scots Criminal Code, cl 38.
a robbery, D1 issues serious threats against V1 and D2 issues threats to V2, and the obviously frail V2 died from a heart attack induced by the shock, it is submitted that the actions of D1 and D2 could be aggregated in determining whether the conduct was sufficiently ‘dangerous’ in the sense required by Church.

Fright, shock and harm as dangerous acts?
Psychiatric injury is now acknowledged to be actual bodily harm, but it would be hard to prove that the risk of such harm would inevitably be recognized by all sober and reasonable people, especially as the law requires expert evidence to prove it. Fright and shock do not amount to ‘actual bodily harm’ but it does not necessarily follow that they are not ‘harm’ for the purposes of constructive manslaughter. In Reid, Lawton LJ, upholding a conviction for manslaughter, said that ‘the very least kind of harm is causing fright by threats’ – in that case, by the use of firearms – but he was discussing the mental element of an accessory rather than the nature of the act, which is our present concern. The act was, in the opinion of the court, likely to cause death or serious injury and therefore was certainly ‘dangerous’. In Dawson, the court assumed without deciding that in the context of manslaughter ‘harm’ includes ‘injury to the person through the operation of shock emanating from fright’. So it seems that it is not enough that the act is likely to frighten. It must be likely to cause such shock as to result in injury.

In Dhaliwal, D had struck his partner a minor blow and she had then committed suicide. This was against a background of domestic abuse amounting to psychological but not psychiatric injury by D. It was held that the infliction of mere psychological harm would not suffice to construct a manslaughter charge.

The prosecution sought to rely for the relevant unlawful and dangerous act on D’s conduct which caused psychological injury to V. The trial judge in his ‘meticulous’ judgment and the Court of Appeal in turn, rejected this approach. It would have required an extension to the definition of grievous bodily harm. Chan-Fook and Burstow make it clear that psychiatric illness may amount to actual or indeed grievous bodily harm. However, it is also clear that the Court of Appeal and House of Lords in those cases were not prepared to extend the definition of bodily harm to include emotional distress or any condition less than a ‘recognisable psychiatric injury.’ Attempts to dilute the definition further would exacerbate the already considerable problems of certainty in definition and proof. However, in an obiter dictum, the Court of Appeal in Dhaliwal left open the possibility that a manslaughter conviction might be available:

where a decision to commit suicide has been triggered by a physical assault which represents the culmination of a course of abusive conduct, it would be possible…to argue that the final assault played a significant part in causing the victim’s death.

15.2.1.3 Causing death
The principles of causation discussed above are applicable. The unlawful and dangerous act must cause death. Causation often gives rise to problems in unlawful act manslaughter cases.

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278 Chan-Fook, below, p 608.
279 (1975) 62 Cr App R 109 at 112.
280 (1985) 81 Cr App R at 155.
283 Expert evidence will be needed to prove the condition and that D caused it: Morris [1998] 1 Cr App R 386.
284 Under the Offences Against the Person Bill (Home Office, Reforming the Offences Against the Person Act 1861 (1998)) the definition of injury includes mental injury which encompasses any impairment of a person’s mental health.
where there is frequently a factor other than D’s unlawful dangerous act which plays a causal role in V’s death. In the recent case of DJ,\textsuperscript{285} for example, it could not be established that D’s unlawful injury to V fracturing his cheek and being abusive had triggered the most direct cause of V’s death which was a heart attack.\textsuperscript{286}

**Fright and flight cases**

The question for the court is always: if there is a sufficient dangerous act did that unlawful and dangerous act cause death? In some cases where a number of acts have been performed it depends on which dangerous act is relied on. The tests to be applied are discussed in Chapter 4. In short, the victim’s conduct in trying to escape D will not break the chain of causation if it is ‘reasonably foreseeable’.\textsuperscript{287} Another variation which has developed is that V’s conduct will break the chain if it is beyond a range of responses which might be regarded as reasonable, given the threat posed by D and V’s predicament.\textsuperscript{288} In evaluating the reasonableness of the response the jury are to have regard to V’s characteristics.

**Causation in drug supply cases**

After a number of years in which the Court of Appeal created confusion in this area, the orthodox approach to causation was reasserted by the House of Lords in Kennedy (No 2).\textsuperscript{289} It was held that where D provides V with a syringe for immediate injection in the case of a fully informed and responsible adult V, it is ‘never’ appropriate to find D guilty of manslaughter. The criminal law generally assumes the existence of free will.\textsuperscript{290} In its remarkably short unanimous judgment delivered by Lord Bingham, the House concluded that the Court of Appeal had been in error repeatedly in recent years in imposing liability in such cases.\textsuperscript{291} There was no doubt that D committed an unlawful and criminal act by supplying the heroin to V. But the act of supplying, without more, could not harm V in any physical way, let alone cause his death. The crucial question was not whether D facilitated or contributed to administration of the noxious thing by supplying V but whether he went further and ‘administered’ it, that is, completed the offence under s 23 of the Offences Against the Person Act 1861. Rogers\textsuperscript{292} was wrongly decided in concluding that where D assisted V by holding the tourniquet he had administered to V and could be liable for his death.\textsuperscript{293}

**Suicide**

Homicide convictions have been upheld in a series of cases in which V has effectively committed suicide consequent upon being injured by D, but in each the decision was based on the fact that the injury inflicted by D was still an operating and substantial cause of the death, as, for example, in Blaue.\textsuperscript{294} Similarly, in Dear,\textsuperscript{295} the wounds inflicted by D were a continuing and

\textsuperscript{285} [2007] EWCA Crim 3133. \textsuperscript{286} See also Warburton [2006] EWCA Crim 627; Fitzgerald [2006] EWCA Crim 1655 (D pushes 92-year-old who dies later of pneumonia). \textsuperscript{287} Roberts (1971) Cr App R 95. \textsuperscript{288} Williams (1991) 95 Cr App R 1. \textsuperscript{289} Kennedy (No 2). See, generally, W Wilson, ‘Dealing With Drug Induced Homicide’ [2005] EWCA Crim 685; Wilson in Clarkson and Cunningham, Criminal Liability for Non Aggressive Deaths (2008). \textsuperscript{290} [14]. \textsuperscript{291} [2007] UKHL 37, [2008] 1 AC 269. cf Keen [2008] 1 Cr App R (S) 34. \textsuperscript{292} [2003] 1 WLR 1374. \textsuperscript{293} ibid, at [31], In Burgess [2008] EWCA Crim 516, the court considered convictions secured pre-Kennedy (No 2) where D had laid the tip of the needle against the vein for V. It was held that the fact that V depresses the plunger does not automatically entitle D to an acquittal. \textsuperscript{294} (1975) 61 Cr App R 271. \textsuperscript{295} [1996] Crim LR 995.
substantial cause of death when V reopened them and bled to death. And, in People v Lewis,\[296\] the conviction for murder was upheld where V had cut his throat to hasten his death when languishing from a gunshot wound inflicted by D, but again the decision was based on the gunshot wound being a substantial and operating cause.

Can D ever be liable for manslaughter where V has committed suicide and D’s act is not at that moment a continuing and operative cause of death? Is it sufficient that V fears D’s immediate attack in physical terms? Is it sufficient that V fears D’s continued psychological abuse? If the injury inflicted by D is no longer an operative cause of death, the courts apply the tests from the flight cases above. Can suicide ever be a reasonably foreseeable response to violence or further psychological harm? Can suicide ever be within a range of reasonable responses to a threat of such harm? In Dhaliwal the Court of Appeal gives obiter support to a suggestion that an unlawful and dangerous act (such as the wound) may be enough for a manslaughter conviction where the victim was of a ‘fragile and vulnerable personality’.\[297\]

There was no reference to any of the case law or issues in the discussion in this paragraph, and it is submitted that the Court of Appeal’s obiter dictum ought to be treated with considerable caution.\[298\]

15.2.2 Gross negligence manslaughter

For many years the courts have used the terms ‘recklessness’ and ‘gross negligence’ to describe the fault required for involuntary manslaughter, other than constructive manslaughter, without any clear definition of either term. It was not clear whether these terms were merely two ways of describing the same thing, or whether they represented two distinct conditions of fault.

All previous cases must now be read in the light of Prentice, Adomako and Holloway\[299\] in the Court of Appeal, and Adomako\[300\] in the House of Lords. The background to the decisions is that the House of Lords decided in Seymour\[301\] that the law governing involuntary manslaughter, other than unlawful act manslaughter, was the same as that of the statutory offence (now repealed) of causing death by reckless driving, that is, that the fault required was Lawrence recklessness, as set out above,\[302\] subject to the omission of any reference to a risk of causing damage to property. There had to be a risk of physical injury to some other person.\[303\] According to this controversial decision of the House of Lords in Seymour, the Lawrence direction was ‘comprehensive and of general application’ and the courts were no longer to apply the common law test of gross negligence propounded by Lord Hewart CJ in Bateman:

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.\[304\]

\[296\] 124 Cal 551 (1899).
\[297\] A Bill was introduced into Parliament to criminalize causing suicide, Hansard, HC Debates, 18 Dec 2006.
\[298\] See further, J Horder and L McGowan, ‘Manslaughter by Causing Another’s Suicide’ [2006] Crim LR 1035, arguing that in an abusive relationship case V would not be a free actor, and that in general gross negligence manslaughter ought to be relied on.
\[301\] [1983] 2 AC 493.
\[303\] See the potential qualification in Kong Cheuck Kwan (1986) 82 Cr App R 18, discussed by JM Brabyn, ‘A Sequel to Seymour Made in Hong Kong’ [1987] Crim LR 84.
\[304\] (1925) 19 Cr App R 8 at 11.
15.2.2.1 Prentice, Holloway and Adomako in the Court of Appeal

In the three appeals considered together in Prentice, the Court of Appeal, not wanting to apply the Lawrence test but being bound by Seymour, held that the Seymour case applied only to ‘motor manslaughter’, cases of causing death by driving a motor vehicle. The three appeals before the court, none of which was a motor manslaughter case, were still governed by a gross negligence test. Prentice and Holloway’s appeals were allowed. Adomako’s appeal was dismissed by the Court of Appeal and by the House of Lords.

In Prentice, doctors had administered an injection which created an obvious risk of causing death and in fact did so. The jury were directed in accordance with Lawrence that the doctors were guilty if they never gave thought to the possibility of there being any such risk. The question should have been whether their failure to ascertain and use the correct method of administering the drug was ‘grossly negligent to the point of criminality’. In Holloway, D, an electrician, had given no thought to the obvious risk of death created by the way he installed the electric element of a central heating system, so, in the opinion of the court, he would have been rightly convicted if Lawrence provided the right test. It did not: the further question should have been asked, whether it was grossly negligent to have such a state of mind.

In Adomako, D, an anaesthetist, failed to notice that the tube supplying oxygen to a patient had become detached. According to expert evidence, any competent anaesthetist would have recognized this immediately. The judge directed the jury that a high degree of negligence was required. The Court of Appeal upheld the conviction as this was the appropriate test to apply, and the appellant appealed to the House of Lords.

15.2.2.2 The House of Lords decision in Adomako

The House held that:

(1) There is no separate offence of motor manslaughter. As Lord Atkin said in Andrews, ‘[t]he principle to be observed is that cases of manslaughter in driving motor cars are but instances of a general rule applicable to all charges of homicide by negligence’. 307

(2) There is no manslaughter by Lawrence recklessness, in effect, though not formally, overruling Seymour. It would now be wrong to direct a jury on any charge of manslaughter in terms of Lawrence recklessness. (Since the decision in G overruling Caldwell, it would be unthinkable to apply that test.) 308

(3) There is now a single, ‘simple’ test of gross negligence. D must have been in breach of a duty of care under the ordinary principles of negligence; the negligence must have caused death; and it must, in the opinion of the jury, amount to gross negligence. The question, ‘supremely a jury question’, is:

having regard to the risk of death involved, [was] the conduct of the defendant . . . so bad in all the circumstances as to amount in [the jury’s judgement] to a criminal act or omission?

Several aspects of the test require further examination.

308 For a clear review of the development of fault in manslaughter from gross negligence, through forms of recklessness and back to gross negligence, see J Stannard, ‘From Andrews to Seymour and Back Again’ [1996] 47 NILQ 1.
A duty of care

The most obvious categories of duty in which liability might arise are those involving doctor and patient, transport carrier and passenger, employment, etc but the categories are limitless and involve duties arising in the course of hazardous activity (for example, on the road smuggling illegal immigrants, taking heroin), or duties arising from relationships (for example, failing to seek medical assistance for a spouse). It is impossible to catalogue all circumstances in which a duty will arise; rather, the approach is to apply the ‘ordinary principles of negligence’ to determine whether the defendant owed a duty to the victim. In Yaqoob, the defendant was a manager of a minicab firm and he had failed to inspect the tyres of a minibus involved in a fatal accident. It was held that it was open to the jury to find that there was a duty to inspect and maintain beyond that required for an MOT test, council inspections and other duties imposed by regulation. Moreover, the jury did not require expert evidence to assess that duty.

In cases of positive acts, it is relatively easy to identify whether there was a duty based on whether the acts created a risk of death which was obvious to the ordinary prudent individual. In cases of omission, much greater care needs to be exercised as there will be situations in which a risk of death would be obvious, but where D has no duty – as with D witnessing a blind stranger walking towards a cliff. No doubt the courts will be comfortable in many cases to recognize a duty arising from a combination of circumstances. In Willoughby, for example, D had with V spread petrol around D’s property with the intention of burning it down to claim on the insurance. V died when the petrol ignited. The Court of Appeal concluded that D’s ownership per se did not give rise to a duty, but because D engaged the deceased to participate in spreading petrol, and with a view to setting fire to D’s premises for D’s benefit, a duty existed.

Lord MacKay’s reference to the ‘ordinary principles of negligence’ should not be regarded as incorporating all of the technicalities of the tort of negligence into the gross negligence offence. Thus, in Wacker, it was held that where D had smuggled 60 illegal immigrants into the UK and 58 had died of suffocation owing to his having shut the air vent in their container, he could not displace the duty by relying on the victims’ being jointly engaged

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312 Including pedestrians killing motorcyclist by being knocked down: Devine [1999] 2 Cr App R (S) 409.


314 Ruffell [2003] Cr App R (S) 330; Parfeni [2003] EWCA Crim 159 (although this must surely have been a case of unlawful act manslaughter by D injecting V with heroin in order to steal from him).

315 Hood [2004] 2 Cr App R (S). See also Sogunro [1997] 2 Cr App R (S) 89 (starving V believing her to be possessed).


317 As in the cases of omission discussed above, p 66, especially in Stone and Dobinson [1977] QB 354 in which the duty arose from the cohabitation, blood relationship and voluntary assumption of responsibility.


with him in a criminal enterprise – \textit{ex turpi causa}.\textsuperscript{320} The court referred to Lord MacKay’s speech in \textit{Adomako} and concluded that his reference to ‘ordinary principles of the law of negligence’ was:

not intended to decide that the rules relating to \textit{ex turpi causa} were part of those ordinary principles, he was doing no more than holding that in an ‘ordinary’ case of negligence the question whether there was a duty of care was to be governed by whether there was a duty of care in the law of negligence.

The courts are clearly anxious to retain a degree of simplicity over this element of the offence which must be put before the jury. Confusion arose over whether the duty issue involved a pure question of law to be determined by the judge,\textsuperscript{321} or whether the judge was to rule on whether there was evidence capable of establishing a duty, in which case that was to be left to be determined by the jury.\textsuperscript{322} The matter has finally been resolved in \textit{Willoughby},\textsuperscript{323} in which the Court of Appeal held ‘that whether a duty of care exists is a matter for the jury once the judge has decided that there is evidence capable of establishing a duty’.

\textbf{Breach of duty}

The breach can be by positive act or by omission.\textsuperscript{324}

\textbf{Risk of death}

The proposition in \textit{Adomako} refers to a risk of death, a point emphasized in \textit{Gurphal Singh}.\textsuperscript{325} If we are to have an offence of homicide by gross negligence at all, it seems right that it should be so limited.\textsuperscript{326} The circumstances must be such that a reasonably prudent person would have foreseen a serious risk, not merely of injury, even serious injury, but of death. The Court of Appeal has confirmed this narrower interpretation in \textit{Misra}.\textsuperscript{327} As a matter of policy the CPS will not prosecute on evidence of anything less. In \textit{Yaqoob} (above) the Court of Appeal emphasized that a direction should expressly refer to the fact that it is the risk of death and not merely serious injury that is relevant. The direction in Singh\textsuperscript{328} should be followed: ‘the circumstances must be such that a reasonably prudent person would have foreseen a serious and obvious risk not merely of injury, even serious injury, but of death’.

\textbf{Gross negligence}

The test is objective – the question is whether the risk would have been obvious to the reasonably prudent and skilful doctor, anaesthetist, electrician, motorist or person on the Clapham omnibus (or driver on the North Circular Road as now seems to reflect the modern view), as the circumstances require.

\textbf{Relationship with recklessness}\textsuperscript{329}

It is, at first sight, surprising that the gross negligence test should be more favourable to the defendant than a recklessness test – even \textit{Lawrence} recklessness. The difference is that that recklessness test did not include the requirement that the jury must be satisfied that the

\begin{itemize}
\item \textsuperscript{320} cf the statutory recognition in relation to corporate manslaughter (below).
\item \textsuperscript{321} \textit{Gurphal Singh} [1999] Crim LR 582.
\item \textsuperscript{322} \textit{Khan} [1998] Crim LR 830; \textit{Sinclair} (1998) unreported.
\item \textsuperscript{323} [2004] EWCA Crim 3365, [2005] Crim LR 393. On interpretations this may have drawn from tort law, see J Herring and E Palser, ‘A Duty of Care in Gross Negligence Manslaughter’ [2007] Crim LR 24.
\item \textsuperscript{325} \textit{Gurphal Singh} [1999] Crim LR 582.
\item \textsuperscript{326} cf the view of LH Leigh, ‘Liability for Inadvertence a Lordly Legacy’ (1995) 58 MLR 457 at 459.
\item \textsuperscript{327} [2004] EWCA Crim 2375.
\item \textsuperscript{328} [1999] Crim LR 582.
\end{itemize}
defendant's conduct was bad enough to be a crime. A direction in Lawrence terms deprived D of the chance of acquittal on that ground. In Prentice, for example, there were many strongly mitigating factors in the doctors' conduct, which were irrelevant if the jury were concerned only with what was foreseeable, but highly relevant to question whether their behaviour was bad enough to deserve condemnation as manslaughter. Ever since Bateman, the courts have asserted that the test is whether the negligence goes beyond a mere matter of compensation and is bad enough to amount to a crime; but this is incomplete, if not plainly wrong. Careless driving amounts to a crime and deserves punishment but, manifestly, it does not on that ground alone amount to manslaughter, if it happens to cause death. Even dangerous driving causing death is not necessarily manslaughter. There are degrees of criminal negligence, and manslaughter requires a very high degree. Should not the jury be asked whether the negligence is bad enough to be condemned, not merely as a crime, but as the very grave crime of manslaughter?330

In Misra,331 the defendants argued that gross negligence should be replaced with an offence of reckless manslaughter, relying on the fundamental rejection of objectivism in G, and the dicta in that case that all serious offences require proof of a blameworthy state of mind. The Court of Appeal concluded that such arguments had been duly considered and rejected in Adomako, and saw nothing in G to cause them to regard Adomako as no longer binding.332

Relevance of D’s state of mind
Since the test of gross negligence is therefore purely objective, it might be thought that the state of mind of the particular accused is irrelevant to the inquiry. However, the courts have held that proof of the defendant’s state of mind and in particular his foresight of the risk of harm or death is ‘not a prerequisite to a conviction’ whilst recognizing also that there may be cases in which the defendant’s state of mind is ‘relevant to the jury’s consideration when assessing the grossness and criminality of his conduct’.334 This approach has been endorsed on a number of occasions, and it has been recognized that it may operate in the accused’s favour.335

Circularity of test
As Lord MacKay acknowledged, the test involves a degree of circularity. It may also be criticized, as was its predecessor, the ‘Bateman test’, on the ground that it leaves a question of law to the jury. It has always been held that the negligence which suffices for civil liability is not necessarily enough for manslaughter, so someone has to decide whether the particular negligence is bad enough to amount to a crime, indeed this very grave crime. It is not necessary for the judge to refer to the distinction between civil and criminal liability, which might tend to confuse the jury.336

The jury appear to be left with the task of deciding the scope of the offence – unlike in applying the definition of, say, intention, which has been supplied by the judge, in gross negligence, they determine what constitutes this serious crime. This seems objectionable in principle.

330 cf Litchfield [1998] Crim LR 507 and commentary. Whether evidence was sufficient to satisfy a jury, and whether evidence of subjective recklessness is admissible on a charge of manslaughter by gross negligence, is considered in DPP, ex p Jones [2000] Crim LR 858 and commentary.
332 [2004] 1 AC 1034.
333 See also the same conclusion in Mark [2004] EWCA Crim 2490.
335 G v DPP, ex p Jones [2000] IRLR 373, DC; R (Rowley) v DPP [2003] EWHC 693 (Admin). Whether the two are consistent on this is debatable.
336 Becker, No 199905228/Y5, 19 June 2000, CA.
In rejecting a challenge that the offence was insufficiently certain to be compatible with Art 7 of the ECHR, the Court of Appeal in Misra held that the jury’s function in gross negligence cases is not to decide a point of law, but one of fact:

The decision whether the conduct was criminal is described [in Adomako] not as ‘the’ test, but as ‘a’ test as to how far the conduct in question must depart from accepted standards to be ‘characterized as criminal’. On proper analysis, therefore, the jury is not deciding whether the particular defendant ought to be convicted on some unprincipled basis. The question for the jury is not whether the defendant’s negligence was gross, and whether, additionally, it was a crime, but whether his behaviour was grossly negligent and consequently criminal. This is not a question of law, but one of fact, for decision in the individual case.337

With respect, it is doubtful whether this meets the criticisms that the test is circular, and that it requires the jury to determine the scope of the criminal law.

ECHR compatibility

The Court of Appeal in Misra concluded that gross negligence manslaughter was sufficiently clear and did not offend the requirement of legal certainty imposed by Art 7 or the common law. The court referred to the writings of Bacon and Blackstone to support its view that Art 7 merely confirmed the common law position on the principle of legal certainty. Thus, the court felt confident that the House of Lords, when framing the offence in Adomako, was not ‘indifferent to or unaware of the need for the criminal law in particular to be predictable and certain’.338 The court observed that Art 7 does not require absolute certainty but that offences are defined ‘…with sufficient precision to enable the citizen to regulate his conduct: he must be able – if need be with appropriate advice – to foresee to a degree that is reasonable in the circumstances, the consequences which any given action may entail’.339 Even applying the stricter interpretation of the test in Hashman and Harrup v United Kingdom,340 the offence would be likely to satisfy Art 7, since gross negligence manslaughter depends on jury evaluation of conduct by reference to its consequences, and in gross negligence manslaughter the jury must be satisfied as to the ‘risk of death’ and of causation.

15.2.3 Reckless manslaughter

Gross negligence is a sufficient, but not necessarily the only, fault for manslaughter. To some extent manslaughter by advertent recklessness, conscious risk-taking still survives. Where D kills by an act (not unlawful apart from the fact that it is done recklessly) knowing that it is highly probable that he will cause serious bodily harm, this was murder (Hyam) before the decision in Moloney,341 so it must still be manslaughter. Where death is so caused, the jury do not have to decide whether it is bad enough to amount to a crime. That question is appropriate only when we are concerned with degrees of negligence, there being no other way of determining the criminal degree. The jury are not asked this question in non-fatal offences against the person, which may be committed recklessly, so it would be quite inconsistent if it applied when death is caused.

The main concern with this least controversial form of manslaughter is to distinguish ‘subjective recklessness’ (manslaughter) from ‘oblique intention’ (murder).342 The leading case is Lidar,343 in which V died when run over by D’s car to which he had been hanging on when pursuing D in the course of a fight. Although the trial judge directed that D’s fault element

would be satisfied by proof of recklessness (that is, D’s personal foresight) as to mere injury, the Court of Appeal held that this was not fatal to the safety of the conviction. Subjective reckless manslaughter requires proof that D foresaw a serious (significant) risk that V would suffer serious injury\(^{344}\) (or death) and took the risk unjustifiably.

15.2.4 Reform\(^{345}\)

The reform debate has been rekindled by the current Law Commission and Home Office agenda for reform of homicide which, although focusing principally on the appropriate scheme of murder and partial defences, has produced a coherent regime which integrates involuntary manslaughter offences.\(^{346}\) The ladder structure of the Law Commission proposals allows for a clearer analysis of the relative degrees of culpability in the different forms of homicide.\(^{347}\) When considering the offences of manslaughter alongside that of murder and the proposed forms of murder, it is essential to bear in mind the numerous statutory offences of homicide – causing death by dangerous driving, causing death by careless driving, etc.\(^{348}\)

15.2.4.1 Unlawful act manslaughter (UAM)

In view of the sustained principled criticism of the offence, it is no surprise that there have been calls for reform and indeed abolition. In the Law Commission’s Consultation Paper No 135 on Involuntary Manslaughter, it was observed that there was ‘no prospect’ of being able to devise any clear principled statement of the law based on concepts of unlawful act manslaughter.\(^{349}\) In its Consultation Paper No 135 the Law Commission provisionally proposed abolishment of UAM without replacement.\(^{350}\) By the time of the Report three years later, its opinion had changed. The Law Commission’s final proposal was that a person is guilty of a careless killing (GCK) offence if he has intended to cause injury, or is aware of the risk of injury and unreasonably takes the risk where the conduct causing or intended to cause the injury constitutes an offence. Keating\(^{351}\) is critical of the failure to secure correspondence between the fault (foresight of injury) and the harm caused, regarding it as ‘unfortunate’ for the Law Commission to include a version of unlawful act manslaughter. The Home Office subsequently questioned whether some version of the constructive manslaughter offence ought to be retained.\(^{352}\) It was unconvinced by the merits of the Law Commission proposal that it was wrong in principle to convict of an offence of death where the offender was aware only of a risk of injury. The example given by the Home Office is an extreme one of a person causing a minor wound to the victim who is a haemophiliac.\(^{353}\) The Home Office proposal would create liability where the accused intended some injury, in the course of the commission of a violent crime, and the death was not foreseen. As with the Law Commission proposal, there is no full correspondence between the fault (foresight of

\(^{344}\) That is why it cannot be subsumed within gross negligence as some commentators suggest see, eg, Herring, \textit{Criminal Law: Text, Cases and Materials} (2006) 288.


\(^{347}\) See, \textit{inter alia}, Tadros, in Clarkson and Cunningham (eds), \textit{Criminal Liability for Non-Aggressive Death} suggesting that there needs to be a lower category of homicide offence for the least serious cases.

\(^{348}\) See Ashworth in Clarkson and Cunningham (eds), \textit{Criminal Liability for Non-Aggressive Death}, and S Yeo, ‘Manslaughter versus Special Homicide Offences: An Australian Perspective’ in the same volume.

\(^{349}\) Para 5.4. On earlier reform proposals including those of the CLRC, Fourteenth Report; see S Prevezer, ‘Criminal Homicides Other Than Murder’ [1980] Crim LR 530.


\(^{353}\) This seemingly fanciful scenario has occurred: see \textit{State v Frazier} 98 SW 2d 707 (1936) Mo.
injury) and the harm (death) for which the defendant is punished. The Home Office offers no justification for basing liability on an accidental outcome rather than intention or foresight.

The Law Commission’s latest proposal is that the offence will be recast as killing another person:

(a) through the commission of a criminal act intended by the defendant to cause injury, or
(b) through the commission of a criminal act that the defendant was aware involved a serious risk of causing some injury (‘criminal act manslaughter’).

15.2.4.2 Gross negligence manslaughter

In 1997, the Law Commission proposed the reform, rather than abolition, of the gross negligence offence. The Law Commission’s latest proposals as part of the Murder, and Manslaughter and Infanticide Report are that gross negligence be recast as follows. A person is guilty of gross negligence manslaughter 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 . . . 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 time;
4. and
5. . . . his or her conduct falls far below what can reasonably be expected of him or her in the circumstances . . .

15.2.4.3 Reckless manslaughter

The Law Commission recommends abolition of this category of manslaughter. It is suggested that all cases will now be adequately catered for in either (i) the new second degree murder offence where D realizes there is a serious risk of death from his conduct and intends to cause injury, or (ii) the new version of gross negligence proposed above. What of D who has specialist knowledge of a risk of his lawful activity which is not known to the reasonable person and who foresees a risk of injury only by his conduct, but who kills V? D cannot be liable for gross negligence even though D’s mental state can be considered by the jury in evaluating whether his conduct is grossly negligent, there is no objective risk of death. Nor is D guilty of second degree murder unless he sees a risk of death.

15.3 The Corporate Manslaughter and Corporate Homicide Act 2007

15.3.1 Introduction

This long-awaited Act, which extends to the whole of the UK, received Royal Assent on 26 July 2007 and most of the Act was brought into force on 6 April 2008. Although the Act appears

\[^{354}\text{LC 304, para 2.163.}\]
\[^{355}\text{Legislating the Criminal Code: Involuntary Manslaughter, Law Com No 237 (1996).}\]
\[^{356}\text{LC 304, para 3.60.}\]
to create a broad-reaching offence in terms of bodies to which it will apply and the duties of care which will trigger liability, these are severely curtailed by the technical qualifications integral to that all important duty question and by the numerous and far reaching exclusions designed to protect public bodies. The layers of technicality serve to restrict the scope of liability far more than would at first appear, and are also likely to lead to substantial practical difficulties in prosecution.

15.3.1.2 Background
Public disquiet with the lack of a specific offence for corporate killing increased with each successive failure to secure convictions for gross negligence manslaughter in any of the large scale disasters such as the Southall, Paddington, Hatfield and Potter’s Bar rail crashes, the Zeebrugge (Herald of Free Enterprise) and Marchioness shipping disasters and the Piper Alpha and King’s Cross fires. With that list in mind, it seems startling that the Act has been such a long time in coming. The immediate background to the Act is traceable to the Law Commission Report from 1996 recommending the creation of a new offence of ‘corporate killing’. A corporation would commit this offence if its ‘management failure’ were a cause of a person’s death, and that failure fell far below what could reasonably be expected of the corporation in the circumstances. That proposal was, as Professor Wells noted, the start of the fundamental change in the UK to move the corporate manslaughter offence away from individual liability, bedevilled as it was by the identification doctrine, towards liability based on ‘management failure’.

The Law Commission Report was followed by a Home Office Consultation Paper in which the Government accepted the need for reform, recognizing the need to restore public confidence that companies responsible for loss of life can properly be held accountable in law. The Government ‘believes the creation of a new offence of corporate killing would give useful emphasis to the seriousness of health and safety offences and would give force to the need to consider health and safety as a management issue’. The Government was prepared to go further than the Law Commission, extending the offence to all ‘undertakings’ including unincorporated associations and other trades or businesses. Following a Report of the Home Affairs and Work and Pensions Committees in 2005, the Government finally responded in March 2006 with another Bill which, after much controversy in Parliament, became the present Act.

15.3.1.3 Problems with the old law
Aside from the symbolic benefits of a specifically labelled offence reflecting the particular wrongdoing involved in death caused by organizational mismanagement, three legal reasons for reform were apparent.

Identification doctrine
The identification principle was a major obstacle to securing a conviction under the common law offence of gross negligence manslaughter, particularly with a company of any size or with

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361 HC 540 I-III.
362 Para 3.1.9.
363 HC 540 I-III.
364 Cm 6755.
any complexity in its management structure. The doctrine is discussed in full in Chapter 10. It requires there to be an individual at a high enough level in the company who can be identified with the company as its ‘directing mind and will’ and who individually fulfils the elements of the gross negligence offence: fatality following a gross breach of a duty of care which posed a risk of death. The only successful prosecutions against corporate entities for gross negligence were in relation to small companies,365 where there is more likely to be a single person directly and immediately responsible for the death and who is senior enough to be regarded as the ‘directing mind and will’ of the company. There were few successful prosecutions for gross negligence manslaughter against corporations. Arguably the new law will retain this disproportionate effect on smaller companies since there is now a requirement that the senior manager(s) played a substantial part in the organizational failure leading to death. The smaller the company the more likely the ‘senior managers’ will have had a hand in formulating and implementing the relevant policy on safety, etc; the breach of which lead to the death.

**Aggregation**

Many critics of the identification doctrine questioned whether it must be proved that an individual controlling officer (whether identifiable or not) was guilty or whether it is permissible to ‘aggregate’ the conduct of a number of officers, none of whom would individually be guilty, so as to constitute in sum, the elements of the offence.366 In the context of gross negligence manslaughter, the argument was that a company owes a duty of care, and if its operation falls far below the standard required it is guilty of gross negligence. A series of minor failures by officers of the company might add up to a gross breach by the company of its duty of care. The argument was strengthened by the fact that such aggregation is permissible in tort367 and the concept of negligence is the same in the criminal law, the difference being one of degree – criminal negligence must be ‘gross’. This argument was, however, rejected by the Court of Appeal in the A-G’s Reference (No 2 of 1999).368 The prosecution arose from the Southall train crash in which seven passengers died. The trial judge ruled that the gross negligence manslaughter offence requires negligence to be proved under the identification doctrine. The Court of Appeal approved that ruling, holding that unless an identified individual’s conduct, characterized as gross criminal negligence could be attributed to the company, the company was not liable for manslaughter at common law.369

**Killing of a human by a human**

It was at one time thought370 that a corporation could not be convicted of an offence involving personal violence but, in *P&O European Ferries Ltd*,371 Turner J held that an indictment for

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365 See, eg, *Kite and OLL Ltd*, Winchester Crown Court, 8 Dec 1994, reported in *The Independent*, 9 Dec 1994; *R v Jackson Transport (Ossett) Ltd* reported in *Health and Safety at Work*, Nov 1996, p 4; *R v Great Western Trains Company (GWT)*, Central Criminal Court, 30 June 1999; *Roy Bowles Transport Ltd* (1999) *The Times*, 11 Dec. 366 See Taylor, *Blackstone’s Criminal Practice Bulletin* (Oct 2007). 367 *W. B. Anderson & Sons Ltd v Rhodes (Liverpool) Ltd* [1967] 2 All ER 850, Cairns J, discussed by M Dean, ‘Hedley Byrne and the Eager Business Man’ (1968) 31 MLR 322. 368 [2000] QB 796; considering *Great Western Trains Co* (1999) 3 June, CCC. It was also rejected in Scotland in *Transco v HM Advocate* 2004 SLT 41. See also *R (Bodycote) v HM Coroner for Hertfordshire* [2008] EWCA Crim 164. 369 The court’s conclusion that there can in general be no corporate liability in the absence of an identified human offender ignores the principle discussed above of corporate liability where a duty is specifically imposed on the corporation as a legal person: *Birmingham & Gloucester Railway (1842)* 3 QB 223. 370 *Cory Bros Ltd* [1927] 1 KB 810 (Finlay J, holding that a corporation could not be indicted for manslaughter or an offence under the *Offences Against the Person Act 1861*, s 31), a ruling of which Stable J said in *ICR Haulage Ltd* [1944] KB 551, ‘if the matter came before the court today, the result might well be different’. 371 (1990) 93 Cr App R 72. [1991] Crim LR 695 and commentary. Streetfield J ruled that an indictment for manslaughter would lie in *Northern Strip Mining Construction Co Ltd* (Glamorgan Assizes, 1 Feb 1965, unreported)
manslaughter would lie against the company in respect of the Zeebrugge disaster. The persuasive authority of this ruling is not impaired by the judge’s subsequent decision that, on the evidence before him, the company had no case to answer. The rejected argument was based on the fact that, from the time of Coke (1601), authoritative books had described manslaughter as ‘the killing of a human being by a human being’. This definition found its way into the law of some states of the USA and, via Stephen’s draft Code Bill of 1880, into the New Zealand Crimes Acts of 1908 and 1961. The effect was that the New Zealand Court of Appeal decided in Murray Wright Ltd[373] that a corporation could not be guilty of manslaughter as a principal. Turner J did not follow that decision. Coke’s purpose in using the phrase ‘by a human being’ was not to exclude corporations from liability – corporations were not indictable for any crime at that time – but to distinguish killings by an inanimate thing or an animal without the fault of any person. Such killings then had legal consequences but were not murder or manslaughter. Moreover, the requirement of an act or omission by a human being is not peculiar to manslaughter. All crimes are acts or omissions, or the results of acts or omissions, by human beings. It is not manslaughter if a person is killed by an earthquake, or a thunderbolt, or a wild animal in the jungle. Conspiracy is committed contrary to s 1 of the Criminal Law Act 1977 ‘if a person agrees with any other person’ but an agreement between two human beings is required to make a conspiracy.[374] A corporation can be convicted of conspiracy but only if at least one of the human beings is a controlling officer of the corporation acting within the scope of his authority.

15.3.2 The new offence

15.3.2.1 The offence

Section 1 of the Act provides:

(1) An organisation to which this section applies is guilty of an offence if the way in which its activities are managed or organised –

(a) causes a person’s death, and

(b) amounts to a gross breach of a relevant duty of care owed by the organisation to the deceased….

(3) An organisation is guilty of an offence under this section only if the way in which its activities are managed or organised by its senior management is a substantial element in the breach referred to in subsection (1).

The offence follows many of the core aspects of gross negligence manslaughter. The crucial difference is that ‘rather than being contingent on the guilt of one or more individuals, liability for the new offence depends on a finding of gross negligence in the way in which the activities of the organisation are run’. The statutory offence, in a reversal of the common law, is focused on the aggregate responsibility of the senior managers. The Home Office Explanatory Notes describe this as the ‘management failure’, but that phrase is not part of the statute.

but the corporation was acquitted on the merits. Maurice J’s decision in a civil action, S and Y Investments (No 2) Pty Ltd v Commercial Co of Australia Ltd (1986) 21 App R 204 at 217, required a ruling that a company was guilty of manslaughter. A company, OLL Ltd, was convicted of manslaughter at Winchester Crown Court, 8 Dec 1994, following a canoeing tragedy in Lyme Bay.

372 See, eg, Stephen, Digest (1st edn, 1877) art 218 and subsequent editions.


375 Home Office Explanatory Notes, para 14.
15.3.2.2 Relationship to other homicide offences

The Act abolishes gross negligence manslaughter as far as it applies to corporations and other bodies to which the 2007 Act applies (s 20). The Act also provides that individuals cannot be liable as a secondary party to an offence of corporate manslaughter (s 18(1)). Individuals within companies can, of course, still be prosecuted for gross negligence manslaughter as principal offenders subject to what has been said above. The House of Commons Committee had recommended that individual managers who connived in the organization’s wrongdoing could be personally liable for corporate manslaughter, but this was rejected by the Government. This attempt at a strict division between organisational and individual fault may pose problems. If an individual defendant is charged alongside a company in the same proceedings the jury will be faced with two different tests of manslaughter liability. An organization can, although this is much less likely, be convicted of unlawful act manslaughter in appropriate circumstances (for example, where D is the manager of a company who encourages employee X to set fire to the company premises in an insurance scam which leads to the death of V on the premises). The corporation may also be liable as an accessory to the principal individual offender in other homicide offences, such as causing death by dangerous driving.

In terms of Health and Safety Act offences, an offending organization can be liable under the 2007 Act and under the relevant health and safety legislation (s 19(1)). Additionally, nothing in the 2007 Act precludes liability for a health and safety offence against an organization which has already been convicted of corporate manslaughter (s 19(2)). The relationship between the health and safety legislation and the new offence is an interesting one. The Government eschewed a model of constructive manslaughter where a breach of health and safety legislation which lead to death could found liability for corporate manslaughter. Liability under the Act is, instead, based on duties founded in the civil law of negligence. However, the breaches of health and safety legislation will not be irrelevant since the jury are directed that they must have regard to such breaches in establishing whether the organization has been grossly at fault (s 8).

15.3.2.3 Which ‘organizations’ are caught?

Section 1(5) provides that the offence under this section is called: (a) corporate manslaughter, in so far as it is an offence under the law of England and Wales. This is misleading because it can also be committed by certain organizations other than corporations. Section 1(2) defines the organizations to which the new offence applies, which includes, most obviously, corporations. Section 1(2) also applies the offence to police forces,

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376 By s 27(4) ‘any liability, investigation, legal proceeding or penalty for or in respect of an offence committed wholly or partly before the commencement of that section’ remains, and by s 27(5) an offence is committed wholly or partly before the commencement if ‘any of the conduct or events alleged to constitute the offence occurred before that commencement’. It is clear that there is no gap left in the law: gross negligence manslaughter remains available in all those circumstances.

377 The Home Office Consultation Paper in 2000 had suggested that there should be responsibility for corporate manslaughter placed on individual directors in appropriate cases but this attracted strong opposition.

378 Cf the argument advanced by C Wells, Corporations and Criminal Liability (2001) 120.


380 Defined in s 25 to mean ‘any statutory provision dealing with health and safety matters, including in particular provision contained in the Health and Safety at Work etc Act 1974’.

381 See also FB Wright, Criminal Liability of Directors and Senior Managers for Deaths at Work’ [2007] Crim LR 949.

382 By s 25, ‘corporation’ does not include a corporation sole but includes any body corporate wherever incorporated. This includes companies incorporated under companies legislation, as well as bodies incorporated under statute (as is the case with many non-Departmental Public Bodies and other bodies in the public sector) or by Royal Charter.
partnerships,383 (Limited Liability Partnerships Act 2000 are caught by the definition of corporation in any event), trade unions384 and employers’ associations,385 if the organization concerned is an employer. Schedule 1 lists the Government Departments to which the offence applies. There are some 40 such departments.386 These include some in which it is not difficult to imagine how corporate manslaughter liability might arise because of the functions they perform, for example Department of Transport, Department of Health, Forestry Commission. With some it may seem a little less likely, for example Revenue and Customs, CPS, ARA, National Audit Office – but since liability can arise as a result of being an employer or occupier, it is not difficult to see how they might be liable for a death.387

In the course of debates in the House of Lords it was emphasized how important is the extension of the offence to public bodies:

[T]here is no reason why the death of an individual in one situation should be considered less of a death, or less deserving of justice, merely because that situation was presided over by government officials as opposed to privately employed foremen. Indeed, it is all the more of a tragedy and contravention of the natural principle of justice where the state itself acts with such gross negligence that the very lives of its own citizens are forfeit.388

Crown Immunity is removed by s 11. Section 11(2) provides that a Crown organization is to be treated as owing whatever duties of care it would owe if it were a corporation that was not a servant or agent of the Crown. However, as will be explained below there are a number of respects in which that liability is very heavily qualified in ss 3 to 7.

Partnerships are to be treated as owing whatever duties of care they would owe if they were a body corporate (s 14(2)).

15.3.3 Elements of the offence

In summary there must be:

- a relevant duty owed to the victim;
- the breach of the duty by the organization must be as a result of the way the activities are managed or organized;
- a substantial element of the breach of the duty must be due to the way the senior management managed or organized activities;
- the breach of the duty must be a gross one;
- V’s death was caused by the breach of the duty.

383 By s 25, ‘partnership’ means: (a) a partnership within the Partnership Act 1890, or (b) a limited partnership registered under the Limited Partnerships Act 1907, or a firm or entity of a similar character formed under the law of a country or territory outside the United Kingdom. See also Stevenson & Sons, above p 255.
384 By s 25, ‘trade union’ has the meaning given by s 1 of the Trade Union and Labour Relations (Consolidation) Act 1992.
385 By s 25, ‘employers’ association’ has the meaning given by s 122 of the Trade Union and Labour Relations (Consolidation) Act 1992.
386 Provision is made in s 16 for the circumstances in which relevant functions are transferred between one Government Department and another or between the other bodies listed in Sch 1, and for cases in which a relevant Government agency is privatized.
387 The list of organizations to which the offence applies can be further extended by secondary legislation, eg, to further types of unincorporated association, subject to the affirmative resolution procedure (s 21). The list of Government Departments in Sch 1 may be changed by the negative resolution procedure (eg the name of a particular department) unless the change is to alter the range of activities or functions in relation to which the s 1 offence applies, in which case the affirmative resolution procedure applies.
388 Hansard HL text for 15 Jan 2007, col GC189 (Lord Hunt).
15.3.3.1 A relevant duty

The definition of a ‘relevant duty of care’ is provided in s 2 of the Act:

(1) A ‘relevant duty of care’, in relation to an organisation, means any of the following duties owed by it under the law of negligence –

(a) a duty owed to its employees or to other persons working for the organisation or performing services for it;
(b) a duty owed as occupier of premises;
(c) a duty owed in connection with –
   (i) the supply by the organisation of goods or services (whether for consideration or not),
   (ii) the carrying on by the organisation of any construction or maintenance operations,
   (iii) the carrying on by the organisation of any other activity on a commercial basis, or
   (iv) the use or keeping by the organisation of any plant, vehicle or other thing;
(d) a duty owed to a person who, by reason of being a person within subsection (2), is someone for whose safety the organisation is responsible [arising where V is in custody].

(3) Subsection (1) is subject to sections 3 to 7.

The duties reflect the duties of care arising at common law. The duty is that owed in the common law of negligence,389 or, where applicable the statutory duty which has superseded the common law duty, for example, the Occupiers’ Liability Act 1957. It is made clear by s 2(4) that a duty owed under the law of negligence will apply if the common law duty of negligence has been superseded by statutory provision imposing strict liability. The Explanatory Notes give the example of the Carriage of Air Act 1961. The most important thing to remember is that the criminal offence does not impose new duties, it is based on the existing duties which are present in civil law – either by statute or common law. The requirement of proving a duty will add to the complexity of the prosecution.

The most frequently arising duties are likely to be from relationships as employers and occupiers, and duties arising from these activities are also of special significance when it comes to identifying the scope of the exemptions for certain types of organization/activity.390

It is easy to see how the categories might give rise to duties of care which, if breached, could lead to fatalities. Duties as employer would include duties to provide safe places of work. Note that the duty as an employer extends beyond the scope of employees as strictly defined and includes sub-contractors, and volunteer workers, etc. Duties as occupier of premises will render organizations liable if there are, eg faulty electrical wiring, dangerous staircases, etc. ‘Premises’ includes land, buildings and moveable structures (s 25); a duty owed in connection with the supply by the organization of goods might arise from provision of foodstuffs; duties arising from the provision of services (whether for consideration or not), would include most obviously rail travel and other transport; duties from the carrying on by the organization of any construction or maintenance operations391 would include building operations.

389 Section 2(7) specifies, for the avoidance of doubt, that ‘the law of negligence’ includes: (a) in relation to England and Wales, the Occupiers’ Liability Act 1957, the Defective Premises Act 1972 and the Occupiers’ Liability Act 1984.
390 See below, p 544.
391 Section 2(7) further defines ‘construction or maintenance operations’ to mean ‘operations of any of the following descriptions – (a) construction, installation, alteration, extension, improvement, repair, maintenance,
This provision overlaps significantly with the previous category of supply of goods or services. It was included to avoid any lacunae where the construction operator was not acting ‘commercially’ – as might be argued with some public sector bodies. Duties arising from the carrying on by the organization of any other activity on a commercial basis was a category included in case activities such as farming or mining were not regarded as involving the provision of services, etc. Duties arising from the use or keeping by the organization of any plant, vehicle or ‘other thing’ could be extremely wide ranging.

The most controversial category is that relating to duties arising from detention. Lord Ramsbotham, former Chief Inspector of Prisons, was successful in the House of Lords in amending the Bill to include what is now s 2(1)(d). There was considerable Government opposition and the Bill almost lapsed. The final compromise position reached was that the commencement of this element requires the further approval of Parliament. By s 27, an order by the Secretary of State to commence s 2(1)(d) is subject to the affirmative resolution procedure, and will require approval in both Houses of Parliament before it takes effect. The most difficult issue, and one which engaged the House of Lords, was the question whether suicides in detention would give rise to liability where the relevant agency, for example the Prison Service, could or should have prevented it.392

Section 2(2) lists the various forms of custody or detention393 which will trigger a duty:

(2) A person is within this subsection if –
   (a) he is detained at a custodial institution or in a custody area at a court or police station;
   (b) he is detained at a removal centre or short-term holding facility;
   (c) he is being transported in a vehicle, or being held in any premises, in pursuance of prison escort arrangements or immigration escort arrangements;
   (d) he is living in secure accommodation in which he has been placed;
   (e) he is a detained patient.

Deaths in custody give rise to problems because of the particular status of the victim; that by definition the activities will be occurring within ‘premises’; and the fact that the organization providing the detention ‘service’ is one which will have to make public policy decisions as to allocation of resources, etc (and therefore in some cases the duty would be excluded under s 3).394

Although the Government intention was not to introduce liability in this category for a further three years, there may be circumstances in which the broad terms of s 2(1) trigger liability for a death in custody. The answer to whether there is a relevant duty involves a most convoluted evaluation of whether there is a duty and whether the exemptions apply. If the death is attributable to a resourcing issue, the duty of care will be one relating to a decision on a matter of public policy and therefore be totally excluded by s 3(1). Preventable deaths due to poor management of the resources provided (rather than due to public policy decisions about resource allocation which will be excluded by s 3(1)) may fall within s 2, but s 3(2) must be borne in mind. That section excludes the duty of care in relation to ‘the exercise of an exclusively public decoration, cleaning, demolition or dismantling of – (i) any building or structure, (ii) anything else that forms, or is to form, part of the land, or (iii) any plant, vehicle or other thing; (b) operations that form an integral part of, or are preparatory to, or are for rendering complete, any operations within paragraph (a).’

392 Under the new division of power, prisons come under the responsibility of the Ministry of Justice. The list of Government Departments as enacted in Sch 1 will need to be amended.
393 The various categories are further defined in s 2(7). Section 23 provides a power to the Secretary of State to add to those categories listed in s 2(2), to whom a ‘relevant duty of care’ is owed by reason of s 2(1)(d).
394 See below, p 545.
function’, and this would include detaining offenders in prison. However, that exclusion does
not include duties under s 2(1)(a) or (b). It is unlikely that s 2(1)(a) would found a duty in relation
to a suicide, etc, as it imposes the organization’s duty as employer to, eg prison officers.
There is, however, possibility of liability under s 2(1)(b) if the organization’s duty is as occupier.
As parliamentary debates accept, if a brick fell off a wall because of poor maintenance and
killed a prisoner, that would be within the Act as in force since the duty of care was the ordinary
one owed by an occupier of premises. To what extent does the prison authority’s duty arising
from its position as an occupier, (under the Occupiers Liability Act 1957) apply not merely to
the cases where injury arises from the state of the premises, but from activity on the premises?
The 1957 Act imposes duties which an occupier of premises owes to his visitors ‘in respect of
dangers due to the state of the premises or to things done or omitted to be done on them’. As
Taylor observes, ‘the very fact that it was thought necessary to add s 2(1)(d) suggests that there
are some aspects that are not covered by the duty as occupier . . . Perhaps a distinction has to be
drawn (but not a very satisfying or persuasive one) between these “normal” occupier duties
and those arising from the special problems arising from the fact that the “visitors” are in cus-
tody, are often disturbed or vulnerable and are subject to special risks such as suicide (or harm
from other inmates or mistreatment by their custodians) as a result.’

Duty issues under s 2

Given the potential breadth of the categories of duty and examination of the common law
which might be necessary to determine whether a duty does exist, it is reassuring to see that
the question whether a duty of care is owed is a question of law. It is for the judge to decide:
s 2(5). Moreover, ‘the judge must make any findings of fact necessary to decide that question’.
This latter provision about the judge finding facts is highly unusual and should be contrasted
with the common law position on gross negligence manslaughter where it was said that
‘whether a duty of care exists is a matter for the jury once the judge has decided that there is
evidence capable of establishing a duty’.

Section 2(6) makes it clear that the duty of care will not be excluded by ex turpi causa and
volenti doctrines. This is potentially very important. The scope of liability at civil law is
restricted in practice by the operation of these doctrines. However, the reason that they are
excluded as defences or limits on criminal liability in this context is easy enough to deduce.
The victim will in many cases not be properly described as taking a truly voluntary risk since
he will be compelled to do so by the organization acting as his employer, etc.

15.3.3.2 The breach must be as a result of the way
the activities are managed or organized

This second element of the offence is designed to ensure that the focus is on the so-called
‘management failure’. This test is not linked to a particular level of management but considers
how an activity was managed within the organization as a whole. It will now be possible to
combine the shortcomings of a wide number of individuals within the organization to prove
a failure of management by the organization. The language is designed to reflect the concen-
tration things done consistently with the organization’s culture and policies more generally.
It remains to be seen how easily this can be proved.

Senior management

The Act does, however, place a significant restriction on the organizational failure test. Under
s 1(3), the offence is committed by an organization only if ‘the way in which its activities

395 See Taylor, above, n 366.
396 ibid.
are managed and organised by its senior management is a substantial element in the breach referred to in subsection (1). Who are the senior managers? By s 1(4)(c): ‘senior management’, in relation to an organization, means the persons who play ‘significant roles’ in making: decisions about how the whole or a substantial part of its activities are to be managed or organised, or the actual managing or organising of the whole or a substantial part of those activities.

This extends beyond the narrow category of senior individuals who would be caught at common law by the identification doctrine being the ‘directing mind and will’.399

The senior managers’ management and organization must be a ‘substantial element’ in the breach of duty leading to death. Two important consequence flow from this aspect of the offence. First, since the senior managers’ involvement need only be a substantial element in the organization, etc, the involvement and conduct of others – ‘non-senior managers’ who are involved in the management and organization of activities – is also relevant. Secondly, when assessing the management failure the contribution of those individuals who are not senior management can be taken into account even if their involvement is ‘substantial’ provided it is not so great as to render the senior managers’ involvement something less than substantial. There can be more than one substantial element. No doubt the courts will say that a ‘substantial’ involvement is something that the jury can evaluate as an ordinary English word meaning more than trivial.

15.3.3.3 A ‘gross’ breach of duty?

The requirement of a gross breach of duty is clearly designed to echo the gross negligence manslaughter offence at common law. Section 2(4)(b) provides a more detailed explanation of the concept – a breach of a duty of care by an organization is a ‘gross’ breach if the conduct alleged to amount to a breach of that duty falls far below what can reasonably be expected of the organization in the circumstances. The language chosen is similar to that proposed by the Law Commission as a suitable form of words to replace gross negligence. The test retains a degree of circularity, although not to the extent of that in the common law offence of gross negligence manslaughter.

The jury’s duty in relation to determining the breach of duty is provided in s 8:

1. This section applies where –
   a) it is established that an organisation owed a relevant duty of care to a person, and
   b) it falls to the jury to decide whether there was a gross breach of that duty.

2. The jury must consider whether the evidence shows that the organisation failed to comply with any health and safety legislation[400] that relates to the alleged breach, and if so –
   a) how serious that failure was;
   b) how much of a risk of death it posed.

3. The jury may also –
   a) consider the extent to which the evidence shows that there were attitudes, policies, systems or accepted practices within the organisation that were likely to have encouraged any such failure as is mentioned in subsection (2), or to have produced tolerance of it;
   b) have regard to any health and safety guidance that relates to the alleged breach.

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399 Is the test too restrictive? Will companies seek to avoid this by nominating people in less senior positions to take responsibility for all health and safety policies?

400 Defined in s 8(5): “‘health and safety guidance’ means any code, guidance, manual or similar publication that is concerned with health and safety matters and is made or issued (under a statutory provision or otherwise) by an authority responsible for the enforcement of any health and safety legislation.”
(4) This section does not prevent the jury from having regard to any other matters they consider relevant.

This section deals with factors to be taken into account by the jury (the offence is only triable on indictment). Note that the jury ‘must’ consider these issues. Note also that the jury is obliged to consider whether the ‘organization’ complied, not just whether its senior management complied. This further supports the argument that the activities of non-senior managers are relevant in determining whether there has been a management failure. Section 8(3) emphasizes that the jury may have reference to general organizational and systems failures. This section has been influenced, as has much of this Act, by the Australian legislation and academic comment in Australia.

15.3.3.4 Causing death

There must be a death of a person. Causation must be established in accordance with orthodox principles. Difficulties may arise where the organization alleges that the individual employee has, with his free voluntary informed fatal act, broken the chain of causation.

15.3.4 Excluded duties

The most important aspect of the legislation is not the scope of relevant duty and of potential liability under s 1 and s 2, but rather what the Government excluded from the scope of liability under ss 3 to 7. The excluded categories of duty are considerable. The different categories and sub-categories of duty also make the interpretation of whether a duty is owed rather more complex to unravel.

15.3.4.1 Public policy

The broadest exclusion is provided in s 3(1) and deals with decisions of public policy taken by public authorities.

Any duty of care owed by a public authority in respect of a decision as to matters of public policy (including in particular the allocation of public resources or the weighing of competing public interests) is not a ‘relevant duty of care’.

This excludes liability where a death is due to a public authority’s decision not to allocate appropriate resources to a particular service. The section is seeking to reflect the distinction between ‘operational’ and ‘public’ policy matters in the law of tort. The manner in which a public authority implements its duty in practice is justiciable in negligence, but the way it exercises its statutory discretion is not. In X v Bedfordshire County Council, Lord Browne-Wilkinson said that, ‘a common law duty of care in relation to the taking of decisions

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401 See further B Fisse and J Braithwaite, Corporations, Crime and Accountability (1993).
402 See Ch 4.
403 See Kennedy (No 2) [2007] UKHL 38. However, it is arguable that the decision in Latif [1996] 1 WLR 104 would apply because the employee and organization are acting in concert.
405 [1995] 2 AC 633, HL.
involving policy matters cannot exist’. The courts have continually struggled with the dividing line and it has been recognized that the test is very difficult to apply. It remains to be seen to what extent will the criminal courts be willing to engage in detailed evaluations of the common law on this issue.

If a relevant public authority therefore decides not to deploy resources to, eg, buy a particular drug for patients suffering a particular illness, no duty arises. If, having made the decision to supply the drug, there is negligence in the way it is supplied/administered, etc, liability may arise. Interesting issues could arise in a trial in which the breach is of a duty owed by a private company and a public body where they have joint responsibility for managing an activity. The effect of the exemptions would be stark.

Section 3(2) provides a less extensive exclusion in relation to things done ‘in the exercise of an exclusively public function’:

(2) Any duty of care owed in respect of things done in the exercise of an exclusively public function is not a ‘relevant duty of care’ unless it falls within section 2(1)(a), (b) or (d).

(3) Any duty of care owed by a public authority in respect of inspections carried out in the exercise of a statutory function is not a ‘relevant duty of care’ unless it falls within section 2(1)(a) or (b).

(4) In this section –

‘exclusively public function’ means a function that falls within the prerogative of the Crown or is, by its nature, exercisable only with authority conferred –

(a) by the exercise of that prerogative, or

(b) by or under a statutory provision;

‘statutory function’ means a function conferred by or under a statutory provision.

The duty of care owed as employer or occupier or custodian under s 2(1)(a) or (b) or (d) still applies in these circumstances. This excludes only public functions involved in s (2)(1)(c), notably the supply of goods or services and construction work, etc. The exemption was not supported by consultees in the Government’s consultation exercise.

15.3.4.2 Military activities: s 4

Many of the activities performed by the armed forces will be excluded by virtue of s 3(2) (above). Section 3(2) does not prevent liability arising as an employer or occupier. Section 4 goes further by providing a total exclusion for some activities. There is no relevant duty for:

operations, including peacekeeping operations and operations for dealing with terrorism, civil unrest or serious public disorder, in the course of which members of the armed forces come under attack or face the threat of attack or violent resistance.

Neither is there liability for preparation and support of military operations of that description, nor training of a hazardous nature, or training carried out in a hazardous way, which it is considered needs to be carried out, or carried out in that way, in order to improve or maintain the effectiveness of the armed forces with respect to such operations.

406 ibid, at 738.
407 Phelps v Hillingdon LBC [2001] 2 AC 619, HL. See further, Horder, above, n 357.
409 By s 12(1) ‘the “armed forces” means any of the naval, military or air forces of the Crown raised under the law of the United Kingdom.
410 Will there be a problem in ECHR terms if the army cannot be prosecuted for killing? Arguably there will be no breach of Art 2 because an intentional killing will be prosecutable as murder on the part of the officer
The armed forces will owe a duty as an employer or occupier other than in those circumstances.\(^{411}\)

### 15.3.4.3 The Police: s 5

The exemptions provided for police activities are also complex. Two categories exist. Sections 5(1) and 5(2) create a total exemption – that is, no relevant duty arises for some types of policing activity. In short these are where there are operations in relation to terrorism or civil unrest. More fully, there is no duty on the organization where officers or employees of the public authority in question are engaged in operations for dealing with terrorism, civil unrest or serious disorder, which involve them coming under attack, or facing the threat of attack or violent resistance, or those involving the carrying on of policing or law-enforcement activities (s 5(2)). Nor is there a duty when the police are preparing for those types of operations, or training to enable them to carry out such operations.

In other circumstances, by s 5(3) a 'relevant duty of care' is owed where the organization is acting as employer, occupier or custodian (that is, s 2(1)(a), (b) or (d)). This exemption will exclude circumstances where a member of the public has been killed in the pursuit of law-enforcement activities. The Explanatory Notes suggest that this includes:

- decisions about and responses to emergency calls, the manner in which particular police operations are conducted, the way in which law enforcement and other coercive powers are exercised, measures taken to protect witnesses and the arrest and detention of suspects.

Professor Horder has suggested\(^{415}\) that the extent of the exceptions in ss 4 and 5 is unwarranted and that the result may be to leave individuals at risk of liability when the agency is the one at fault. He suggests also that the exemption was unnecessary having regard to the need for the DPP’s consent. This is debatable. For Parliament to have fixed these activities as off-limits is one thing. To expect the DPP to have to make policy decisions such as the exemption of the police in a case of fatality is to subject him to media censure for whatever decision is made, and to diminish the level of certainty in the law.

### 15.3.4.4 Emergency services: s 6

In the law of tort, considerable difficulties have arisen in identifying the scope of the duty of care owed by the emergency and rescue services in the course of performing rescue activity. Section 6 puts beyond doubt that the corporate manslaughter offence does not apply generally to these agencies when responding to emergencies.\(^{416}\) Approximate consistency with the civil law is secured by excluding liability arising from delay in response to an emergency, or involved.

\(^{411}\) By s 12(2), a person who is a member of the armed forces is to be treated as employed by the Ministry of Defence.

\(^{412}\) There is no liability for special forces: ‘Any duty of care owed by the Ministry of Defence in respect of activities carried on by members of the special forces is not a “relevant duty of care”’ (s 4(3)). This is presumably necessary to allow for more extreme forms of training. By s 4(4), ‘the “special forces” means those units of the armed forces the maintenance of whose capabilities is the responsibility of the Director of Special Forces or which are for the time being subject to the operational command of that Director’.

\(^{413}\) Section 13 provides that police officers are to be treated as the employees of the police force for which they work (and are therefore owed the employer’s duty of care by the force). It also ensures that police forces are treated as occupiers of premises and that other conduct is attributable to them as if they were distinctly constituted bodies.

\(^{414}\) This could include other authorities such as SOCA or immigration officials: s 5(4).

\(^{415}\) Above, n 357, at 119.

\(^{416}\) Emergency circumstances include circumstances that are believed to be emergency circumstances: s 6(8). This deals with the circumstances in which the response is to a hoax call.
the level of skill exercised in responding to the operation. The relevant emergency services protected by this exclusion are: the fire and rescue authorities and other emergency response organizations providing fire and rescue services; NHS bodies and ambulance services or blood/organ transport; the Coastguard and RNLI; the armed forces (either responding to military emergency such as a fire on a base or when assisting the civilian rescue services). By s 6(7), emergency circumstances are defined in terms of those that are life-threatening or which are causing, or threaten to cause, serious injury or illness or serious harm to the environment or buildings or other property.

The emergency services may still be liable for a death arising from their status as employer or occupier even where the death arises in the course of an emergency (s 6(5)). The exemption also does not apply to duties that do not relate to the way in which a body responds to an emergency, for example, duties to maintain vehicles in a safe condition; these will be capable of prosecution under the offence. There is no exemption from liability for medical treatment itself, or decisions about this (other than decisions that establish the priority for treating patients). Matters relating to the organization and management of medical services will therefore be within the ambit of the offence (s 6(4)).

15.3.4.5 Child protection and probation: s 7
Section 7 limits the duty of care that a local authority or other public authority owes in respect of the exercise of its functions under Parts 4 and 5 of the Children Act 1989. In relation to the carrying on of those duties, a relevant duty arises for the purposes of s 1 only in relation to its activities as employer, occupier and duties relating to detention (s 2(1)(a), (b), (d)). There is no relevant duty, for example, if a child was not identified as being at risk and taken into care and was subsequently fatally injured. Similarly, any duty of care that a local probation board or other public authority owes in respect of the exercise by it of functions under Part 1 of the Criminal Justice and Court Services Act 2000 is excluded. In relation to carrying out those duties a relevant duty arises for the purposes of s 1 only in relation to its activities as employer, occupier and duties relating to detention (s 2(1)(a), (b), (d)).

15.3.5 Procedure
The offence of corporate manslaughter is triable only on indictment (s 1(6)), and a prosecution may not be instituted without the consent of the DPP (s 17(1)). Proceedings against partnerships for the offence are to be brought in the name of the partnership (and not in that of any of its members) (s 14(2)). Any fine imposed on a partnership is to be paid out of the funds of the partnership (s 14(3)). Further provision is made in s 15 for evidential and procedural mechanisms to apply to organisations which are not corporations. The section ensures that the relevant evidential and procedural provisions apply, in the same way as they apply to corporations, to all those Government departments or other bodies listed in Sch 1, as well as to police forces and those unincorporated associations covered by the offence.

15.3.5.1 Jurisdiction
Section 28 deals with extent and territorial application. The Act extends to the whole of the United Kingdom. Section 1 applies if the harm resulting in death is sustained: in the United Kingdom; or within the seaward limits of the territorial sea adjacent to the United Kingdom;

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417 Those effecting sea rescue are also exempt in a very wide exclusionary provision.
418 Other than limited liability partnerships, which are corporate bodies and covered by the new offence as such.
on a British registered ship, British-controlled aircraft; a British-controlled hovercraft; in, on or above, or within 500 metres of, an offshore installation in United Kingdom territorial waters or a designated area of the United Kingdom’s continental shelf (s 28(3)).

Section 28(4) provides that:

For the purposes of subsection (3)(b) to (d) harm sustained on a ship, aircraft or hovercraft includes harm sustained by a person who –

- is then no longer on board the ship, aircraft or hovercraft in consequence of the wrecking of it or of some other mishap affecting it or occurring on it, and
- sustains the harm in consequence of that event.

Section 1 will therefore still apply if the harm resulting in death is sustained as a result of an incident involving a British vessel, but the victim is not physically on board when he suffers that harm. It will not apply if the incident involves a non-British vessel in international waters.

15.3.5.2 Penalties

An organization guilty of corporate manslaughter is liable to an unlimited fine (s 1(6)). In addition, the court has power on the application of the prosecution to impose a remedial order against an organization convicted of corporate manslaughter requiring it to take specified steps to remedy: the breach; any matter appearing to have resulted from it and to have been a cause of the death; or any health and safety deficiency in the ‘organisation’s policies, systems or practices’ appearing to be indicated by the breach (s 9(1) and (2)). This provision is also heavily influenced by Australian experience. Any such order must be on ‘such terms (whether those proposed or others) as the court considers appropriate having regard to any representations made, and any evidence adduced, in relation to that matter by the prosecution or on behalf of the organisation’ (s 9(2)).

Section 9(4) provides for the form of a remedial order. It must specify a period within which the remedial steps are to be taken and may require the organization to supply evidence of compliance. Periods specified may be extended or further extended by order of the court on an application made before the end of that period or extended period. An organization which fails to comply with a remedial order commits an offence triable only on indictment and punishable with an unlimited fine (s 9(5)). There appears to be nothing to prevent the conviction of a director as an accessory to this offence.

In addition, the court has power to impose a ‘publicity order’ under s 10 ‘requiring the organisation to publicise in a specified manner’ its conviction, specified particulars, the amount of any fine and the terms of any remedial order. Before imposing such an order, the court must ascertain the views of any relevant enforcement authority as it considers appropriate, and have regard to any representations made by the prosecution or the organization. The form of a remedial order must specify a period within which the publicity order must be complied with, and may require the organization to supply evidence of compliance. An organization which fails to comply with an order commits an offence triable only on indictment and punishable with an unlimited fine (s 10(4)). Section 10 was added to the Bill during its passage in the House of Lords. It is clearly predicated on the assumption (probably correct) that large organizations are more concerned about adverse publicity than a fine.

The Sentencing Advisory Panel recommends a fine with a starting point of 5 per cent of the turnover of the organization.419

419 Consultation (2007).