

Homicide Laws in Other Jurisdictions

1. Introduction

1.1 This Paper is a companion piece to our Discussion Paper on the Mental Element in Homicide,¹ intended to provide more detail on the homicide laws that exist in selected other jurisdictions around the world. The Discussion Paper contains references to particular aspects of the homicide laws of other jurisdictions throughout by way of comparison in its examination of specific issues arising in the Scots law of homicide. However, this Paper sets out the broader structure of the homicide laws in some of those jurisdictions in an attempt to give more context for the reader.

1.2 While Lord Gill, in the case of *Petto v HM Advocate*,² did not mention which particular jurisdictions he believed displayed a “greater maturity” in relation to homicide law, the following jurisdictions have been examined as part of this project: Italy, South Africa, Australia, USA, England and Wales, Ireland, and New Zealand.

1.3 Why have these particular jurisdictions been chosen? Lord Gill referred to “English-speaking jurisdictions”, and accordingly a selection of those countries has provided the main focus for comparison. Nevertheless Italy has been selected as an example of a civilian system that offers a striking contrast to the Scottish system (and indeed most common law jurisdictions) in terms of both its homicide offence structure and its procedure. In respect of the English-speaking jurisdictions, South Africa (as a mixed system) is perhaps most closely aligned to Scotland, and has a similar structure of homicide law. England and Wales, and Ireland, have been chosen as our neighbouring jurisdictions who have attempted homicide reform. The USA and Australia provide us with a federal perspective, while New Zealand has been specifically selected given the reference made to it by Lord Rodger in *Drury v HM Advocate*,³ while also offering an interesting example of an entirely codified law of homicide.

2. Italy

2.1 In terms of the *Codice Penale*, there are five categories of homicide: homicide, aggravated homicide; pre-intentional homicide (injury resulting in death), negligent (culpable) homicide, and homicide as a consequence of another crime. The Code sets out the offences in separate articles, and specifies the penalty to be applied under each one. Article 42 provides that in order to be criminally liable for any offence, there must be intent (*dolo*). However, there are two exceptions to the general rule:

¹ Scottish Law Commission, *Discussion Paper on the Mental Element in Homicide* (Discussion Paper No 172, 2021).

² 2011 SCCR 519. See para [21] when Lord Gill, then Lord Justice Clerk, states “...I have the impression that other English-speaking jurisdictions may have attained greater maturity in their jurisprudence on this topic [ie “the mental element in murder and culpable homicide in contemporary Scots law”] than Scotland has.”

³ 2001 SCCR 583.

No one may be punished for an act designated by law as a crime if he has not committed it intentionally (*doloso*), except in cases of pre-intentional (*preterintenzionale*) or negligent (*colposo*) crimes designated by law (Article 42).

2.2 Article 43 then defines when an offence is intentional, pre-intentional, or negligent:

Intentional: A crime is intentional when “the harmful or dangerous event which is the result of an act or omission is foreseen (*preveduto*) and desired (*voluta*) by the actor as a consequence of his own act or omission”. By applying the doctrine of *dolo eventuale* to the definition of intention under Article 43, it follows that the death of the victim, even if not wanted, may nevertheless be considered *volute*: if the accused contemplated that death might occur and was prepared to take that risk, he is held to have acted intentionally if death occurs.⁴ The primary focus is on the accused’s willingness to endanger life, rather than on the probability of the risk materialising (for example, whether the risk was significant or remote). In that context, the Italian courts focus on the accused’s subjective state of mind, not on the objective risk.⁵

Pre-intentional (preterintenzionale): A crime is pre-intentional when “the act or omission is followed by a harmful or dangerous event more serious than that desired by the actor.” This is a form of constructive intention: if an accused intended to produce one particular result (say, assault), and a more serious one occurs (death), he is deemed to have intended that serious result, even if it cannot be proved whether or not he realised the risk of that serious outcome.⁶

Negligent (colposo): A crime is negligent when it is contrary to intention:

“The event, even though foreseen, is not desired and occurs because of negligence, recklessness, lack of skill, or failure to observe law, regulations, orders or disciplines.”

A doctor might commit such a crime through lack of skill, or a driver as a result of driving while tired.⁷ The explicit “contrary to intention” indicates offences of a lesser degree of blameworthiness (a refinement not expressly available in the Scottish definition of culpable homicide, but no doubt recognised in sentence).

2.3 The five categories are therefore:

(i) *Homicide (omicidio)*: The equivalent of murder in Scotland:

“Whoever causes the death of a human being shall be punished by imprisonment for not less than twenty-one years (Article 575).”

⁴ Thus in Cass, sez 1, 25 Maggio 1981, Andraous, Cass Pen 1982, 1535: a defendant used a hostage as a human shield, thinking that it was a remote possibility that the police would open fire: the police did open fire, killing the hostage: conviction for murder upheld by the Supreme Court of Cassation.

⁵ In England, the jury are directed that they “are not entitled to infer the necessary intention, unless they feel sure that death or serious bodily harm was a *virtual certainty* as a result of the defendant’s actions and that the defendant appreciated that such was the case” (*R v Woollin* [1999] 1 AC 82).

⁶ ME Badar, “Dolus Eventualis and the Rome Statute Without It” 2009 12(3) New Crim LR 433.

⁷ A Di Amato, *Criminal Law in Italy* (1st edn 2011) p 85.

(ii) *Aggravated homicide (omicidio aggravato)*: There is a list of aggravating circumstances under Articles 576 and 577 (for example, premeditation, torture, fleeing from justice, perverting the course of justice, child prostitution, rape, police officer victim). The crime reflects the depravity of certain types of killing.⁸

(iii) *Pre-intentional homicide/injury resulting in death (omicidio preterintenzionale)*: Where an assault results in a death, the crime (Article 584) is similar to the Scots law of culpable homicide.

(iv) *Negligent (culpable) homicide (omicidio colposo)*: This offence (Article 589) provides another example of the narrow and distinct categories of homicide offences in Italian law. Examples include medical professionals who negligently cause death. In Scotland there are very few (if any) prosecutions of such a nature. Either a civil action for damages or prosecution under health and safety legislation would be brought in practice.

(v) *Homicide as a consequence of another crime*: Scots law does not have a directly comparable offence.⁹ The “other crime” excludes assault. Drug supply cases have been prosecuted under this category.¹⁰

3. South Africa

3.1 Homicide law in South Africa is common law, not statute. There are three homicide offences: murder, culpable homicide, and infanticide. The *mens rea* is intent and negligence respectively. Only murder with aggravating circumstances attracts the mandatory life sentence.¹¹ In contrast with the bi-partite classification in Scotland,¹² under South African law the mental element for murder is solely intent. There are three forms of intention.

3.2 *Direct intention (dolus directus)*: This is intention in the normal sense of the word: wishing to achieve the result.¹³

3.3 *Indirect intention (dolus indirectus)*: Indirect intention is proved where the death of the victim is not the main goal, but death is substantially certain as a result of the conduct.¹⁴

3.4 *Dolus eventualis*: This applies where an accused foresees a consequence of his actions, reconciles himself with that risk, and carries on regardless.¹⁵ A four part test is

⁸ While in Scots law these aggravations would be reflected in the indictment and at the sentencing stage.

⁹ Although the doctrine of constructive malice may be relevant: see Scottish Law Commission, *Discussion Paper on the Mental Element in Homicide* (Discussion Paper No 172, 2021), ch 3 The structure of Scots homicide law.

¹⁰ Cassazione penale, Sez Unite, sentenza n 22676 del 29 maggio 2009.

¹¹ Criminal Law Amendment Act 1997 Pt I of Sch 2. This is comparable to aggravated homicide in Italy, and first degree murder in certain US states such as New York and California. The aggravating circumstances vary from one jurisdiction to another, depending on social and historical context. If such a structure were to be adopted in Scotland, there would have to be a decision about the classification of the crimes attracting the most repugnance and moral stigma.

¹² Where the *mens rea* is either intent, or wicked recklessness.

¹³ This is therefore similar to intention in Scots law.

¹⁴ See, for example, *R v Kewelram* 1922 AD 213, where the accused set alight stock in a store to obtain insurance money. It is possible that this would be murder under Scots law following the decision in *Petto*.

¹⁵ SV Hoctor, *Criminal Law in South Africa* (1st edn, 2013) p 60. *Dolus eventualis* is often the fallback position as it may be difficult for the prosecution to prove beyond reasonable doubt either direct or indirect intention. While in Scottish cases it is equally difficult to prove what the accused's state of mind was at the time of the offence (and whether or not there was intent), the “wicked recklessness” second branch of the definition of murder can be proved

applied: (a) the accused must have foreseen the (b) possibility that the consequence might occur, (c) in substantially the same manner that it did in fact occur, (d) and had accepted this possibility.¹⁶ Foresight is assessed subjectively.¹⁷ A possibility, rather than a probability, is the second element.¹⁸ If the manner in which the death actually occurred was different from the possibility envisaged, the mental element required for the crime of murder is not made out.¹⁹ The possibility must have been accepted by the accused.²⁰

3.5 A killing which does not satisfy the criteria of murder may be culpable homicide. However that category comprises only negligent killings.²¹ Negligence requires three elements: (a) would a reasonable person have foreseen the reasonable possibility of the consequences, including the unlawfulness; (b) would a reasonable person have taken steps to guard against the possibility; and (c) did the accused fail to take the steps which he should have reasonably taken to guard against it.²² There is case-law defining the reasonable man, reasonable foreseeability, and steps which should reasonably have been taken.²³

4. Australia

4.1 Australia has nine jurisdictions.²⁴ Each jurisdiction categorises homicide as murder or manslaughter: but some jurisdictions have a third offence, namely assault resulting in death. Most, but not all, convictions for murder attract a mandatory life sentence. Many of the jurisdictions have legislation prescribing a minimum non-parole period.²⁵ Each jurisdiction uses a “pure” jury system for homicide trials, comprising 12 jurors randomly selected and empanelled for a particular case. Unanimity of verdict is required in the Australian Capital Territory, but all other states allow majority verdicts to some degree, with varying rules as to minimum times for deliberation and majorities required.²⁶

beyond reasonable doubt by circumstantial evidence as to the accused's state of mind. Some Scottish commentators regard *dolus eventualis* as an indication of the level of fault which wicked recklessness seeks to express (PR Ferguson and C McDiarmid, *Scots Criminal Law: A Critical Analysis* (2nd edn 2014) p 272).

¹⁶ JM Burchell and J Milton, *Principles of Common Law* (3rd edn 2005) p 467.

¹⁷ *S v Sigwahala* 1967 (4) SA 566 (A), although in practice the test applied by the courts is closer to the objective approach adopted in England.

¹⁸ *R v Horn* 1958 (3) SA 457 (A): contrast with the “virtual certainty” test in England (*R v Woollin* [1999] 1 AC 82), a test not applied in Scottish first instance trials although referred to in the fire-raising appeal *Petto v HM Advocate* 2011 SCCR 519.

¹⁹ *S v Goosen* 1989 (4) SA 1013 (A), where an armed robber unintentionally shot another robber: see JM Burchell and J Milton, *op cit* pp 450-451.

²⁰ *S v Ngubane* 1985 (3) SA 677 (A). There has been criticism of the final criterion: JM Burchell and J Milton, *op cit* pp 483-484.

²¹ It no longer encompasses unintended death arising from illegal activity, or cases involving provocation or diminished responsibility. Partial defences no longer exist under South African law: the court has a preliminary inquiry into criminal capacity, taking into account any factor which might impair it (such as provocation, emotional stress, voluntary intoxication): if the court finds that criminal capacity has been impaired, the accused is acquitted: JM Burchell and J Milton, *op cit*, p 428.

²² JM Burchell and J Milton, *op cit*, p 525.

²³ *S v Burger* 1975 (4) SA 877 (A); *S v Bernardus* 1965 (3) SA 287 (A); *S v Van As* 1976 (2) SA 921 (A) (accused slapped the deceased who lost balance, fell backwards, hit his head and died); JM Burchell and J Milton, *op cit*, p 530.

²⁴ Australian Capital Territory, Northern Territory, Queensland, New South Wales, Western Australia, Tasmania, South Australia, Victoria, and the Commonwealth jurisdiction.

²⁵ Reflecting aggravating features such as the victim being a police officer, emergency services worker, judicial officer, health professional; or a murder committed in the course of a sexual assault or a home burglary; or a perpetrator having previous murder convictions.

²⁶ Only New South Wales and Northern Territory appear to allow majority verdicts in murder cases.

4.2 The crime of murder requires²⁷ intent to kill, or intent to cause serious injury/grievous bodily harm, or recklessness towards death, or recklessness towards serious injury/grievous bodily harm. The crime of manslaughter is similar to that of culpable homicide in Scots law.

Murder

4.3 *Intention to kill*: Despite widespread codification, “intention” is not defined by statute. In the jurisdictions where recklessness is not a separate branch of the definition of murder, the definition of intention is of considerable importance. The Law Reform Commission of Western Australia (“LRCWA”) examined the issue in 2007.²⁸ Concepts discussed included:

- Foresight of the virtual certainty of death.
- Meaning to bring about death.
- Awareness that death would occur in the ordinary course of events.
- Subjective foresight of the possibility of death (cf *dolus eventualis* in other jurisdictions).

The LRCWA did not recommend expanding the definition of intention to include an appreciation of the virtual certainty of death.²⁹ What emerges from Australian case law and commentary is a reluctance to define intention in any positive sense, there being instead a preference for stating what it is not.³⁰ Australia’s position is therefore rather similar to that of Scotland, in that both jurisdictions have avoided any substantial analysis of intent in view of the availability of the second branch of the definition of murder.³¹

4.4 *Intention to cause serious injury/serious harm/grievous bodily harm*: The different states have different definitions of serious injury, grievous bodily harm, and bodily injury. The LRCWA took a critical view of jurisdictions³² where the definition of serious harm included injury which caused, or was likely to cause, serious or permanent injury to health.³³ The LRCWA considered that such an approach risked convictions for murder where killings were far less morally culpable.³⁴ Their final report recommended that murder constituted by intent to cause serious injury be narrowed to cases where the injury was likely to cause death.³⁵

4.5 *Recklessness as to death/serious injury*: Five of the eight jurisdictions have recklessness as to death as constituting murder, while three also have recklessness as to

²⁷ Various, depending upon the jurisdiction.

²⁸ Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report* (2007) pp 65-73.

²⁹ Contrary to the view expressed by Lord Justice Clerk Gill in *Petto v HM Advocate* 2011 SCCR 519 at para [13]. The Commission’s view was supported by Australian academic writers and by past and subsequent case-law: see, for example, P Fairall, *Homicide: Laws of Australia* (1st edn 2012) pp 86 to 89; *Pemble v the Queen* (1971) 124 CLR 107; *R v Crabbe* (1985) 156 CLR 464; *Boughey v The Queen* (1986) 161 CLR 10; *Vallance v The Queen* (1961) 108 CLR 56; *Zaburoni v The Queen* (2016) 256 CLR 482.

³⁰ Perhaps an indication that “it is not only unnecessary, but undesirable, in charging a jury, to set about explaining an ordinary and well understood word in the English language” (Connolly J in *R v Willmot (No 2)* (1985) 18 A Crim R 42).

³¹ In Scotland, wicked recklessness.

³² Including its own.

³³ Law Reform Commission of Western Australia, *Review of the Law of Homicide: Final Report* (2007) pp 46 to 47.

³⁴ *Ibid.*

³⁵ *Ibid.* An approach of some interest in Scotland in the light of *HM Advocate v Purcell* 2007 SCCR 520, where it was held that the second branch of the definition of murder (namely wicked recklessness) can be established only where there is intention to injure.

serious injury as constituting murder. The common law definition emphasises the probability of death, rather than the possibility.³⁶ Where the crime has been codified, different definitions have been adopted.³⁷ The reckless indifference is similar to the Scots law wicked recklessness.³⁸

4.6 *Manslaughter*: The offence of manslaughter in Australia is similar to that of culpable homicide in Scotland, being a residual offence for those killings falling short of murder. The Australian common law categories are voluntary and involuntary homicide, the latter being further subdivided into (i) unlawful and dangerous act manslaughter, and (ii) criminal negligence manslaughter.³⁹ Some states have codified the offence, defining circumstances⁴⁰ in which a homicide may properly be categorised as manslaughter as a result of provocation, diminished responsibility, excessive self-defence, and domestic abuse.⁴¹

4.7 *Unlawful and dangerous act manslaughter*: At common law, the causative act is not limited to assault: the act may be of any type, provided that it is unlawful, dangerous, and a substantial cause of death.⁴² The unlawful act must carry an appreciable risk of serious injury to the victim.⁴³ The appreciable risk must be one which, viewed objectively, is apparent to the reasonable person.⁴⁴ The supply of drugs to a victim who died after voluntarily ingesting them was held not to constitute an unlawful and dangerous act: the accused must have assisted the victim in taking the controlled substance⁴⁵. Causation may present difficulties.⁴⁶

4.8 *Criminal negligence manslaughter*: Intention to cause death or injury is not required, simply an act:

³⁶ *R v Crabbe* (1985) 156 CLR 464: the focus (unlike Scots criminal law) is upon knowledge that the consequences will probably occur, rather than the offender's indifference to the consequences of his act. See too *Royall v The Queen* (1991) 172 CLR 378; *Boughey v The Queen* (1986) 161 CLR 10; *Darkan v The Queen* (2006) 227 CLR 373.

³⁷ For example, "reckless indifference to the probability of causing the death of any person"; "reckless indifference to human life"; "any unlawful act or omission which the offender knew, or ought to have known, to be likely to cause death in the circumstances". The foresight is subjectively assessed.

³⁸ Prior to *HM Advocate v Purcell* 2007 SCCR 520, defined as the accused's utter indifference towards the life of the victim. Some academic commentary in Australia suggests that the element of indifference is unnecessary: if an offender foresees death as a possibility and nevertheless continues to act, he is clearly indifferent about the life of the victim.

³⁹ *Wilson v The Queen* (1992) 174 CLR 313.

⁴⁰ Where a partial defence is successfully pled.

⁴¹ Also partial defences defined as "infanticide" and "suicide pact".

⁴² P Fairall, *Homicide: Laws of Australia* (1st edn, 2012) p 218. For example, robbery, or unlawful administration of drugs: cf *Wilson v The Queen* (1992) 174 CLR 313.

⁴³ In contrast with Scots law: "Culpable homicide is simply the causing of death by any unlawful act. The unlawful act must be intentional, but it is quite immaterial whether death was the foreseeable result of that act." (*HM Advocate v Hartley* 1989 SLT 135, Lord Sutherland at p 136).

⁴⁴ *Wilson v The Queen* *cit sup*, para [4]. The physical attributes of the victim are taken into account: Fairall, *op cit*, page 229; and see *Withers v The Queen [No 2]* [2010] VSCA 151.

⁴⁵ *Burns v The Queen* [2012] HCA 35; 246 CLR 334: at para [11] French CJ commented that specific legislation might be required. Courts in Scotland have taken a different approach: "The adult status and the deliberate conduct of a person to whom a controlled drug is recklessly supplied by another will be important, in some cases crucial, factors in determining whether that other's act was or was not, for the purposes of criminal responsibility, a cause of any death which follows upon ingestion of the drug. But a deliberate decision by the victim of the reckless conduct to ingest the drug will not necessarily break the chain of causation" (*MacAngus and Kane v HM Advocate* 2009 SCCR 238).

⁴⁶ For example, where the victim jumped out of a window for self-preservation, following upon a serious assault by the accused (*Royall v The Queen* (1991) 172 CLR 378: it was held that the chain of causation was not broken).

“... which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow, that the doing of the act merited criminal punishment.”⁴⁷

The core elements are (a) a duty of care;⁴⁸ (b) a standard of care;⁴⁹ (c) a gross departure from the standard of care.⁵⁰

4.9 *Statutory definitions of manslaughter:* In certain jurisdictions,⁵¹ definitions of manslaughter can be found in criminal codes and statutes. The majority of jurisdictions simply state that manslaughter is all other unlawful killings falling short of murder.

4.10 *Minor assaults causing death, including “single punch” cases:* Although minor assault manslaughter is no longer an offence under common law,⁵² most jurisdictions⁵³ have recently enacted statutory provisions dealing with minor assaults which result in death. The jurisdiction of Victoria refers specifically to a single punch or strike to a person’s head or neck, even if the injury from which the person dies is not the punch or strike itself, but another injury resulting from impact caused by the punch or strike.⁵⁴ The statutory provisions discard the elements of intention and foreseeability, and describe the act as “an offence”, or “a crime”, or “a dangerous act for the purposes of the law relating to manslaughter by an unlawful and dangerous act”.⁵⁵

5. United States of America

5.1 In the USA, the law of homicide is codified in the Penal Codes of each of the 50 states, and the District of Columbia. There are two models for murder: (i) the model adopted in the California Penal Code (CPC) and certain other codes; and (ii) that adopted in the New York Penal Code (NYPC) and certain other codes. The latter is largely based on the American Law Institute’s Model Penal Code (MPC). While the CPC model is based on traditional common law, distinguishing murder and manslaughter by the presence or absence of “malice

⁴⁷ *Nyadam v The Queen* [1977] VR 430, at pp 444-445.

⁴⁸ A general duty of care exists at common law: but some Codes legislate specific duties of care.

⁴⁹ An objective test based on a reasonable person and reasonable foreseeability of death or injury: P Fairall, *Homicide: Laws of Australia* (1st edn, 2012) pp 254-256. Scots law is less clear, as previous case law indicating that an objective test was to be applied was qualified by *dicta* in *Transco plc v HM Advocate (No 1)* 2004 SCCR 1, at p 49, by taking account of “the actual state of mind of a person accused of culpable homicide of this kind” rather than basing the question of guilt or innocence on an objectively set standard. Some commentators in Australia have argued for a subjective approach: Model Criminal Code Officers Committee, *Discussion paper: Fatal Offences Against the Person* (1998) p 249.

⁵⁰ See *Nyadam, cit sup*: many courts prefer not to define a gross departure, leaving it to the jury to decide the matter (see for example *R v Stephenson* [1976] VR 376, at p 383). In Scotland these elements are found in civil actions for damages and not in criminal prosecutions.

⁵¹ Australian Capital Territory, New South Wales, Northern Territory, Queensland, Tasmania, and Western Australia.

⁵² *Wilson v The Queen* (1992) 174 CLR 313.

⁵³ New South Wales, Victoria, Queensland, Western Australia, and Northern Territory.

⁵⁴ Crimes Act 1958 (Vic) s 4A(4).

⁵⁵ Reflecting the view that these offences are regarded as less serious, carrying less moral blameworthiness than other manslaughter offences: cf C Ferguson and R Robson, *A Legal and Social Analysis of ‘One Punch’ Cases in Western Australia*, *UWSLR* (2104) 19 at p 28. Note however that the Criminal Code of Western Australia prescribes a sentence of 20 years imprisonment, apparently taking a graver view: Criminal Code (WA) section 281(1). Also some critics argue that the statutory provisions have not solved the social issues underlying the offence, namely violence amongst groups of young men: C Ferguson and R Robson, *op cit*, p 43.

aforethought”,⁵⁶ the NYPC and those codes influenced by the MPC favour more distinct and well-defined fault elements to identify the various homicide offences.⁵⁷

The NYPC model

5.2 The NYPC gives a general definition of homicide, as follows:

“Homicide means conduct which causes the death of a person or an unborn child with which a female has been pregnant for more than twenty-four weeks under circumstances constituting murder, manslaughter in the first degree, manslaughter in the second degree, criminally negligent homicide, abortion in the first degree or self-abortion in the first degree”⁵⁸

5.3 Murder in the first degree is murder which has been committed intentionally in the presence of one or more of a list of aggravating factors.⁵⁹ Other factors supporting first degree murder include the victim being a police officer, or a witness in criminal proceedings; and the killing being contractual.⁶⁰

The CPC model

5.4 The CPC defines murder as:

“... the unlawful killing of a human being, or a fetus, with malice aforethought”.⁶¹

“Malice” is defined:

“(a) For the purpose of section 187, malice may be express or implied.

(1) Malice is express when there is manifested a deliberate intention to unlawfully take away the life of a fellow creature.

(2) Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart ...

(b) If it is shown that the killing resulted from an intentional act with express or implied malice ... no other mental state need be shown to establish the mental state of malice aforethought ...”⁶²

5.5 As in the NYPC, the CPC has retained first and second degree murder, the former being viewed as the basic murder provision. Section 189(a) of the CPC defines first degree murder as:

⁵⁶ C Finkelstein, *Two Models of Murder: Patterns of Criminalisation in the United States*, in J Horder (ed) *Homicide Law in Comparative Perspective* (2007) p 84.

⁵⁷ *Ibid.*

⁵⁸ New York Penal Code s 125.00.

⁵⁹ Acting alone or with one or more persons, he commits or attempts to commit robbery, burglary, kidnapping, arson, rape in the first degree, aggravated sexual abuse, escape in the first degree, or escape in the second degree, and in so doing causes the death of a person: NYPC s 125.27. In Scots law these factors have no bearing on the criminal offence charged and are taken into account in the indictment and at sentencing.

⁶⁰ NYPC s 125.27.

⁶¹ California Penal Code s 187(a).

⁶² *Ibid* s 188.

“All murder that is perpetrated by means of a destructive device or explosive, a weapon of mass destruction, knowing use of ammunition primarily to penetrate metal or armour, poison, lying in wait, torture, or by any other kind of wilful, deliberate, and premeditated killing, or that is committed in the perpetration of, or attempt to perpetrate, arson, rape, carjacking, robbery, burglary, mayhem, kidnapping, train wrecking, or murder that is perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person outside of the vehicle with intent to inflict death is murder of the first degree.”

5.6 Section 189(b) states that all other murders are murders of the second degree. Although not explicitly stated in the Code, second degree murder can be divided into (1) purposeful killing without premeditation;⁶³ (2) implied malice murder; and (3) inherently dangerous felony murder.⁶⁴

Categories

5.7 The NYPC, CPC and MPC each use different vocabularies: the MPC uses “purposely”, “knowingly” and “recklessly/with extreme indifference”; the NYPC uses “intentionally” and “recklessly/with depraved indifference”; and the CPC uses “malice aforethought”, which is divided into express and implied malice. Despite the different vocabularies, two main categorisations emerge: (i) purposefully, intentionally, knowingly and with express malice; and (ii) recklessly with extreme/depraved indifference and implied malice.

(i) Purpose, intention, knowledge, express malice

5.8 The NYPC and the MPC give specific definitions of “purposely”⁶⁵ and refer to the accused’s “conscious object”. The MPC also defines “knowingly”⁶⁶ as including the accused’s awareness that “it is practically certain that his conduct will cause such a result”.⁶⁷ Because direct intent is often difficult to prove, the NYPC and MPC include recklessness as another element for murder.⁶⁸ Some commentators suggest that the codes’ definitions are too vague.⁶⁹

5.9 In the CPC, murder is defined as killing with malice aforethought, express or implied.⁷⁰ Express malice is defined as existing:

“[W]hen there is manifested a deliberate intention to take away the life of a fellow creature.”⁷¹

⁶³ Also referred to as intentional killing with express malice.

⁶⁴ SS Davoudian, *Developments in California Homicide Law* (2003) LLALR 1371 at p 1384.

⁶⁵ NYPC s 15.05(1); MPC s 2.02(2)(a).

⁶⁶ MPC s 2.02(2)(b).

⁶⁷ The MPC commentaries state that proof of “purposely” or “knowingly” requires a subjective inquiry into the accused’s state of mind: American Law Institute, *Model Penal Code and Commentaries Part II Articles 210.0 to 213.6* at Art.210.2 cmt 3, p 20.

⁶⁸ Thus avoiding difficulties which arise by artificially expanding the definition of intent: cf the Scots law element of “wicked recklessness”.

⁶⁹ KW Simons, *Should the Model Penal Code’s Mens Rea Provisions Be Amended?*, (2003) OSJCL 179; D Crump, *What Does Intent Mean?*, (2010) Hofstra LR 1059.

⁷⁰ CPC s 188, 189(a).

⁷¹ CPC s 188(a)(1), regarded as equivalent to intention to kill (*People v Saille* 820 P.2d 588 (Cal 1991)).

5.10 The second degree murder offence of “purposeful killing without premeditation” appears to require an absence of premeditation or provocation, and an intentional killing with express malice.⁷² “Malice” is defined in the definitions section of the CPC as follows:

“The words ‘malice’ and ‘maliciously’ import a wish to vex, annoy, or injure another person, or an intent to do a wrongful act, established either by proof or presumption of law.”⁷³

(ii) Recklessness with extreme/depraved indifference, and implied malice

5.11 A type of killing defined as “depraved indifference murder” or “depraved heart murder”, found in the three penal codes, is equivalent to the Scots law “wicked recklessness” murder. Different states adopt different approaches to this offence.⁷⁴

Model Penal Code approach

5.12 Under the MPC, murder may be committed recklessly, in circumstances demonstrating extreme indifference to human life.⁷⁵ “Recklessly” is defined as follows:

“A person acts recklessly with respect to a material element of an offence when he consciously disregards a substantial and unjustifiable risk that the material element exists or will result from his conduct. The risk must be of such a nature and degree that, considering the nature and purpose of the actor’s conduct and the circumstances known to him, its disregard involves a gross deviation from the standard of conduct that a law abiding person would observe in the actor’s situation.”⁷⁶

It is for the jury to assess “substantial” and “unjustifiable”.⁷⁷ The MPC commentary also takes the view that the concept of “recklessness so extreme that it shows an indifference to human life” cannot be further clarified: it is accordingly for the jury to assess whether the recklessness is so extreme as to be equivalent to “purpose” and “knowledge”, and therefore treated as murder, or whether it is less extreme, warranting the label of manslaughter.⁷⁸ The inherent flexibility of the definition was preferred to a more precise and detailed approach.⁷⁹

⁷² SS Davoudian, *Developments in California Homicide Law*, (2003) LLALR 1271 at p 1384. This description seems to suggest that express malice is something distinct, to be proved in addition to intent: but there remains some ambiguity.

⁷³ Again it is not clear whether the term “express malice” is synonymous with intent, or whether it requires something further: C Finkelstein, “Two Models of Murder: Patterns of Criminalisation in the United States” in J Horder (ed) *Homicide Law in Comparative Perspective* (2007) p 87.

⁷⁴ These are: (i) the “objective circumstances” approach focuses solely on the objective circumstances surrounding the killing, rather than the mental state of the accused. By assessing the circumstances surrounding the killing, the jury is to determine whether or not a reasonable person would have regarded the accused’s actions as displaying indifference to the lives of others; (ii) the “degree of risk” approach concerns cases where the accused created a substantial risk of death occurring. The majority of jurisdictions apply an objective test; (iii) the “multiple victims” approach focuses upon situations where the accused’s actions created a risk of death or injury to more than one person; (iv) the “common law” approach focuses on the traditional common law language of “depraved heart” to interpret the offence.

⁷⁵ MPC Art 210.2(1)(b).

⁷⁶ MPC Art.2.01(2)(c).

⁷⁷ American Law Institute, *Model Penal Code and Commentaries Part 1 Articles 1.01 to 2.13* at Art.2.02 cmt 3 pp 237-238.

⁷⁸ American Law Institute, *op cit*, *Articles 210.0 to 213.6* at Art 210.2 cmt 4 p 22.

⁷⁹ *Ibid* p 25: The drafters were of the view that “extreme indifference to human life” captured the moral culpability of the types of killings which fall under this offence. However not all agree: see for example JC Duffy, *Reality Check: How Practical Circumstances Affect the Interpretation of Depraved Indifference Murder*, (2007) Duke Law J 425 at p 429 (commenting that the definition is no clearer than the common law concept of “depraved heart”

The NYPC and CPC approach

5.13 The focus in these codes is on the accused's actual awareness of the risk created, rather than on the objective circumstances surround his or her actions.⁸⁰

5.14 The NYPC defines "depraved indifference murder" and "recklessness" as follows:

"A person is guilty of murder in the second degree when ... under circumstances evincing a depraved indifference to human life, he recklessly engages in conduct which creates a grave risk of death to another person."⁸¹

"A person acts recklessly with respect to a result or to a circumstance described by a statute defining an offence when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or that such circumstance exists. The risk must be of such nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation."⁸²

5.15 Following the case of *People v Feingold*,⁸³ which held that:

"[D]epraved indifference is best understood as an utter disregard for the value of human life – a willingness to act not because one intends harm, but because one simply doesn't care whether grievous bodily harm results or not."⁸⁴

New York courts began to move away from the objective degree of risk approach, and to use concepts of "disregard for the value of human life", "wickedness", and lack of care "whether grievous bodily harm results".

5.16 Under the CPC, depraved indifference murder is referred to as implied malice murder, and prosecuted under the offence of murder in the second degree. "Implied malice" is defined as follows:

"Malice is implied when no considerable provocation appears, or when the circumstances attending the killing show an abandoned and malignant heart."⁸⁵

which the drafters were seeking to improve upon), and p 444 (expressing concern that the jury, in deciding whether the recklessness was so extreme as to warrant a murder conviction, might adopt an "I know it when I see it" approach).

⁸⁰ JC Duffy, *op cit* at p 431; CL Maylor, *op cit* at p 416.

⁸¹ NYPC s 125.25(2).

⁸² NYPC s 15.05(3).

⁸³ 852 NE2d 1163 (NY 2006), where the accused attempted to commit suicide in a gas oven, but a spark from the fridge caused an explosion damaging neighbouring flats. He was charged with reckless endangerment in the first degree, which had the same "depraved indifference" element as depraved indifference murder. The court held that depraved indifference to the value of human life required a subjective assessment of the accused's mind, and that in this case, the accused did not possess the level of "wickedness, or abject moral deficiency, which is required of depraved indifference".

⁸⁴ *Feingold* 852 NE2d 1163 (NY 2006) at p 1170.

⁸⁵ CPC s 188(a)(2).

But further refinement of the definition in *People v Watson*⁸⁶ resulted in three elements: (i) an act dangerous to life; (ii) the accused is aware of an unjustifiable risk; and (iii) the accused acts regardless of the risk, showing a conscious disregard for the unjustifiable risk.⁸⁷

Felony murder

5.17 The felony murder doctrine operates on the basis of transferred intent, where an accused can be found guilty of murder in the event of a death during the commission of a felony in cases where the accused had no intent to kill, or where the accused did not personally even cause the death.⁸⁸

5.18 The drafters of the MPC abolished the felony murder rule, and in its place created a rebuttable presumption of recklessness and extreme indifference if the killing occurred in the following circumstances: robbery, sexual attack, arson, burglary, or felonious escape.⁸⁹

5.19 By contrast, the NYPC retained the murder felony doctrine, leading to a conviction for second degree murder if a death occurs during one of the listed felonies. No proof of a fault element is required.⁹⁰

5.20 The CPC has a felony murder doctrine which applies to both first and second degree murder.⁹¹

Manslaughter and lesser homicide offences

5.21 In the context of manslaughter and lesser homicide offences, there are significant differences between the codes.⁹²

Reckless manslaughter

5.22 CPC: an accused is guilty of misdemeanour manslaughter if death occurs in the course of an unlawful act not amounting to a felony. Intention to cause death, or awareness of a risk of death, is not required, but it is necessary to take all the circumstances into account.⁹³

5.23 By contrast, the MPC and the NYPC provide for a conviction of manslaughter when death is caused recklessly.⁹⁴ “Recklessly” is defined as follows:

“A person acts recklessly ... when he is aware of and consciously disregards a substantial and unjustifiable risk that such result will occur or such circumstance exists.

⁸⁶ 30 Cal 3d 290 (1981).

⁸⁷ A Gamer, *Developments in California Homicide Law*, (2003) LLALR 1371 at p 1431. The awareness is subjective. *People v Watson* 30 Cal 3d 290 (1981).

⁸⁸ The equivalent doctrine in Scots law is constructive malice.

⁸⁹ MPC s 210.2(1)(b).

⁹⁰ NYPC s 125.25(3). There may be a defence if the accused did not commit or aid the homicidal act; was not armed; had no reasonable ground to believe that another participant was armed; and had no reasonable ground to believe that any other participant would engage in conduct likely to result in death or serious physical injury.

⁹¹ CPC s 189(a), 189(e) and case law.

⁹² The provisions are too detailed to set out in full, but of interest are definitions of elements such as recklessness; extreme mental or emotional disturbance; intention to cause serious physical injury; voluntary manslaughter upon a sudden quarrel or heat of passion; involuntary manslaughter in the commission of an unlawful act; committing an abortion; intentionally causing or aiding suicide.

⁹³ *People v Cox* 23 Cal 4th 665 at 670 (2000).

⁹⁴ MPC Art 210.3(1)(a); NYPC s 125.5(1).

The risk must be of such a nature and degree that disregard thereof constitutes a gross deviation from the standard of conduct that a reasonable person would observe in the situation.”⁹⁵

In addition to recklessness, there must be extreme/depraved indifference to the value of human life.⁹⁶ Despite the variations in approach, both codes focus on the accused’s awareness of the substantial risk created, and assesses the probability of death occurring in order to determine the level of risk.

Negligent homicide and lawful act involuntary manslaughter

5.24 The CPC defines this type of manslaughter as occurring:

“[In] the commission of a lawful act which might produce death, in an unlawful manner, or without due caution and circumspection.”⁹⁷

Criminal negligence is assessed objectively.⁹⁸

5.25 The MPC defines negligent homicide as criminal homicide which is committed negligently.⁹⁹ “Negligence” is defined as follows:

“A person acts negligently with respect to a material element of an offence when he should be aware of a substantial and unjustifiable risk that the material element exists or will exist from his conduct. The risk must be of such a nature and degree that the actor’s failure to perceive it, considering the nature and purpose of his conduct and the circumstances known to him, involves a gross deviation from the standard of care that a reasonable person would observe in the actor’s situation.”¹⁰⁰

5.26 The NYPC adopts an almost identical definition for the offence of “criminally negligent homicide”.¹⁰¹

⁹⁵ American Law Institute, *Model Penal Code and Commentaries Part II Arts 210.0 to 213.6* at Art 210.3 cmt 4, p 53.

⁹⁶ The definitions and distinctions between murder and manslaughter in the two codes are different, with the MPC focusing upon the level of recklessness, whereas the NYPC regards “depraved indifference” as a separate element (*People v Suarez* 5 NY 3d 202 (2005)).

⁹⁷ CPC s 192(b).

⁹⁸ *People v Penny* 44 Cal 2d 861 (1951), where an unlicensed beauty consultant poisoned her client whilst removing facial wrinkles: “[The accused] had knowledge, actual or imputed, that the act ... tended to endanger life, [and that] the facts must be such that the fatal consequence of the negligent act could reasonably have been foreseen” (pp 879-89); see too *People v Watson* 30 Cal 3d 290 (1981). Setting the standard of a reasonable person can present difficulties (see, for example, *Walker v Superior Court* 47 Cal 3d 112 at p 119, where a mother failed to seek treatment for her ill daughter, believing that prayer would cure: the daughter died of meningitis). The decisions are often very fact-sensitive, to be determined in the light of contemporary community standards (*Walker* at p 136).

⁹⁹ MPC Art 210.4(1).

¹⁰⁰ MPC Art 2.02(2)(d). Again, therefore, an objective approach is adopted.

¹⁰¹ The objective approach permits adaptation to changing standards of reasonable behaviour. Thus, for example, in “drug supply” cases, the public’s increased awareness of the harmful effects of drugs is reflected in the court’s approach in *People v Cruciani* 353 NYS 2d 811 (NY App Div 1974), where the accused had injected the victim with heroin at her request, with fatal consequences. The appeal court upheld the trial judge’s direction that a conviction of criminally negligent homicide was open to the jury where the accused “knew or should have known” that the injection “could” result in an overdose (p 813).

5.27 Both codes place this type of killing as a separate offence, distinct from manslaughter and a grade below it.¹⁰²

5.28 It is interesting to note that Scots law does not have a specific offence of “negligent homicide” and that “negligence” does not typically feature in Scots criminal law given that it has a distinct civil law meaning.

6. England and Wales

6.1 There are three homicide offences: murder, manslaughter, and infanticide. Murder has two mental elements, either of which must be proved for a conviction, namely (i) intent to kill, or (ii) intent to cause grievous bodily harm (GBH). Manslaughter (the approximate equivalent of culpable homicide in Scots law) is further divided into voluntary manslaughter and involuntary manslaughter, the latter category being further divided into “unlawful and dangerous act” manslaughter, and “gross negligence” manslaughter.¹⁰³

Murder: intent to kill

6.2 There is no statutory definition of “intent”. One key issue which has emerged in case-law is whether or not the concept should be restricted to direct intent, or whether it should be expanded to include foresight of consequences occurring.¹⁰⁴ It has been authoritatively decided that the jury is entitled to find that the necessary intention to kill exists where death or bodily harm was a virtual certainty as a result of the accused’s actions, and that the accused appreciated that such was the case.¹⁰⁵ That approach has caused some debate,¹⁰⁶ but in practical terms the expanded definition of intent is necessary as it may be difficult for the prosecution to prove direct intent.

Murder: intent to cause grievous bodily harm

6.3 *R v Cunningham*¹⁰⁷ confirmed that an accused is guilty of murder if the intention was to inflict serious harm, whether or not the risk of death was foreseen or anticipated. The latter element (no need for foresight of the risk of death) has troubled some.¹⁰⁸ However others

¹⁰² The MPC explains the lower grading by contrasting conscious risk (recklessness) and inadvertent risk (negligence), citing the lesser culpability of the latter.

¹⁰³ Two Law Commission Reports provide useful source material, although their recommendations have not been put into effect: Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, Law Com No 237 (1996); Law Commission, *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006).

¹⁰⁴ “The *Moloney* guidelines”, which focused on foresight of a natural consequence of an act, were disapproved and overruled in *R v Nedrick* [1986] 1 WLR 1025, affirmed in *R v Woollin* [1999] 1 AC 82: the jury should be directed that they are not entitled to find the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty (barring some unforeseen intervention) as a result of the accused’s actions, and that the accused appreciated that such was the case (Lord Lane at p 1028 of *Nedrick*, and Lord Steyn at p 96 of *Woollin*).

¹⁰⁵ *Woollin*, *cit sup*. It has been suggested that the current law permits juries some flexibility, and to be influenced by moral and social factors: A Norrie, *Crime, Reason and History* (3rd edn, 2014) p 63; J Horder, *Ashworth’s Principles of Criminal Law* (8th edn, 2016) pp 194-5.

¹⁰⁶ Some argue that the *Woollin* approach dilutes the concept of intent and the high culpability which it reflects: MS Moore, *Placing Blame: A Theory of Criminal Law* (1st edn, 2010) p 477.

¹⁰⁷ [1982] AC 566.

¹⁰⁸ Who argue that many of those convicted of murder do not deserve the label or murderer, or the mandatory life sentence: A Ashworth and B Mitchell (eds), *Rethinking English Homicide Law* (1st edn, 2004) p 10.

contend that everyone must take responsibility for their actions, and for the consequences of those actions.¹⁰⁹

6.4 The Law Commission of England and Wales concluded that the current definition resulted in the offence of murder being too wide.¹¹⁰ They recommended a three-tier structure of homicide offences:

- First degree murder, encompassing (1) intentional killings, and (2) killings with the intent to do serious injury where the killer was aware that his or her conduct involved a serious risk of causing death.¹¹¹
- Second degree murder, encompassing (1) killings intended to cause serious injury; or (2) killings intended to cause injury or fear or risk of injury where the killer was aware that his or her conduct involved a serious risk of causing death; or killings intended to kill or to cause serious injury where the killer was aware that his or her conduct involved a serious risk of causing death but successfully pleads provocation, diminished responsibility or that he or she killed pursuant to a suicide pact.¹¹²
- Manslaughter, encompassing (1) killing another person through gross negligence (“gross negligence manslaughter”); or (2) 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”)¹¹³

6.5 Thus in terms of the LCEW recommendations, offences falling under the current GBH rule, but lacking foresight of death, would fall under the lower tier category of second degree murder, and would no longer attract the mandatory life penalty.¹¹⁴ Cases in which the accused intended to cause injury and was aware that his or her conduct involved a serious risk of death (previously categorised as manslaughter) would also fall under the category of second degree murder.¹¹⁵ The LCEW reasoned that the element of foresight of the risk of death, coupled with an intent to cause (serious) injury, ensures that only accused who had directed a physical attack against the victim are to be convicted of either first or second degree murder. Those who killed through negligence or carelessness would be charged with manslaughter.¹¹⁶

6.6 Certain aspects of the recommendations were criticised. One point made was that the failure to define “serious injury” meant that the distinction between first and second degree

¹⁰⁹ W Wilson, “Murder and the Structure of Homicide” in A Ashworth and B Mitchell (eds) *Rethinking English Homicide Law* (1st edn, 2004) p 35; J Horder, *Ashworth’s Principles of Criminal Law* (8th edn, 2016) pp 252-3.

¹¹⁰ Law Commission, *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006) para 1.17.

¹¹¹ *Ibid* para 2.50.

¹¹² *Ibid* para 2.70. This would replace the current GBH rule: the killer would have to be aware that his or her conduct involved a serious risk of causing death. Second degree murder would no longer attract the mandatory life sentence: para 2.70, 2.73.

¹¹³ *Ibid* para 2.163.

¹¹⁴ *Ibid* para 2.70, 2.73.

¹¹⁵ *Ibid* para 2.70, 2.74.

¹¹⁶ *Ibid* para 2.111.

murder left the decision¹¹⁷ to the jury without any guidance as to the meaning of “serious injury”.¹¹⁸

6.7 Of note was the LCEW’s rejection of murder being defined by utter indifference to the life of the victim and whether death would result from his or her actions.¹¹⁹

Manslaughter

6.8 A charge of murder may be reduced to “voluntary manslaughter” where partial defences apply (namely loss of self-control;¹²⁰ diminished responsibility;¹²¹ and killing in pursuance of a suicide pact¹²²). Involuntary manslaughter, on the other hand, is divided into two categories: “unlawful and dangerous act manslaughter” and “manslaughter by gross negligence”.¹²³

Unlawful and dangerous act manslaughter

6.9 An accused is guilty of unlawful and dangerous act manslaughter if he or she caused the death of another person by committing a criminal act which is objectively dangerous.¹²⁴

“[T]he unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm”.¹²⁵

Manslaughter by gross negligence

6.10 At common law, the leading case is *R v Adomako*.¹²⁶ The test was defined as follows:

¹¹⁷ Resulting in either first or second degree murder.

¹¹⁸ A Ashworth, *Principles, Pragmatism, and the Law Commission’s Recommendations on Homicide Law Reform* (2007) Crim LR 333 at pp 336, 338.

¹¹⁹ Law Commission, *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006) para 2.13. Thus the Commission rejected what had been the Scottish definition of “wicked recklessness” prior to *HM Advocate v Purcell* 2007 SCCR 520, on the view that such a definition was too vague.

¹²⁰ Coroners and Justice Act 2009, s 54-55. In terms of section 54(2), it does not matter whether or not the loss of control was sudden. Sexual infidelity is expressly excluded from the qualifying triggers for loss of self-control: s 55(6)(c).

¹²¹ *Ibid* s 52.

¹²² Homicide Act 1957, s 4.

¹²³ A possible third category, “reckless manslaughter”, where the accused was aware that his or her conduct involved the risk of causing death or serious injury, and took that risk, was considered by the LCEW to constitute either gross negligence manslaughter, or (where there was intent to injure), second degree murder; see Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, Law Com No 237 (1996) para 2.26; F Stark, *Reckless Manslaughter* (2007) Crim LR 736; CMV Clarkson, “Context and Culpability in Involuntary Manslaughter: Principle or Instinct”, in A Ashworth and B Mitchell (eds), *Rethinking English Homicide Law* (1st edn, 2004) p 135.

¹²⁴ Some think this too punitive where an accused did not intend to cause serious injury, and did not foresee the risk of death or injury: Law Commission, *Murder, Manslaughter and Infanticide*, Law Com No 304 (2006) para 3.43; J Horder, *Ashworth’s Principles of Criminal Law* (8th edn, 2016) p 296; (9th edn, 2019) p 300.

¹²⁵ *R v Church* [1966] 1 QB 59, a test criticised by some as too severe where the consequences were unforeseen: see Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, Law Com No 237 (1996), para 3.5, giving an example of a push resulting in a fall and fatal brain injury, and the recommendation for abolition in para 5.16. A real-life application of the test can be seen in *R v M* [2013] 1 WLR 1083 (the accused were guilty of manslaughter where physical contact during a disturbance caused the rupture of an asymptomatic aneurism with fatal blood loss). However others consider that a person should be accountable for a violent unlawful act: CMV Clarkson, “Context and Culpability in Involuntary Manslaughter: Principle or Instinct” in A Ashworth and B Mitchell (eds), *Rethinking English Homicide Law* (1st edn, 2004) p 158-159.

¹²⁶ [1995] 1 AC 171. The LCEW criticised the test as being circular, leaving to the jury the question whether the actions of the accused were of a criminal nature (Law Commission, *Legislating the Criminal Code: Involuntary*

“ ... the ordinary principles of the law of negligence apply to ascertain whether or not the defendant has been in breach of a duty of care towards the victim who has died. If such a breach of duty is established the next question is whether that breach of duty caused the death of the victim. If so, the jury must go on to consider whether that breach of duty should be characterised as gross negligence and therefore as a crime. This will depend on the seriousness of the breach of duty committed by the defendant in all the circumstances in which the defendant was placed when it occurred. The jury will have to consider whether the extent to which the defendant’s conduct departed from the proper standard of care incumbent upon him, involving as it must have done a risk of death to the patient, was such that it should be judged criminal.”

7. Ireland

7.1 There are three homicide offences under Irish law: murder, manslaughter, and infanticide.¹²⁷ Murder occurs where there is intent to kill, or intent to cause serious harm.¹²⁸ Manslaughter is divided into voluntary and involuntary manslaughter, with the latter further divided into (i) unlawful and dangerous act manslaughter and (ii) gross negligence manslaughter.

Murder: intent to kill

7.2 Section 4 of the Criminal Justice Act 1964 provides:

“(1) Where a person kills another unlawfully the killing shall not be murder unless the accused person intended to kill, or cause serious injury to, some person, whether the person actually killed or not.

(2) The accused person shall be presumed to have intended the natural and probable consequences of his conduct; but this presumption may be rebutted.”

7.3 It has been suggested that there is a lack of case law on the topic of intent, making it difficult to assess what level of foresight is required, and whether the English test of virtual certainty¹²⁹ has been adopted in Ireland.¹³⁰ Some commentators advocate expanding the definition of murder to include recklessness.¹³¹

Murder: intent to cause serious injury

7.4 Under existing Irish law, the second element in the definition of murder is intent to cause serious injury.¹³² As in the law of England and Wales,¹³³ the test is an objective one. It

Manslaughter, Law Com No 237 (1996), para 3.9); and also criticised the use of civil law terms such as “duty of care” and “negligence” (para 3.10).

¹²⁷ A summary of the present law and recommendations for change can be found in the Law Reform Commission for Ireland’s report: Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008).

¹²⁸ Criminal Justice Act 1964, s 4(1).

¹²⁹ *R v Woolin* [1999] 1 AC 82.

¹³⁰ Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008) para 2.6; G Coffey, “Codifying the Meaning of ‘Intention’ in the Criminal Law” (2009) J Crim Law 394 at p 411.

¹³¹ C Fennell, “Intention in Murder: Chaos, Confusion and Complexity” (1990) NILQ 325 at p 335. This is comparable to the approach taken in Scots law. There are two advantages: (i) recourse to circumstantial evidence when direct intent cannot be proved; and (ii) providing a second and distinct *mens rea* from intent, rather than artificially expanding the parameters of intent (thus avoiding complex discussions and analyses concerning intent).

¹³² Criminal Justice Act 1990, s 4.

¹³³ *R v Cunningham* [1983] AC 566.

is irrelevant whether an accused who intended to inflict serious harm anticipated the risk of death occurring.¹³⁴

Manslaughter

7.5 Manslaughter is divided into voluntary and involuntary manslaughter. The former applies when an accused has successfully raised a partial defence, reducing the charge of murder to manslaughter. In Irish law, the partial defences are: provocation,¹³⁵ use of excessive force in self-defence,¹³⁶ diminished responsibility,¹³⁷ and infanticide.¹³⁸

Involuntary manslaughter

7.6 Involuntary manslaughter is divided into two further categories of offences: (i) unlawful and dangerous act manslaughter and (ii) gross negligence manslaughter.

Unlawful and dangerous act manslaughter

7.7 Unlawful and dangerous act manslaughter occurs where the accused causes the death of another person by committing a criminal act which is objectively dangerous. As Kenny J explained in *The People (AG) V Crosbie and Meehan*:¹³⁹

“[T]he act causing death must be unlawful and dangerous to constitute the crime of manslaughter. The dangerous quality of the act must however be judged by objective standards and it is irrelevant that the person did not think that the act was dangerous.”

It is not necessary for the accused to have foreseen the death of, or even injury to, the deceased as a result of the criminal act. There are conflicting views about such an objective test.¹⁴⁰ The Law Reform Commission of Ireland were of the view that the offence of unlawful and dangerous act manslaughter should retain its existing parameters, and should not be re-defined to include an element of subjective foresight, or an objective foreseeability of death

¹³⁴ Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008) para 2.60.

¹³⁵ See *The People (DPP) v MacEoin* [1978] IR 27. 1.1. Any conduct (including words and gestures) is capable of amounting to provocation. The test is subjective, although there is a proportionality element in the reference to “reasonable relation” of the provocation to the amount of force used.

¹³⁶ See *The People (AG) v Dwyer* [1972] IR 416. If a jury is satisfied that the accused honestly believed that the extent of force he used was necessary and proportionate to repel an attack, the appropriate verdict is manslaughter rather than murder.

¹³⁷ Criminal Law (Insanity) Act 2006, s 6. This provides that where a person is tried for murder and is found to have committed the act alleged, was at the time suffering from a mental disorder, and the mental disorder was not such as to justify finding him or her not guilty by reason of insanity, but was such as to diminish substantially his or her responsibility for the act, then the accused should be found guilty of manslaughter on the ground of diminished responsibility.

¹³⁸ Infanticide Act 1949, s 1, as amended by the 2006 Act. This provides that a woman is guilty of infanticide if she causes the death of a child under twelve months and at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of a mental disorder within the meaning of the Criminal Law (Insanity) Act 2006. The Act further states that if death of a child occurs in those circumstances, the accused may be tried and punished as for manslaughter and, on conviction may be dealt with under section 6(3) of the 2006 Act as if she had been found guilty of manslaughter on the grounds of diminished responsibility.

¹³⁹ [1966] IR 162.

¹⁴⁰ Subjectivists argue that an accused should not suffer such grave criminal liability for consequences which were not intended; objectivists contend that unintended consequences are just as morally significant as those which are intended and foreseen, and further that if an accused chooses to commit an unlawful act, they are responsible for any negative consequences which ensue: Law Reform Commission of Ireland, *Consultation Paper: Involuntary Manslaughter* (LRC CP 44-2007) para 2.176.

occurring. However they did concede that a conviction of manslaughter might be unduly harsh in cases of unforeseen and unforeseeable killings which, had death not occurred, would have been charged as merely minor assault.¹⁴¹ Hence the Commission's recommendation that a new offence be introduced by legislation, and placed in a tier below manslaughter, namely "assault causing death".

7.8 The recommended new offence of "assault causing death" was defined as follows:¹⁴²

"Assault causing death occurs where an accused commits an assault which causes death and a reasonable person would not have foreseen that death or serious injury was likely to result in the circumstances."

Under Scots law as it presently stands, such an assault would be indicted as culpable homicide.¹⁴³ Critics argue that such a conviction of culpable homicide in the circumstances is too severe, and that the offence of culpable homicide encompasses too wide a range of killings and too many variations in gravity and moral culpability.¹⁴⁴ The recommended new offence of "assault causing death" may offer a useful solution.

7.9 A second recommendation made by the Law Reform Commission of Ireland in the context of involuntary manslaughter concerned manslaughter by the injection of a drug.¹⁴⁵ Such cases involve an accused who is alleged to have assisted the deceased by –

- supplying the drugs, and/or
- preparing a syringe, and/or
- directly injecting the drugs,

leading to the death of the deceased.¹⁴⁶ The Law Reform Commission of Ireland noted difficulties in proving the original unlawful act with regards to the question of a possible break in the chain of causation where the drug had been voluntarily ingested by the deceased.¹⁴⁷ Although not presented as a final recommendation, the Commission suggested that a new and separate offence of "drug induced homicide" might be the best option in such cases.¹⁴⁸

Gross negligence manslaughter

¹⁴¹ Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008) para 4.26.

¹⁴² *Ibid* para 5.46.

¹⁴³ See, for example, the definition given by Lord Sutherland in *HM Advocate v Hartley* 1989 SLT 135 at p 136: "Culpable homicide is simply the causing of death by any unlawful act. The unlawful act must be intentional, but it is quite immaterial whether death was a foreseeable result of that act."

¹⁴⁴ See for example Professor McDiarmid's paper on culpable homicide which accompanies our *Discussion Paper on the Mental Element in Homicide* (Discussion Paper No 172, 2021), available at: <https://www.scotlawcom.gov.uk/law-reform/law-reform-projects/homicide/>.

¹⁴⁵ Law Reform Commission of Ireland, *Consultation Paper: Involuntary Manslaughter* (LRC CP 44-2007) para 5.89.

¹⁴⁶ *Ibid*.

¹⁴⁷ *Ibid*; see also paras 2.75-2.89 for the Law Reform Commission of Ireland's discussion of the English approach in these cases.

¹⁴⁸ *Ibid* para 5.92. Such a solution might be seen as more appropriate for such cases: less harsh than manslaughter, but acknowledging the gravity of the accused's actions leading to the death of the deceased.

7.10 There have been few prosecutions for gross negligence manslaughter.¹⁴⁹

7.11 The prosecution must prove four elements: (a) the accused was, by ordinary standards, negligent; (b) the negligence caused the death of the victim; (c) the negligence was of a very high degree; and (d) the negligence involved a high degree of risk or likelihood of substantial injury to others.¹⁵⁰ The test is an objective one.¹⁵¹

8. New Zealand¹⁵²

8.1 New Zealand law defines three homicide offences: murder, manslaughter and infanticide. There is no mandatory life sentence for murder,¹⁵³ and no partial defences of “provocation”¹⁵⁴ or “diminished responsibility”.¹⁵⁵

8.2 The relevant law is entirely statutory. Section 160 of the Crimes Act 1961 gives an all-inclusive definition, namely *any* unlawful killing is “culpable homicide”.¹⁵⁶ The 1961 Act further provides:

158 Homicide defined

Homicide is the killing of a human being by another, directly or indirectly, by any means whatsoever ...

160 Culpable homicide

(1) Homicide may be either culpable or not culpable.

(2) Homicide is culpable when it consists in the killing of any person –

(a) by an unlawful act; or

(b) by an omission without lawful excuse to perform or observe any legal duty; or

(c) by both combined; or

¹⁴⁹ Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter* (LRC 87-2008) para 4.34.

¹⁵⁰ Law Reform Commission of Ireland, *Consultation Paper: Involuntary Manslaughter* (LRC CP 44-2007) para 5.140; *The People (AG) v Dunleavy* [1948] IR 95, noting at page 102 that the higher degree of negligence which would justify a conviction for dangerous driving would not necessarily be sufficient.

¹⁵¹ Amounting to a derogation from an objective standard of care in cases where the accused had no intent to kill, nor was subjectively reckless as to whether death or injury might occur.

¹⁵² The law of New Zealand is of particular interest in the context of provocation, as in *Drury v HM Advocate* 2001 SCCR 583 the Lord Justice General (Lord Rodger) referred to, and was apparently influenced by, New Zealand law.

¹⁵³ That having been abolished in 2002.

¹⁵⁴ When the mandatory life sentence was abolished, there was seen to be no need for the partial defence of provocation (which might reduce murder to manslaughter). The sentencing judge is able to take into account any provocation or loss of intellectual capacity: see the New Zealand Law Commission Report at p 39.

¹⁵⁵ New Zealand has never had a defence of “diminished responsibility”. Any perceived gap in the law was filled by a broader approach to provocation, which was extended to include individuals acting with diminished responsibility: F Wright, “Does New Zealand need a diminished responsibility defence?”, *Yearbook of New Zealand Jurisprudence*, 1998, Vol 2(1) pp 109-129 at p 115.

¹⁵⁶ Contrast with the meaning of “culpable homicide” in Scotland (see Ch 5 (Culpable homicide) of our *Discussion Paper on the Mental Element in Homicide*, (Discussion Paper No 172, 2021)).

(d) by causing that person by threats or fear of violence, or by deception, to do an act which causes his death; or

(e) by wilfully frightening a child under the age of 16 years or a sick person.

(3) Except as provided in section 178 [infanticide] culpable homicide is either murder or manslaughter.

(4) Homicide that is not culpable is not an offence ...

167 Murder defined

Culpable homicide is murder in each of the following cases:

(a) if the offender means to cause the death of the person killed:¹⁵⁷

(b) if the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless¹⁵⁸ whether death ensues or not:¹⁵⁹

(c) if the offender means to cause death, or, being so reckless as aforesaid, means to cause such bodily injury as aforesaid to one person, and by accident or mistake kills another person, though he or she does not mean to hurt the person killed:¹⁶⁰

(d) if the offender for any unlawful object does an act that he or she knows to be likely to cause death, and thereby kills any person, though he or she may have desired that his or her object should be effected without hurting anyone.¹⁶¹

168 Further definition of murder

(1) Culpable homicide is also murder in each of the following cases¹⁶² whether the offender means or does not mean death to ensue, or knows or does not know that death is likely to ensue:

¹⁵⁷ Cf the first branch of the Scots law definition of murder ("wicked intention"), but the word "wicked" is absent. Under New Zealand law, a mercy killing would undoubtedly be murder: there may be exercises of prosecutorial discretion in individual cases.

¹⁵⁸ Cf the second branch of the Scots law definition of murder, ("wicked recklessness"). Note that in Scots law there must be "*an act intended to cause physical injury* [in addition to] displaying a wicked disregard of fatal consequences": *Purcell v HM Advocate* 2007 SCCR 520.

¹⁵⁹ "Whether death ensues or not" is similar to Macdonald's statement that murder is committed where the offender displays "such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences". However a limiting factor in New Zealand law is that the offender must know that the bodily injury which he wishes to inflict is "likely to cause death". This is more restrictive than the Scots law of wicked recklessness.)

¹⁶⁰ A statutory statement of one aspect of the doctrine of transferred intent: cf Gordon, *Criminal Law* (3rd edn, 2000), Vol 1, paras 9.12 to 9.13. It is not clear whether a doctrine of transferred intent is part of Scots law, but it may be that "wicked recklessness" would cover such a situation.

¹⁶¹ For a conviction of murder, the prosecution would have to prove that the offender knew of the likelihood of death ensuing (cf the discussions in *Petto v HM Advocate* 2011 SCCR 519 concerning setting fire to a block of flats).

¹⁶² Listed in s 168(2) as treason, espionage, sabotage, piracy, piratical acts, escape or rescue from prison/lawful custody/detention, sexual violation, murder, abduction, kidnapping, burglary, robbery, and arson). In effect this is a form of "constructive malice".

- (a) if he or she means to cause grievous bodily injury for the purpose of facilitating the commission of any of the offences mentioned in subsection (2), or facilitating the flight or avoiding the detection of the offender upon the commission or attempted commission thereof, or for the purpose of resisting lawful apprehension in respect of any offence whatsoever, and death ensues from such injury:
- (b) if he or she administers any stupefying or overpowering thing for any of the purposes aforesaid, and death ensues from the effects thereof:
- (c) if he or she by any means wilfully stops the breath of any person for any of the purposes aforesaid, and death ensues from such stopping of breath.

171 Manslaughter

Except as provided in section 178 [infanticide], culpable homicide not amounting to murder is manslaughter.

Law reforms in 1989, 2002, and 2009

8.3 In New Zealand, the mandatory penalty for murder was the death sentence until it was replaced in 1961¹⁶³ by a mandatory penalty of life imprisonment.¹⁶⁴ At that time, the partial defence of provocation continued to be important, as it could reduce the crime of murder to manslaughter.¹⁶⁵ However in 2002, New Zealand carried out a further reform, abolishing the mandatory life sentence for murder,¹⁶⁶ and replacing it with a statutory presumption that a life sentence must be imposed unless to do so would be “manifestly unjust”.¹⁶⁷ One important further reform was the repeal in 2009 of the statutory defence of provocation,¹⁶⁸ partly because a life sentence was no longer mandatory and the sentencing judge was able to all the circumstances into account.

8.4 Defences to a charge of homicide currently include insanity¹⁶⁹ and self-defence.¹⁷⁰ New Zealand law does not have partial defences of provocation or diminished responsibility, but it

¹⁶³ It was abolished for all offences in 1989: Abolition of the Death Penalty Act 1989.

¹⁶⁴ Crimes Act 1961, s 172.

¹⁶⁵ Thus avoiding a life sentence.

¹⁶⁶ Sentencing Act 2002, s 165, replacing section 172 of the Crimes Act 1961: while a convicted murderer is “liable” to imprisonment for life, that is qualified by the Sentencing Act 2002, s 102: see the following footnote below.

¹⁶⁷ Sentencing Act 2002, s 102: “An offender who is convicted of murder must be sentenced to imprisonment for life unless, given the circumstances of the offence and the offender, a sentence of imprisonment for life would be manifestly unjust.” Written reasons are required if a life sentence is not imposed, and few cases have qualified to date: New Zealand Law Commission, *Understanding Family Violence; Reforming the Criminal Law Relating to Homicide* (R139, 2016). Circumstances in which life imprisonment might be deemed manifestly unjust include mercy killings, failed suicide pacts, and “battered defendants” who were subjected to “prolonged and severe abuse”: R Chhana, P Spier, S Roberts, and C Hurd “The Sentencing Act 2002: Monitoring the First Year” (2004) pp 13-14

¹⁶⁸ Crimes (Provocation Repeal) Amendment Act 2009, s 4.

¹⁶⁹ Where the insanity defence is successful, the verdict is recorded as “not guilty by reason of insanity”: Criminal Procedure (Mentally Impaired Persons) Act 2003, s 20(1).

¹⁷⁰ Crimes Act 1961, s 48.

does have a partial defence of suicide pact.¹⁷¹ Whilst a defence of compulsion exists,¹⁷² it is expressly provided that this does not apply to murder.¹⁷³

Infanticide

8.5 Infanticide is the third homicide offence under New Zealand law.¹⁷⁴ Section 178 of the Crimes Act 1961 sets out detailed provisions applicable where a woman causes the death of her child who is under the age of 10 years. The provisions recognise situations¹⁷⁵ where the balance of the woman's mind was disturbed to such an extent that she should not be held fully responsible.¹⁷⁶ In those circumstances, the maximum sentence for what would otherwise be murder or manslaughter is three years.¹⁷⁷

¹⁷¹ Crimes Act 1961, s 180.

¹⁷² *Ibid*, s 24(1)

¹⁷³ *Ibid*, s 24(2)(e)

¹⁷⁴ Scots law does not recognise such an offence, although the law in England and Wales does: Infanticide Act 1938, s 1(1). There have been only nine convictions for infanticide in England and Wales since April 2007, and none since April 2014 (ONS, *Homicide in England and Wales: Year Ending March 2018* (2019) Appendix Table 16.

¹⁷⁵ Such as not fully recovered from childbirth of the child victim or any other child; the effect of lactation; any disorder consequent upon childbirth or lactation.

¹⁷⁶ In effect, an equivalent to the Scottish partial defence of "diminished responsibility".

¹⁷⁷ Crimes Act 1961, s 178(1).