**Homicide and the loss of life**

The offences of homicide all share one fact in common: the loss of life of the victim.

- While violent crime in general has decreased by 49% since 1995, homicide has generally been on the increase: over the last 20 years the average annual increase has been 1.6%
- Provisional figures for 2008/09 suggest, however, that the number of homicides have decreased, rather than increases, to 648, the lowest figure in 20 years
- Males are most likely to be both the victims and offenders in homicide. At first glance this seems to portray a picture similar to that encountered with non-fatal offences against the person of young males inflicting violence on each other. However, closer analysis of the official statistics reveals a different picture: that homicide is predominantly “domestic” in nature. The V is likely to have known the killer.
- All this data is of importance and relevance to the way the law responds, particularly in relation to the development of the partial defences of provocation (or loss of control, as it now is) and diminished responsibility and the general defence of self-defence. For example, increased understandings of such issues has been a driving force behind developments in the law reforming provocation and replacing it with a new defence of “loss of control” to incorporate elements of excessive force in self-defence.
- The official statistics (HOSB) also revealed another important fact. Children under one year of age are most at risk of homicide. This led to a debate as to whether infanticide should be retained as a separate offence or whether many of such killings should be brought within the ambit of the defence of diminished responsibility.
- Homicide is regarded as the most serious offence. Our revulsion against it is embedded deep within us and our reactions to certain killings may be extreme.

- Homicide is arguably is deemed the most serious offence in the criminal law because with homicide we are referring to the death of the V
- Take away their right
- With sexual offenders the offender impacts upon their sexual choices
- Homicide is final, it involves the death of a person
- This is important not because of its seriousness but also because it impacts upon the way the law is created
- Homicide infringe the principle of sanctity of life

- The following extract attempts to explain the underlying significance of homicide:

  **Fletcher, G. P. (1978) Rethinking Criminal Law**
There are three prominent starting places for thinking about criminal liability. In the pattern of **manifest criminality**, the point of departure is an act that threatens the peace and order of community life. In the theory of **subjective criminality**, the starting place is the actor’s intent to violate a protected legal interest. In the law of homicide, the focal point is neither the act nor the intent, but the **fact of death**. This overpowering fact is the point at which the law begins to draw the radius of liability. From this central point, the perspective is: who can be held accountable, and in what way, for the desecration of the human and divine realms?

**What does it mean?**

In essence thinks of criminal liability, distinguish between manifest criminology and subjective criminology

**Manifest criminology**: interested in actions that threaten our interests. The point of criminal law in this regard is not about the relationship of the D and the V. The peace and order community life is destructed. Collective interests in community life. So the criminal law is above the interests of the V. When the act does not look like a crime.

**Subjective criminology**: focus is not on the act but instead the state of mind of the D.

**Example that supports Fletcher idea**: the example of driving offences where death is caused. How do we respond to a drunk driver who causes the death of another? How do we respond to reckless driving? These examples are good examples of Fletcher idea.

Causing death unlicensed is another example.

So death and sanctity of life are all important.

We will how the law of homicide is different from other offences.

The principle of correspondence is breached in many cases

Is this overplaying the importance of death in our thinking?

- **Self-defence**
  - Can we kill another in the defence of ourselves?
  - Fletcher point: if we kill in self-defence this is not manifest criminology

- **Re A (Children) (Conjoined Twins: Medical Treatment) (No. 1) [2001] 2 WLR 480**
  - CA allowed the separation operation
  - The court faced with the Q whether surgeon can separate the twins knowing that one twin will die
  - The court allowed the operation
Constructive or Unlawful Act Manslaughter

- Note: there are two basic categories of manslaughter: voluntary and involuntary
- Note: there are two (or possibly three) categories of involuntary manslaughter:
  1. Constructive manslaughter
  2. Gross negligence manslaughter
  3. Reckless manslaughter

The requirements of this offence are that:

- The defendant has committed an **unlawful act**
- The unlawful act is **dangerous**; namely it must expose the V to the risk of some bodily harm resulting therefrom.
- The act **causes the death** of the victim

Manslaughter is constructed from a lesser offence
- Note: there is no need to show that the D intended or foresaw the death of the V. it is enough that the D had the MR for the particular unlawful act.

1. The unlawful act

Also known as constructive manslaughter; liability for homicide is constructed from the unlawful act that has caused death. Not all unlawful acts suffice for constructive manslaughter – three limitations:

- The act must be a crime
- The act must be unlawful for some other reason than it was negligently performed
- Omissions will not suffice

a) The act must be a crime

- A tort or other civil wrong will not suffice

In *Franklin* (1883) 15 Cox CC 163: a crime (not a tort) must be committed.

- Historical thought that tort wold be sufficient but held that unlawful act must be a crime and for purposes of constructive of manslaughter the prosecution must state what the crime is

- **Filed J** rules that “the 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 in a criminal case.”

- Further, if the D would have a defence to the unlawful act, then there is no crime for the purposes of constructive manslaughter,
**DPP v Newbury [1977] AC 500:**

- The appellants, two boys aged 15, pushed part of a paving stone off the parapet of a railway bridge. The stone struck on oncoming train, through the glass window of the driver’s cab and killed a guard who was sitting next to the driver. The boys were convicted of manslaughter.
- The CA dismissed their appeal but certified the following point: can a D be properly convicted of manslaughter when his mind is not affected by drink or drugs, if did not foresee that his act might cause harm to another?
- **Lord Salmon:** it is unnecessary to prove that the accused knew that the act was unlawful or dangerous.

  “The test is still the objective test. In judging whether the act was dangerous the test is not did the accused recognise that it was dangerous but would all sober and reasonable people recognise its danger”, per Lord Salmon (at p507).

- It is not entirely clear what the unlawful act was that formed the basis of the manslaughter charge and conviction in Newbury
- Was it criminal damage, common assault or the offence of endangering the safety or any person conveyed upon a railway contrary to the OAAPA 1861 s34?

Two points to note:

1. Objective requirement (cf subjective requirement)
   - From the subjectivist view: constructive manslaughter is problematic in the sense that one is guilty of homicide offence even if the D has not foreseen the harm, and the second problem is that only some harm has to been foreseen and not a serious injury. This heavily breaches the correspondence principle; the Mr does not correspond to the AR.
   - Constructive manslaughter is in breach of correspondence principle. The harm is death, the level of MR is the foresee of some harm.

Four questions:

a) **Does the unlawful act have to create a risk of physical harm?**

**Dawson (1985) 81 Cr App R 150:**

- Here, the Ds committed a robbery on a petrol station, 60 years old man with heart condition, as a result of robbery the man suffered hear attack and died
- Q: does the act need to create a risk of physical harm?
- Physical harm was caused by the shock
**Dalby [1982] 74 Cr. App. R. 348:**

- The appellant who had obtained Diconal tablets upon prescription, unlawfully supplies his friend, O’Such, with some of the tablets (this was the unlawful act, namely, an offence contrary to s4(1) of the Misuse of Drugs Act 1971). The friend injected himself intravenously with the tablets and later died. He appealed against his conviction for manslaughter.

- **Waller LJ:** the supply did not cause any direct harm to the V. the kind of harm envisaged in all the reported cases of involuntary manslaughter was physical injury of some kind as an immediate and inevitable result of the unlawful act. Where the charge of manslaughter is based on an unlawful and dangerous act it must be directed at the V and likely to cause immediate injury, however slight.

    "In all the reported cases, the physical act has been one which inevitably would subject the other person to the risk of some harm from the act itself. In this case, the supply of drugs would itself have caused no harm unless the deceased had subsequently used the drugs in a form and quantity which was dangerous", per Waller LJ (at p351).

However, Waller LJ, further stated that the unlawful act must be directed at the victim.

- However, this approach has, apparently, been disapproved.

But, what about *Larkin [1943] 1 All ER 217*?

- The D in this case brandished a razor at a man in order to terrify him. His mistress fell against the razor, cut her throat and died. Larkin’s conviction for manslaughter was upheld. In this case, unlike *Lamb* there was clearly an unlawful act, namely an assault by intentionally terrifying the man

**Mitchell [1983] QB 741:**

Held: “The only question was one of causation: whether her death was caused by the appellant's act”, per Staughton J (a p748).

- It was also mentioned that in *Dalby* there had been no sufficient link between Dalby’s wrongful act (supplying the drug) and his friend’s death.
Mere negligence does not suffice for manslaughter: gross negligence must be established.

For a period it was thought that this basis for manslaughter had been subsumed into *Lawrence* recklessness manslaughter. However, in the following case, the HL jettisoned *Lawrence* in the context of manslaughter and reverted to the test of gross negligence.

Adomako [1995] 1 AC 171 is the leading case.

The D was an anaesthetist in an eye operation which involved paralysing the patient. During the operation a tube became disconnected from the ventilator. The D became aware that something was wrong four and a half minutes after the disconnection when an alarm sounded. However, the cracks he carried out failed to reveal the disconnection. The patient suffered a cardiac arrest and died. The D was convicted of manslaughter and appealed.

- Applies anaesthetic, check the vital signs of the patient, to make sure they are safe for the operation. During an operation the V’s ventilation tube got disconnected. The patient suffered cardiac arrest and died. He was negligent and realised the disconnection very quickly. Expert evidence said that he should realise it within 15 seconds. Realised the patient was not breathing, the machine not working and realised that the patient became blue. Failed to do so. Standard of case
- Before: prosecuted on the basis of objective manslaughter (Caldwell)

The requirements of the offence are:
- The defendant needs to owe the victim a duty of care
- The defendant needs to be in breach of that duty
- That breach has to cause the death of the victim
- The negligence has to be gross negligence: it has to be conduct deserving of punishment

Lord Mackay L.C: “for the prosecution it was alleged that the appellant was guilty of gross negligence in failing to notice or respond appropriately to obvious signs that a disconnection had occurred and that the patient had ceased to breathe. The appellant failed to notice that the patient’s chest was not moving, that the alarm of the ventilator was not switched on and that the patient was becoming progressively blue. The appellant failed to notice that the patient’s pulse had dropped and the patient’s blood pressure had dropped.

the CA held that in cases of manslaughter by criminal negligence not involving driving but involving a breach of duty is it a sufficient direction to the jury to adopt the gross negligence test without reference to the test of recklessness as defined in R v *Lawrence*.

What about Wacker [2003] 1 Cr. App. R. 22 where D and Vs were engaged on a joint criminal enterprise, and therefore owed no duty of care to each other in tort?

Agreed to take 16 immigrants to Uk, had refrigerated truck and crossed them over. When they went to customs, he will close the air ventilation of the lorry. However, he kept it close for too long and they died of asphyxiation. CAO: he argued that he didn't owe the V's a duty of care so he was not crossly negligence. The law of tort doesn't engage in duty of care because of criminal activities. Rejected by COA.

In this case, the appellant attempted to smuggle illegal Chinese immigrants into the country in a lorry. On arrival, one of the containers have found contain the dead bodies of most of the immigrants. The appellant was convicted of s5 offences of manslaughter and appealed.

Kay LJ: the first question to consider is whether the appellant owed to those in the container a duty of care. He submitted that one of the general principles in the law of negligence, known by the Latin maxim of *ex turpi causa non oritur action* was that the law of negligence did not recognise the relationship between those invoves in a criminal enterprise as giving rise to a duty of care owed by one participant to another.

it is clear that the criminal law adopts a different approach to the civil law in this regard because the same public policy that causes the civil courts to refuse the claim points in a quite different direction in considering a criminal offence.

...looked at as a matter of pure public policy, we can see no justification for concluding that the criminal law should decline to hold a person as criminally responsible for the death of another simply because the two were engaged in some joint unlawful activity at the time or, indeed, because there may have been an element of acceptance of a degree of risk by the victim in order to further the joint unlawful enterprise (at p338).

more than public policy; people cant escape liability for these reasons.

Criminal responsibility are not about balancing the responsibility between the D and the V, but in determining whether the activity engaged in by the D is sufficiently harmful and blameworthy in the eyes of the state to justify a criminal conviction – *Herring and Palser 2007*
the common law defence of provocation is abolished by s56 of the new Act

- whilst the Law Commission’s recommendations for change had retained the label for the partial defence as ‘provocation’ this was dropped by the Government on the basis that conversations with stakeholders had revealed that the term carries ‘negative connotations’
- in comparison with Homicide Act s3 the new provision provides far more detail, and the elements of the defence are further clarified in s55
- the defence can no longer be separated into subjective test and an objective test. But if it is looked closely it is seen that it is very much based on the common law defence of provocation and retains many of its characteristics.

3. The requirements for the partial defence to apply

- There needs to be a loss of control.
- There is a qualifying trigger for the loss of control.
- A person of the defendant's sex and age, with a normal degree of tolerance and self-restraint, might have reacted in the same or in a similar way to the defendant.

4. Loss of control

- Initially a common law defence
- The old definition of provocation is provided below:

  The common law defined provocation as:

  …some act, or series of acts, done by the dead man to the accused which would cause in any reasonable person, and actually causes in the accused, a sudden 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. (Duffy [1949] 1 All ER 932, per Devlin, J as approved by Lord Goddard CJ.)

- An important point of the common law it that it required sudden and temporary self-control + rendering the accused so subject to passion
- This definition was incorporated into the Homicide Act 1997
- But thought that this definition was gender based.
- The argument was made was that for women their response will be different – described as an anger rather than immediate and temporary loss of self – control
No matter how severe the provocation, if the D was in control at the time of the killing, there was no evidence upon which the defence could be based.

Rationale for the defence: it is the law’s desire to make concessions to human frailty.

The Q that remains, however, is what is meant by self control? It is clearly a subjective test: the issue is whether the D lost his self-control, causing him to kill.

Holton and Shute (2007) argued that self-control consists of the ability to bring one’s actions into line with one’s considered judgements about what it would be best to do, where these judgements depart from one’s desires. They argued that what one loses is one’s control over which of one’s mental elements drive one’s actions. Thus they argue, that the defence of provocation (or loss of control) ought to start with a test establishing whether the D had self-control prior to the provocation before requiring that it was lost and that such a loss led to the D killing the deceased; “you can’t lose what you ain’t never had”.

In the case above loss of self-control was equated with anger and not with fear or despair or other strong emotions. The person who killed through terror of what might happen to her was traditionally excluded from the ambit of the provocation defence it this terror did not express itself in anger.

Notes from the book: this concept of anger required further consideration. Horder has suggested that loss of self control is one of the forms that anger may take. For example, a lecturer may be so enraged by the late arrival to her lecture that her response is to take out a gun and shoot the unfortunate student. Taking this sequence of events apart, the late arrival of the student leads to a judgment being made by the lecturer that wrong has been done to her. This generates anger in the form of loss of control so that the lecturer responds “impetuously”, without stopping to determine the appropriate response to the provocative event.

If as Horder suggests, the modern law of provocation was based upon such a conception of anger, one can see why the law insisted that the loss of self-control be “sudden and temporary”.

However, there remained the Q of what precisely the phrase sudden and temporary meant?
Under the common law, the defendant had to lose control as a result of things said or done, and such things need not have come from the victim, nor need they have been ‘wrong’. See, for instance, *Doughty* (1986) 83 Cr App R 319: it was wrong for the judge to remove the partial defence when the defendant claimed he lost control as a result of a baby crying.

- Therefore the rationale for this case was stated in the above case where the D killed his 17 year old son in circumstances where the D had had to look after both is wife and the baby since their return from the hospital. The baby was extremely restless and cried persistently, leading to the D finally trying to stop the crying by placing a cushion over the baby’s head and then kneeling on it. The trial judge ruled that the perfectly natural episodes of crying or restlessness by a young baby could not constitute evidence of provocation.
- The D appealed against the conviction and the CA held: the judge was wrong not have the left the defence of provocation to the jury on the basis that the D had lost control because of things said or done. The issue for the jury would then have been, in applying the objective test, whether it was reasonable for the D to have done so.

**Instead, we now have two qualifying triggers under the act:**

- D must fear ‘serious violence’.
- Something must be said or done as per s55(4)(a) and (b).

(a) D must fear ‘serious violence’

In essence, it is a partial defence to those who cannot fully rely upon self-defence, yet their actions are in response to the victim who poses a threat of ‘serious violence’.

- This is an entirely new basis of a partial defence to murder. It allows for Ds who are likely to fail in a plea of self-defence because they have reacted disproportionately to a threat from the deceased to avoid a murder conviction and be convicted of the lesser offence of manslaughter. Why was it seen as a necessary addition?
- **Law Commission** in 2006: the current law of provocation is deficient in two ways:
  1. To succeed in a plea of self-defence, D must make a case that what he or she did was within the bounds of reasonableness, as a means of averting a threat posed by V. Also, in order to be able to plead self-defence the defence requires that the D respond to an imminent threat of violence.
  2. If no defence is found because the intent to kill or do serious harm was disproportionate as a response to the threat posed by the V, then D can only
4. Substantially impairs Ds ability

The Act requires that the abnormality of mental functioning ‘substantially impairs’ the defendant’s ability to do one or more of three things:

- Understand the nature of his conduct (the def did not understand what he was doing)
- Form a rational self-judgment (can they rationally judge their actions? Can they know what they did was wrong?)
- Exercise self-control.

for all these above things, there must be substantial impairment

What does ‘substantial’ mean?

R. v Ramchurn [2010] 2 Cr App R 3:

“Substantially” is an ordinary English word which appears in the context of a statutory provision creating a special defence which, to reflect reduced mental responsibility for what otherwise would be murderous actions, reduces the crime from murder to manslaughter. Its presence in the statute is deliberate. It is designed to ensure that the murderous activity of a defendant should not result in a conviction for manslaughter rather than murder on account of any impairment of mental responsibility, however trivial and insignificant; but equally that the defence should be available without the defendant having to show that his mental responsibility for his actions was so grossly impaired as to be extinguished. [per Judge, LCJ, at 23.]

- substantial = it is falls in the middle of those two examples, more than something which is trivial and insignificant but does not have to result in gross impairment
- merely has to be more than minimum

Substantially impairs D’s ability

Has the new partial defence altered this? Wake, ‘Substantial Confusion within Diminished Responsibility?’ (2011) 75 Journal of Criminal Law 12
To use the defence it needs to be shown that the D was suffering from an abnormality of mental functioning caused by a recognized medical condition at the time of the incident. This means that it is not enough for the D simply to show that he or she was in a disturbed state; they must identify the recognized condition they are suffering from.
The effect of the act is that if you leave with a partner who abuse the child then you have to do something to prevent it.

What does reasonable mean? Does it take into account the context of the D’s situation? The answer is yes, this was decided by the CA in Khan.

We can see in the provision that the prosecution do not need to show the exact contribution that the defendant made to the victim’s death; all that needs to be proved is that they either killed the victim (as a result of an unlawful act) or that the defendant allowed this to happen, when they were aware of a significant risk of serious physical harm to V, or should have been aware of this risk. Note that the offence is restricted to members of the same household and the defendant needs to have had frequent contact with the victim.

Some issues with the offence:
- The victim needs to die as a result of an unlawful act (rather than a pure omission).
- In allowing the harm to occur, D need not be aware of a risk; the requirement is objective, in that D ought to have been aware of the risk. This is a requirement of negligence.
- Note: this does not mean that the circumstances of which D ought to have been aware need to be identical to those that occurred, only that they are of the same kind.
- The risk must be a significant risk of serious physical harm being caused to V.
- Commentators have questioned whether the offence is too broad; there is no defence for a parent who allows the death of a child where that parent is also suffering from abuse from the parent who kills the child. Can we expect victims of domestic violence who cannot protect themselves to also protect their children?
- Note: Herring argued that the problem with section 5 is that it deflects attention away from the main problems faced by society in such cases and makes criminals out of mothers who are themselves victims of domestic violence.
- Herring: the offences are often based on a glamorised view of motherhood which regards the mother in an idealistic way as an all-knowing all-sacrificing protector. The prosecution of women who fail to live up to this image can lead to the focus of legal and public attention not being on the abuser but on the mother who ‘left her children to die’. The time and effort in prosecuting abused women who fail to protect their children would be better spent on ensuring there was effective and adequate protection of women and children from violence.

On this, see


**Morrison** (2013) ‘Should there be a domestic violence defence to the offence of familial homicide’, *Criminal Law Review* 826, rejects this claim, as the
(b) Killing where the offender intended to cause some injury or a fear or risk of injury, and was aware of a serious risk of causing death. (this is the Wilson’s proposal mentioned above)
(c) Killing in which there is a partial defence to what would otherwise be first degree murder. (loss of control and diminishes responsibility would merely reduce first degree murder to second degree murder, not murder to manslaughter. In this way it is called murder)

(3) Manslaughter (discretionary life maximum penalty)
(a) Killing through gross negligence as to a risk of causing death.
(b) Killing through a criminal act:
Where the D either
(i) intended to cause injury; or
(ii) where there was an awareness that the act involved a serious risk of causing injury.

In essence reformed constructive manslaughter – there is no subjective MR associated with the criminal act

Example: act of criminal damage, and regard this as objective dangerous, and the D did not foresee that as dangerous, it would be charged as manslaughter.
This does breach the correspondence principle: awareness of serious injury not murder.

Jonathan Herring Great Debates
➢ Note: if a D stabs the V in the foot, and due to unforeseen consequences the V dies, is that properly a case for murder or is it just bad luck for which the D is not liable? The argument in favour of the current law would be that any serious injury carries a risk of death you cannot stab a person without to some extent taking their life into your hands.
➢ So just as a person can be guilty of an assault occasioning ABH, even though they only intended an assault, the same kind of reasoning can justify the GBH rule.
➢ Notably the Law commissions’ proposals restrict murder to cases where the D was aware of the risk of death; Their proposal is based on the point that not all GBH are harms which are liable to lead the death of the V; only when the injury engages life should the D be considered to have taken the V’s life into his hands and therefore be liable for a murder conviction. (Jonathan Herring Great Debates)
➢ Anthe Pedain argues that a terrorist who intends to create a risk of death, even though they do not intend death, should be guilty of murder.
➢ In relation to manslaughter: these proposals will not be supported by subjectivists who oppose the current law and argue that a person should not be convicted of a homicide offence if they did not intend or foresee death. However the general view is against such a strictly subjectivist approach. Indeed the very fact that juries are willing to convict of gross negligence manslaughter indicates that juries find there are cases where the D should be guilty of manslaughter even though she did not foresee death or even serious harm.
time and expense and indicate that prosecutors, at least, are often willing to rely on judges exercising their sentencing discretion reasonably.

- Example: in the Iranian Embassy siege case the prosecution accepted a plea of guilty to manslaughter in a fairly clear-cut of murder; the D as promptly sentenced to life imprisonment, the same sentence he would have received after a long, expensive trial resulting in a murder conviction. If there were a single offence of unlawful homicide, one would avoid the present anomalous situation of some prosecutors accepting lesser pleas, while other prosecutors insist on pursuing a murder charge.

- Another argument in favour of single unlawful homicide offence: if the law is in strait-jacket (ie mandatory life imprisonment for murder) judges, prosecutors, and juries will start ignoring the law (ie juries will return verdicts of manslaughter in cases which are in law plainly murder, because they do not think that life imprisonment is the appropriate sentence). If this starts happening too extensively, should not the law be changed?

- A single offence of unlawful homicide would mean that life imprisonment would be restricted to the worst cases. This would increase public confidence in the life sentence.

Other objections:

- **Law Commission**: At the moment the judge has discretion in accordance with the guidance provided by the CJA 2003 Sch21 as to the minimum term to be served in prison. To have a single offence of homicide, combining murder with a lesser offence of manslaughter, would mean that the jury's verdict would leave the judge with no guidance as to the gravity of the offence. Furthermore, to abolish the offence of murder as such (ie abolish the mandatory life sentence) many appear to have the effect of lessening the seriousness of taking life; “we think that in the public’s mind there is a stigma attaching to a conviction of murder and that this rightly emphasized the seriousness of the offence and may have a significant deterrent value.

- Such a proposal would result in a substantial increase of judicial discretion in sentencing. Over the past three decades there has been a strong movement away from judicial discretion in sentencing which ought to lead to a more precise classification of offences.

- If were to abolish the distinction between murder and manslaughter would it not follow that we should abolish the distinction between such offences as malicious wounding and inflicting gbh and wounding and causing gbh with intent?

- In relation to the principle of fair labelling: If we have a single label of homicide which covers every killing from the most heinous pre-mediated murder to mercy killings to a killing by a person with a severe mental abnormality, the label of homicide would not attract a sufficiently clear notion of the kind of offences it covers.