

# **CONSULTATION PAPER**

ON

**HOMICIDE: THE MENTAL ELEMENT IN MURDER** 

(LRC - CP 17 - 2001)

# **IRELAND**

The Law Reform Commission

I.P.C. House, 35-39 Shelbourne Road, Ballsbridge, Dublin 4

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The Law Reform Commission 2001 March 2001

ISSN 1393 - 3140

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The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government in Autumn 2000. The Commission also works on matters which are referred to it on occasion by the Office of the Attorney General under the terms of the Act.

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#### **ACKNOWLEDGEMENTS**

The Commission would like to thank Mr. Patrick MacEntee, Senior Counsel, who provided valuable advice and assistance. Full responsibility for this Consultation Paper, however, lies with the Commission.

The Commission also wishes to record its thanks to the following researchers who contributed to the work of the Commission in the preparation of this Consultation Paper:

Lia O'Hegarty, former researcher; and, Jane McCullough, researcher.

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#### INTRODUCTION

#### A. Background to the Consultation Paper

- In 1976, the Law Reform Commission's First Programme for Law Reform, under the heading of Criminal Law, proposed a review of the mental element in crime, and the legal fault required to constitute a crime.
- This paper reviews the mental element for the crime of murder, as governed by section 4 of the Criminal Justice Act, 1964.

## B. Overview of the Consultation Paper

- The paper undertakes a review of the mental element in murder. Section 4 of the Criminal Justice Act, 1964 defines the mental element in murder as an intention to kill or to cause serious injury. In what follows we examine whether there are morally reprehensible killings which fall outside the present definition of murder, but which nevertheless ought to be punished as murder. Although there is little reported Irish authority on the meaning of 'intention', in England that concept has been interpreted as embracing, in addition to situations where it is the actor's conscious object or purpose to kill, situations where, although it may not be the actor's object or purpose to kill, he nevertheless foresees death as virtually certain to result from his actions. On that construction it follows that no matter how culpable the taking of the risk in question may be, it cannot be murder unless the actor foresees death as a virtually certain consequence of his actions. This would exclude from the definition of murder many forms of socially unacceptable risk-taking which fall short of a virtual certainty.
- Of course, it does not necessarily follow that intention bears the same meaning in Irish law as it does in English law. It may be that in Irish law intention bears a wider meaning than that ascribed to it by the English courts. If that is the case it raises the further question as to what exactly intention means in Irish law. In view of the scarcity of reported Irish authority on the matter it is difficult to give a precise answer to this question. The Commission is of the view that greater clarity is desirable in this important area of the law, and therefore recommends that the law should be reformed as discussed in Chapter Four below. The paper also examines whether intention to cause serious injury should be retained as part of the definition of murder.
- 5 The paper is divided into five main chapters. Chapter One contains an historical overview. Chapter Two outlines the present law. Chapter Three

R v Woollin [1998] 4 All ER 103. See also Smith and Hogan, Criminal Law, (9th ed., London, 1999), 55.

examines the law and proposals for reform in other jurisdictions. Chapter Four examines issues for reform arising out of the present law, evaluates possible options for reform and makes provisional recommendations in this regard. The Commission's central recommendation is that the mental element in murder should be broadened to embrace certain types of reckless killings. The formulation favoured by the Commission is based on that contained in the American *Model Penal Code*, namely that killings "committed recklessly under circumstances manifesting an extreme indifference to the value of human life" constitute murder. The Commission also recommends that an intention to cause serious injury should be retained as part of the mental element in murder. Chapter Five discusses whether certain key terms such as 'intention' and 'serious injury' should be defined, and sets out possible definitions as well as a draft clause. Chapter Six contains a summary of the Commission's recommendations for reform.

The Commission has already recommended in a previous report that the mandatory life sentence for murder be abolished,<sup>3</sup> and therefore does not revisit the issue in this Consultation Paper. Similarly, no consideration has been given to the mental element for attempted murder as the Commission feels that this raises discrete policy issues which properly belong in a general review of the law of attempts.

### C. Should the Murder/Manslaughter Distinction be Retained?

7 A number of arguments may be made in favour of abolishing the murder/manslaughter distinction and replacing it with a single offence of unlawful homicide. Firstly, the distinction can appear arbitrary from a moral point of view. As Finlay CJ. commented in *People v Conroy (No. 2)*:

"Having regard to the multiple factors which enter into consideration of sentence in the case of a homicide, there would not appear to me to be any grounds for a general presumption that the crime of manslaughter may not, having regard to its individual facts and particular circumstances be in many instances, from a sentencing point of view, as serious as, or more serious than, the crime of murder."

- Secondly, the introduction of a single offence of unlawful homicide might lead to a greater number of guilty pleas, with a consequent saving in court time and expense. At present one of the main issues in homicide cases is whether a particular killing amounts to murder or manslaughter. If the distinction was abolished that issue would lapse, thus greatly simplifying and expediting the trial process. Furthermore, the introduction of a single offence of unlawful homicide would avoid many of the problems of classification which arise under the present law.
- 9 This paper is, however, based on the assumption that the murder/manslaughter distinction should be retained. The following considerations

American Law Institute, Model Penal Code and Commentaries (2<sup>nd</sup> ed., 1980), Part II, 21.

Law Reform Commission, Report on Sentencing (LRC 53-1996), Recommendation 12, 69.

<sup>&</sup>lt;sup>4</sup> People v Conroy (No. 2) [1989] IR 160, 163.

may be cited in support of this conclusion. First, the distinction is rooted in the historic principle that criminal liability presupposes an intention to commit the relevant *actus reus*. This principle has long been recognised as a cornerstone of the criminal law. Since Coke's time it has been regarded as one of the distinguishing insignia of criminal liability so that offences which do not conform to it are treated as deviations from the normal pattern of liability.

- Second, the law ought to distinguish between more serious and less serious killings. The effect of abolishing the distinction would be to lump together into a single category the most cold-blooded murders with the least blameworthy manslaughters. This category would be particularly uninformative as it would describe and label crimes of such varying culpability in identical terms. For example, killings committed with diminished responsibility or under provocation would be described and labelled in the same manner as contract killings.
- Third, a conviction for murder carries a unique stigma which emphasises the seriousness of the offence and may also have significant deterrent value. The term 'murder' has a very important symbolic and declaratory effect, and serves to convey the seriousness of the particular killing and to indicate to society the nature and quality of the offender's crime. Differentiating between homicide offences emphasises the differing stigma attaching to each. Removal of murder as a distinct offence would result in a failure to convey adequately the degree of stigma and revulsion society attaches to particularly heinous killings.
- Fourth, abolishing the murder/manslaughter distinction would effectively shift the centre of gravity of homicide trials to the sentencing stage, thus marginalising the role of the jury in the criminal process. At present, important questions of fact, such as whether the defendant acted under provocation, are decided, following detailed evidence, by the jury prior to verdict. If, however, a single offence of unlawful homicide were created, only the judge would be able to decide, as relevant to culpability and the level of sentence to be imposed, many of these important questions of fact at sentencing stage. At present, matters of mitigation, examined after conviction, are often only "skimpily gone into." Deprived of the detailed evidence such as might presently be called at trial, the judge would have less material upon which to make these decisions. Furthermore, this would shift important questions which are presently decided by the jury to the judge alone, possibly leading to the undermining of the right to trial by jury.
- Finally, to abolish the murder/manslaughter distinction would be to abolish a distinction which has been in the law for hundreds of years, and which is "deeply imbedded in our social and legal culture." Removal of the distinction would be

This point was made by the Law Reform Commission of Victoria. The Law Reform Commission of Victoria, *Homicide* (Discussion Paper No. 13, March 1988), para. 108.

The Criminal Law Revision Committee of England and Wales acknowledged this point in recommending the retention of the distinction between murder and other unlawful killings. Criminal Law Revision Committee, Offences against the Person (Cmnd 7844, 14th Report, 1980), para. 15.

Williams, Textbook of Criminal Law (1st ed., Stevens & Sons, 1978), 217.

Law Reform Commission of Victoria, *Homicide* (Discussion Paper No. 13, March 1988), para. 108.

likely to engender significant opposition from the public As the Criminal Law Revision Committee of England and Wales found

"As far as we have been able to judge from the memoranda submitted to us the public generally wants murder to be retained as a separate offence. If we were to propose the abolition of the separate crime of murder and its incorporation in a wider offence of unlawful homicide, many people would certainly find it hard to appreciate that the proposal was not meant to weaken the law and would be likely to think that the law no longer regarded the intentional taking of another's life as being especially grave. We recommend that murder should continue to be a separate crime"

- The Law Reform Commission of Victoria noted a similar result from its consultations "no submission favoured the unlawful homicide approach" <sup>10</sup> In New Zealand the Criminal Law Reform Committee proposed replacing the term 'murder' with that of 'culpable homicide', however, this proposal proved extremely contentious and attracted widespread criticism <sup>11</sup> In 1989 the New Zealand Crimes Consultative Committee accepted that there was widespread support for the retention of the term 'murder' <sup>12</sup> Thus, it appears that the public as a whole supports the distinction This may be a factor to be taken into account in retaining public confidence in the criminal justice system. It is perhaps also significant that the vast majority of common law jurisdictions have retained the distinction
- In light of the considerations set out above this paper presupposes the continued existence of the murder/manslaughter distinction. The Commission is of the view that many of the difficulties associated with the distinction can better be met by means other than abolition, including the removal of the mandatory life sentence for murder and the careful expansion of existing grounds of exculpation, and we intend to return to this issue in a subsequent consultation paper.

#### D. The Consultation Process

This Consultation Paper is intended to form the basis for discussion and accordingly the recommendations contained herein are provisional only. The Commission will make its final recommendations on this topic following further consideration of the issues and consultation with interested parties. Submissions on the provisional recommendations included in this Consultation Paper are welcome. In order that the Commission's Final Report may be made available as soon as possible, those who wish to do so are requested to make their submissions in writing to the Commission by 30th June 2001.

Criminal Law Revision Committee of England and Wales, Offences against the Person (Cmnd 7844, 14th Report, 1980), para 15

Law Reform Commission of Victoria, *Homicide* (Report No. 40, 1990 - 1991), para 119

Criminal Law Reform Committee New Zealand, Report on Culpable Homicide (July 1976)

The New Zealand Crimes Consultative Committee, Crimes Bill 1989 Report of the Crimes Consultative Committee (April 1991), 43-45

- 17 The Commission envisages that this paper will be the first in a series which will focus on various aspects of the law of homicide. Topics which the Commission is considering for examination include (though not necessarily in this order): provocation, legitimate defence, manslaughter, causation and the proper limits of exculpation.
- It should be noted that words such as "he" which import the masculine gender, should be construed throughout this Paper as also importing the feminine gender, and vice versa, unless the contrary intention appears. See section 11 of the *Interpretation Act, 1937* and section 33 of the *Interpretation (Amendment) Act, 1993.*



#### CHAPTER ONE: HISTORICAL OVERVIEW<sup>13</sup>

1.01 The early history of the crime of murder is bound up with attempts to curtail the influence of benefit of clergy, the medieval device whereby defendants could escape liability by reciting a verse from the Book of Psalms. Beginning in 1512 the legislature sought to remedy this situation by denying benefit of clergy in respect of killings done with malice aforethought. Such killings were henceforth classified as murder, and carried the death penalty. The residual category of unlawful homicide came to be known as manslaughter and continued to attract benefit of clergy.

#### A. Malice Aforethought

- 1.02 The phrase 'malice aforethought' originally bore its literal meaning. A killing would only be murder if it was planned or premeditated in some way. However, it soon became clear that this definition of murder was too narrow as it excluded other types of killing deemed just as heinous and deserving of the death penalty. Furthermore, the identification of malice aforethought with premeditation meant that it was often difficult to prove.
- 1.03 Accordingly, judges began to expand the concept of 'malice aforethought' and quickly dispensed with the requirement of premeditated intent. Thus it was soon held that malice could be implied from the surrounding circumstances. Indeed, there was support for the view that malice could be implied from a general intent to injure. Furthermore, unprovoked homicides were excluded from benefit of clergy with the result that provocation, rather than premeditation, became the test of whether a homicide could be subject to benefit of clergy.
- 1.04 By 1628 Coke was able to define murder as an unlawful killing done with "malice aforethought, either expressed by the party or implied by law." Malice would be implied by law where the killing was done in the absence of provocation, by poisoning or in the course of a robbery (the forerunner of the modern 'felony murder rule'). Coke's analysis was quickly seized on by judges as a way of extending the law of murder to killers who "in the public opinion of the day, ought not to be let off with the comparatively slight punishment attaching to clergyable offences". By the mid-seventeenth century it was clear that malice aforethought comprehended:

For a more detailed discussion see McAuley and McCutcheon, Criminal Liability (Round Hall Press, 2000), Chaps. 1 and 6; Sayre, "Mens Rea" (1931-32) 45 Harv LR 974; Perkins, "A Reexamination of Malice Aforethought" (1933-34) 43 Yale LJ 537.

<sup>&</sup>lt;sup>14</sup> R v Saunders [1576] 2 Plowd 473.

Coke, The Third Part of the Institutes of the Lawes of England (London, 1983), 45-52.

<sup>&</sup>lt;sup>16</sup> Sayre, "Mens Rea" (1931-32) 45 Harv LR 974, 998.

- (1) an intention to kill (express malice);
- (2) an intention to cause serious injury (implied malice);
- (3) killing while resisting lawful arrest (constructive malice);
- (4) killing in the course of committing a felony (also constructive malice).<sup>17</sup>

1.05 It is clear that malice aforethought lost its ordinary or natural meaning, becoming a term of art which could be shaped or altered to fit the prevailing view as to the proper scope of the crime of murder. In particular, it was interpreted so as not to undermine or frustrate the repressive function of the criminal law. The various modifications to the concept of malice aforethought reflected an underlying shift in attitudes as to what crimes were heinous enough to justify being labelled as murder.

1.06 In early modern criminal law the focus was on malice - in all its forms, express, implied and constructive - rather than on intention. However, as the reforming influences of the French Revolution began to spread, a greater emphasis came to be placed on the deterrent aspect of the penal sanction. This resulted in an attempt to define mens rea in terms of conscious mental states, capable of being deterred. This approach continued to gather momentum throughout the nineteenth century, when it was considered sufficient that the defendant had reconciled himself to committing the relevant actus reus, whether or not he directly intended it. Thus, the Criminal Law Commissioners of 1833 regarded the meaning of 'malice' as being knowingly to incur the risk of the relevant actus reus, as well as actually intending it, but as excluding everything else. Article 244(b) of Stephen's Digest of the Criminal Law<sup>18</sup> provided an alternative mental element for murder in addition to intention. According to this article, malice aforethought would include "knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person...although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused". This provision was also incorporated into section 174 of the Draft Criminal Code, 1879.

1.07 These provisions came to be generally accepted as correctly stating the mental element in murder, and until the 1960s (and the decision of the House of Lords in *DPP v Smith* 19) most commentators recognised a mental state of recklessness for murder distinct from intention. In 1954 Lord Chief Justice Goddard and Justice Humphreys, two senior judicial witnesses before the Royal Commission on Capital Punishment, were prepared to accept the definition of

This became known as the 'felony-murder rule'. To fall within the felony-murder rule it was only necessary to show an intention to commit the felony. It was not necessary to show a specific intention to kill. It was not until the passing of section 4 of the *Criminal Justice Act*, 1964 that the rule was finally abolished in this jurisdiction. The rule still survives in a number of states in the USA, although it is generally limited to felonies which are inherently dangerous.

Stephen, Digest of the Criminal Law (6th ed., Macmillan and Co., 1904).

DPP v Smith [1960] 3 All ER 161.

murder based on section 174 of the *Draft Criminal Code*, 1879 as representing the current law.<sup>20</sup> Kenny's *Outlines of Criminal Law*<sup>21</sup> defined malice aforethought as including an "intention to do an act which the prisoner realised was likely to kill, although he had no purpose of thereby inflicting any hurt". A similar provision was to be found in *Russell on Crime*<sup>22</sup> where the fault element for murder was said to include "an intention to pursue a course of conduct while realising that to do so may cause some person's death".

1.08 Thus, in addition to the standard case of a defendant who intended to kill, malice aforethought also embraced a defendant who foresaw death as a probable result of his actions, whether he intended to kill or not. The situation in respect of a defendant who merely contemplated death as a possibility of his actions was less clear, although in practice such a defendant would probably have been caught by the 'felony-murder rule'.

1.09 According to some commentators, the result was that, traditionally, it was the extent of malice rather than the definition of intention that was the principal focus of judicial attention in discussions of the *mens rea* of murder. The concepts of implied malice and constructive malice were used to catch defendants who were considered to be morally indistinguishable from the paradigm case of the intentional killer. The underlying principle was that "he who was as bad as a murderer...should be punished as one". 24

#### B. Summary

1.10 It is clear from the foregoing discussion that the *mens rea* of murder has varied with the underlying conceptions and objectives of the criminal justice system. In early law, when the objective of the criminal justice system was to restrict and supplant the bloodfeud, the mental element was of relative unimportance. As malice aforethought came to represent the *mens rea* of murder it was given a technical meaning by the courts in order to circumvent clerical exemption, and ensure that defendants who deserved to be punished as murderers were so punished. Thus, the phrase was interpreted (and reinterpreted) in order to fit the exigencies of the time, and to conform with what was felt to be the proper scope of the mental element of murder.

Royal Commission of England and Wales on Capital Punishment, (Cmnd 8932, 1953), paras. 472, 473 and 478.

Kenny, Outlines of Criminal Law (16th ed., Cambridge, 1952), 121. The first edition of this book appeared in 1902.

Russell, Russell on Crime (12th ed., London, 1964), 467.

McAuley and McCutcheon, Criminal Liability (Round Hall Press, 2000), 290.

<sup>&</sup>lt;sup>24</sup> Ibid. at 276.

#### C. DPP v Smith

- 1.11 It was against this backdrop that the House of Lords considered the mental element in murder in  $DPP \ v \ Smith$ . The accused was driving a car containing stolen property when he was asked to stop by a police officer. The accused refused to stop and the police officer clung on to the front of the car. The accused drove approximately one hundred yards, gaining speed and pursuing an erratic course until the officer was shaken off and fell in front of oncoming traffic, sustaining fatal injuries. The accused was charged with capital murder.
- 1.12 The accused was convicted of murder at first instance, but the Court of Criminal Appeal overturned his conviction, reaching a verdict of manslaughter. The Court held that the trial judge had erred in applying an objective test in determining the accused's intention. According to Byrne J:

"[the] presumption of intention means that, as a man is usually able to foresee what are the natural consequences of his acts, so it is, as a rule, reasonable to infer that he did foresee them and intend them. Although, however, that is an inference which may be drawn, and on the facts in certain circumstances must inevitably be drawn, yet if on all the facts of the particular case it is not the correct inference, then it should not be drawn."<sup>26</sup>

- 1.13 On appeal, however, the House of Lords reversed the decision of the Court of Criminal Appeal, and reinstated the conviction for capital murder. The House rejected any subjective test as to intention. According to Viscount Kilmuir:
  - "...it matters not what the accused in fact contemplated as the probable result, or whether he ever contemplated at all, provided he was in law responsible and accountable for his actions, *ie*, was a man capable of forming an intent, not insane within the M'Naghten Rules and not suffering from diminished responsibility. On the assumption that he is so accountable for his actions, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary, responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result."<sup>27</sup>
- 1.14 The decision in *Smith* provoked a torrent of criticism. As one commentator observed, <sup>28</sup> according to *Smith* all that was necessary to establish the mental element for murder was to show that the accused intended to do *some* unlawful act which, whether the accused realised it or not, was likely to cause death or serious injury. Thus, although the *English Homicide Act*, 1957 had purported to

DPP v Smith [1960] 3 All ER 161.

<sup>&</sup>lt;sup>26</sup> R v Smith [1960] 2 All ER 450, 453.

DPP v Smith [1960] 3 All ER 161, 167.

JC Smith, "Case and Comment: DPP v Smith" (1960) Crim LR 765.

abolish constructive malice<sup>29</sup>, the decision in *Smith* had, in effect, virtually reintroduced it.<sup>30</sup>

1.15 The decision in *Smith* provoked such an outcry that the legislatures in both Ireland and England introduced legislation to reverse its effect. In Ireland this took the form of the section 4 of the *Criminal Justice Act*, 1964.

According to the marginal note to the section, section 1 of the *English Homicide Act*, 1957 purported to abolish this doctrine.

Indeed, to some extent the rule introduced by Smith was broader than the older doctrine of constructive malice as it extended to the doing of any unlawful act, and was not confined to violent felonies likely to cause death. See Glanville Williams "Constructive Malice revived" [1960] 23 MLR 604, 607-609; McAuley and McCutcheon, Criminal Liability (Round Hall Press, 2000), 294.

#### CHAPTER TWO: PRESENT LAW - SECTION 4 OF THE 1964 ACT

- 2.01 The mental element for murder in Irish law is laid down by section 4 of the *Criminal Justice Act, 1964*, which provides:
  - 4. (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.

As a result of section 4(2) the test of intention is a subjective one depending on the actual state of mind of the accused.

#### A. Intention in the Case Law

- 2.02 There are only two reported Irish cases which discuss the meaning of intention, one in the context of attempted murder,<sup>31</sup> and the other in the context of capital murder.<sup>32</sup> These cases rely on the relevant English authority pertaining to the definition of 'intention', and so it is proposed to deal mainly with the latter cases here. Both the Irish and English cases are set out below in chronological sequence.
- 2.03 Following DPP v Smith, the next major case in this area of the law to reach the House of Lords was Hyam v DPP.<sup>33</sup> In this case the accused, Mrs Hyam, in order to frighten away her rival for the affections of a man, poured petrol through the letterbox of the house where the woman and her children were sleeping. She then ignited the petrol causing a fire in which two of the children were killed.
- 2.04 The trial judge directed the jury that the necessary intent would be established if the jury were satisfied that when the accused set fire to the house she knew that it was highly probable that this would cause death or serious bodily harm.
- 2.05 The question which came before the House of Lords was whether proof of the fact that the accused knew that it was highly probable that the act in question would result in death or serious bodily harm would suffice to establish malice aforethought in the crime of murder. The House of Lords, by a majority, upheld the

People (DPP) v Douglas and Hayes [1985] ILRM 25.

<sup>&</sup>lt;sup>32</sup> People v Murray [1977] IR 360.

<sup>33</sup> Hyam v DPP [1974] 2 All ER 41.

conviction for murder.<sup>34</sup> All five judges were of the view that carrying out an act with the knowledge that it was highly probable that death or grievous bodily harm would result amounted to malice aforethought.<sup>35</sup> Accordingly, as this state of mind was held to be a species of malice aforethought, it was not strictly necessary to decide whether the accused actually intended to kill or cause grievous bodily harm. Nevertheless, various views were expressed as to whether foresight of probable consequences would amount to intention in the strict sense.

2.06 Lord Hailsham adopted the definition of intention laid down by Asquith L.J. in the civil case of *Cunliffe v Goodman*:

"An 'intention', to my mind, connotes a state of affairs which the party 'intending'...does more than merely contemplate. It connotes a state of affairs which, on the contrary, he decides, so far as in him lies, to bring about, and which, in point of possibility, he has a reasonable prospect of being able to bring about by his own act of volition." <sup>36</sup>

Lord Hailsham also indicated that foresight of probable consequences was *not* the same as intention. Although foresight of probable consequences (or degrees of likelihood) was an essential factor that should be placed before the jury in determining whether the consequences were intended, the two concepts were distinct.

2.07 Although Viscount Dilhorne did not find it necessary to decide whether knowledge of a high probability constituted the necessary intention, he inclined towards the view that such knowledge did constitute the necessary intention. Lord Diplock held that no distinction was to be made in the law of murder between doing an act with the object of causing death or grievous bodily harm and doing an act knowing that it may well cause death or grievous bodily harm. Lord Cross appeared inclined to agree with Lord Diplock, although for the purposes of the appeal he confined himself to the question of whether foresight of consequences could amount to malice aforethought.

2.08 Thus, different views were expressed by the House of Lords as to whether foresight of probable consequences (or degrees of likelihood) would amount to intention.

2.09 The first Irish case to discuss the meaning of the concept of intention was *People v Murray*.<sup>37</sup> Although this case concerned capital murder, in the course of

The two dissenting judges, Lords Diplock and Kilbrandon, differed from the majority only in construing grievous bodily harm as bodily harm known by the offender as being likely to endanger life.

In reaching this decision the House of Lords based themselves on the definition of *mens rea* contained in article 244(b) of Stephen's *Digest of the Criminal Law:* "knowledge that the act which causes death will probably cause the death of, or grievously bodily harm to, some person, whether such person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievously bodily harm is caused or not, or by a wish that it may be caused" – Stephen, *Digest of the Criminal Law* (6<sup>th</sup> ed., Macmillan and Co., 1904), article 244(b).

<sup>&</sup>lt;sup>36</sup> Cunliffe v Goodman [1950] 1 All ER 720, 724.

<sup>&</sup>lt;sup>37</sup> People v Murray [1977] IR 360.

his judgment<sup>38</sup> Walsh J. discussed the concept of intention, drawing a sharp distinction between intention on the one hand, and foresight of consequences on the other:

"To intend to murder, or to cause serious injury...is to have in mind a fixed purpose to reach that desired objective. Therefore, the state of mind of the accused person must have been not only that he foresaw but also willed the possible consequences of his conduct."<sup>39</sup>

At a later point in his judgment he stated:

"...it is, I think, accepted that a person who does not intend to kill and does not intend to cause serious injury but nevertheless does an act which exposes others to the risk of death or serious injury would not be guilty of murder when the mens rea required is an intent to kill or intent to cause serious injury."

2.10 The meaning of intention was also briefly considered by the Court of Criminal Appeal in *People v Douglas & Hayes*. <sup>41</sup> Strictly speaking, the Court's remarks in relation to murder are *obiter* as the offence charged was "shooting with intent to commit murder" contrary to section 14 of the *Offences Against the Person Act*, 1861. However, the Court considered that English decisions on the meaning of intention in the context of murder were applicable to section 14 of the 1861 Act, and in a brief judgment, delivered by McWilliam J., in which the Court quoted from a number of these English decisions, it was held that foresight and recklessness could not be equated with intention, although they might, in particular circumstances, constitute evidence from which an inference of intention could be drawn. McWilliam J. briefly summarised the law on intention as follows:

"In the circumstances of any particular case evidence of the fact that a reasonable man would have foreseen that the natural and probable consequence of the acts of an accused was to cause death and evidence of the fact that the accused was reckless as to whether his acts would cause death or not is evidence from which an inference of intent to cause death may or should be drawn, but the court must consider whether either or both of these facts do establish beyond a reasonable doubt an actual intention to cause death".

2.11 The House of Lords reconsidered the meaning of intention in R  $\nu$  Moloney. <sup>44</sup> The unanimous opinion of the Court is set out in the judgment of Lord

Walsh J. dissented on the main issue as to what was the *mens rea* required for a conviction for capital murder. In the course of his judgment, however, he discussed (*obiter*) the meaning of 'intention'.

<sup>&</sup>lt;sup>39</sup> People v Murray [1977] IR 360, 386.

<sup>40</sup> Ibid. at 387.

People v Douglas and Hayes [1985] ILRM 25.

<sup>42</sup> *Ibid.* at 26.

<sup>43</sup> Ibid. at 28.

<sup>44</sup> R v Moloney [1985] 1 All ER 1025.

Bridge who held that there was no rule of substantive criminal law that foresight of probable consequences was equivalent to, or alternative to, the necessary intention for a crime of specific intent. Rather, the question of foresight of consequences as an issue having a bearing on the concept of intention belongs not to the substantive law on the crime of murder, but to the law of evidence. In the rare case where it may be necessary to direct a jury by reference to foresight of consequences, two questions arise:

- (a) Was death or very serious injury a natural consequence of the defendant's voluntary act?
- (b) Did the defendant foresee that consequence as being a *natural* consequence of his act?

If the answer to both questions was in the affirmative, an *inference* could be drawn that the defendant had *intended* that consequence.

2.12 According to the Court, the important word in this formulation is 'natural'. In the words of Lord Bridge:

"This word conveys the idea that in the ordinary course of events a certain act will lead to a certain consequence unless something unexpected supervenes to prevent it. One might almost say that, if a consequence is natural, it is really otiose to speak of it as also being probable."

- 2.13 Furthermore, at another point in the judgment it is stated that "the probability of the consequence taken to have been foreseen must be little short of overwhelming before it will suffice to establish the necessary intent", 46 reinforcing the point that before an inference of intention may be drawn from a purported instance of foresight of consequences, the probability that death or very serious injury would be a natural consequence of the defendant's act must be a very high probability indeed.
- 2.14 Despite this clarification of the law, uncertainties remained and the issue returned to the House of Lords in *R v Hancock*.<sup>47</sup> The Court unanimously disapproved of the *Moloney* guidelines, holding that if it was necessary to direct the jury on intent by reference to foresight of consequences, the direction should not merely refer to the natural consequences of the accused's acts, but should also refer to the probable consequences of his acts, as this may amount to cogent evidence that the result was intended. Failure to explain the relevance of probability may mislead a jury into concentrating exclusively on the causal link between an act and its consequence. According to Lord Scarman it should be explained to the jury that the greater the probability of a consequence the more likely it is that it is foreseen, and if it is foreseen the greater the probability that it is also intended.<sup>48</sup>

<sup>45</sup> R v Moloney [1985] 1 All ER 1025, 1039.

<sup>46</sup> Ibid. at 1036. At page 1037 Lord Bridge paraphrases this as a "moral certainty".

<sup>&</sup>lt;sup>47</sup> R v Hancock [1986] 1 All ER 641.

<sup>48</sup> *Ibid.* at 651.

- 2.15 In R v Nedrick the Court of Appeal, having reviewed the authorities, summarised the law as follows:
  - "...if the jury are satisfied that at the material time the defendant recognised that death or serious harm would be virtually certain (barring some unforeseen intervention) to result from his voluntary act, then that is a fact from which they may find it easy to infer that he intended to kill or do serious bodily harm, even though he may not have had any desire to achieve that result...Where the charge is murder and in the rare cases where the simple direction is not enough, the jury should be 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 (barring some unforeseen intervention) as a result of the defendant's actions and that the defendant appreciated that such was the case."
- 2.16 The use of the word 'infer' in this formulation attracted academic criticism. As several commentators pointed out, the use of the word 'infer' implied that foresight of a virtual certainty was not a species of intention when many view it as a clear example of intention.<sup>50</sup>
- 2.17 In R v  $Woollin^{51}$  the House of Lords revisited the issue. The direction formulated by Lord Lane CJ in R v Nedrick was approved subject to one important modification. Lord Steyn held that the word 'find' should be substituted for 'infer'.  $^{52}$
- 2.18 The Court also found that the trial judge had misdirected the jury by instructing them that if the defendant realised there was a substantial risk that he would cause injury, it would be open to them to find that he had intended to cause injury. According to Lord Steyn, use of the phrase "substantial risk" had blurred the line between intention and recklessness, and hence between murder and manslaughter, and had in effect enlarged the scope of the mental element required for murder.

#### B. Summary of Irish and English Positions

2.19 As a result of the decision in  $R \ v \ Woollin$ , the law in England (at least in cases where it is not the defendant's purpose to kill) is that a jury is not entitled to find the necessary intention, unless they feel sure that death or serious bodily harm was a virtual certainty and the defendant appreciated that such was the case.

<sup>49</sup> R v Nedrick [1986] 3 All ER 1, 3 - 4.

See for example: Ashworth, Principles of Criminal Law (2<sup>nd</sup> ed., Clarendon Press, 1995), 172; J.
 C. Smith, "Case and Comment: R v Nedrick" (1986) Crim LR 742.

<sup>&</sup>lt;sup>51</sup> R v Woollin [1998] 4 All ER 103.

<sup>18</sup>id. at 113. Lord Steyn cited in support of this modification J C Smith, "Case and Comment: (R v Nerick)" (1986) Crim LR 742; Glanville Williams, "The mens rea for murder; leave it alone" (1989) 105 LQR 387; Ashworth, Principles of Criminal Law (2<sup>nd</sup> ed., Clarendon Press, 1995), 172.

2.20 In Ireland the law would appear to be as set out by the Court of Criminal Appeal in *People v Douglas & Hayes*. <sup>53</sup> Foresight of death as a natural and probable consequence of one's actions does not amount to intention *per se*, although it may be evidence from which intention can be inferred. <sup>54</sup>

# C. Serious Injury.

- 2.21 The term 'serious injury' is not defined by the *Criminal Justice Act, 1964*. In England the related term 'grievous bodily harm' has been interpreted by the courts as meaning "really serious bodily harm". It is not necessary in every case for the trial judge, when directing the jury, to use the prefix 'really' before 'serious bodily harm'. In the *Janjua and Choudury Case*<sup>56</sup> it was held not to be necessary where the act was stabbing with a five and a half-inch blade.
- 2.22 The term 'bodily harm' has been held, in the context of non-fatal offences, to include recognisable psychiatric illnesses. In *R v Ireland, R v Burstow*<sup>57</sup> the House of Lords held that the term 'bodily harm' should be given a contemporary interpretation so as to include recognised psychiatric illnesses, such as an anxiety disorder or depressive disorder, which affects the central nervous system of the body. *In R v Burstow*<sup>58</sup> an eight month campaign of silent telephone calls, hate mail and general non-physical harassment by the defendant, which caused the victim to suffer severe depression, <sup>59</sup> was held to amount to grievous bodily harm within the meaning of *Offences against the Person Act, 1861*, section 20.
- 2.23 Thus, grievous bodily harm could be inflicted where no physical violence was applied directly or indirectly to the body of the victim. Lord Steyn noted that the injury suffered in the case before him was not a structural injury to the brain such as might require the intervention of a neurologist, nor was it a psychotic illness or a personality disorder. Rather, it was a mental disturbance of a lesser order, namely a neurotic disorder.<sup>60</sup>

People v Douglas & Hayes [1985] ILRM 25.

Certainty as to consequences may amount to intent, however. McWilliam J. (at page 27 of the Report) quotes with apparent approval a dictum by Byrne J. in *Re. v Smith* [1961] AC 290 that "once...an accused man knows a result is certain the fact that he does not desire that result is irrelevant".

See J. C. Smith "Case and Comment: R v Saunders" [1985] Crim LR 230. A broken nose was held to be 'really serious bodily harm' in the context of a charge under section 20 Offences against the Person Act, 1861. The trial judge had directed the jury that grievous bodily harm meant "serious injury". The Court of Appeal upheld the conviction. According to the Court of Appeal if the omission of the word "really" was ever a proper ground of appeal, which was doubted, it made no difference in the case before the Court. A broken nose on any view was serious bodily harm, indeed 'really serious bodily harm'.

Janjua and Coudury [1999] 1 Cr App Rep 91.

<sup>8</sup> R v Ireland, R v Burstow [1997] 4 All ER 225. The two cases were heard and decided together by the House of Lords.

<sup>&</sup>lt;sup>58</sup> *Ibid.* Heard and decided together with R v Ireland.

Described by the consultant psychiatrist as "grievous harm of a psychiatric nature."

<sup>60</sup> R v Ireland, R v Burstow [1997] 4 All ER 225, 231.

2.24 However, Lord Steyn stressed that those neuroses had to be distinguished from states of fear, or problems in coping with everyday life, which did not amount to psychiatric illnesses:

"Neuroses must be distinguished from simple states of fear, or problems in coping with every day life. Where the line is to be drawn must be a matter of psychiatric judgment. But for present purposes it is important to note that modern psychiatry treats neuroses as recognisable psychiatric illnesses". 61

# D. The Presumption: Section 4(2) of the 1964 Act

2.25 Section 4 of the *Criminal Justice Act, 1964* provides, in relation to murder, that the accused person shall be presumed to have intended the natural and probable consequences of his conduct, but this presumption may be rebutted. This provision, which was introduced in light of the decision in *DPP v Smith*, <sup>62</sup> does not state the meaning of intention, but rather how the latter may be proved. Ultimately, it is for the jury to decide whether the accused actually intended to cause death or serious injury. <sup>63</sup>

<sup>61</sup> R v Ireland, R v Burstow [1997] 4 All ER 225, 231.

<sup>62</sup> DPP v Smith [1960] 3 All ER 161.

People v Douglas & Hayes [1985] ILRM 25, 28. See also Peter Charleton, Offences Against the Person (Round Hall Press, 1992), 47-53.



# CHAPTER THREE: LAW AND PROPOSALS FOR REFORM IN OTHER JURISDICTIONS

3.01 The following chapter contains an overview of the law and proposals for reform in other jurisdictions in relation to the mental element in murder. The jurisdictions dealt with here have been selected according to their relevance for the discussion of options for reform in Chapter Four. Many of the features of the jurisdictions included in this chapter are further discussed in their relevant context in Chapter Four.

#### A. England

#### (a) Proposals for Reform

3.02 Discussion of English case law is included in Chapter Two, and accordingly we deal here with reform proposals only.

#### (i) Intention

- 3.03 The law relating to the mental element in murder in England has been reviewed by three different bodies: The Law Commission of England and Wales, the Criminal Law Revision Committee (CLRC) and the House of Lords Select Committee on Murder and Life Imprisonment (Nathan Committee). Their Reports will be dealt with chronologically.
- 3.04 Following the decision in *DPP v Smith*<sup>64</sup> the Law Commission of England and Wales examined the mental element in murder.<sup>65</sup> The Commission concluded that the essential element in intent to kill was willingness to kill. Accordingly, the Commission proposed the following definition of intention in murder:
  - "A person has an 'intent to kill' if he means his actions to kill, or if he is willing for his actions, though meant for another purpose, to kill in accomplishing that purpose." 66
- 3.05 The Commission took a strong subjectivist stance and rejected any form of presumption as to intention, even a rebuttable one. Moreover, the Commission

<sup>64</sup> DPP v Smith [1960] 3 All ER 161.

The Law Commission of England and Wales, *Imputed Criminal Intent* (Director of Public Prosecutions v Smith) (1967).

<sup>66</sup> Ibid. at Appendix, Draft Clause 2(2).

recommended that intention to inflict grievous bodily harm should no longer form part of the mental element in murder.

3.06 Subsequently, however, the Law Commission of England and Wales published a report on the mental element in crime<sup>67</sup> and proposed a revised definition of intention (to apply to all intention-based offences):

"a person should be regarded as intending a particular result of his conduct if, but only if, either he actually intends that result or he has no substantial doubt that the conduct will have that result".<sup>68</sup>

- 3.07 The effect of this recommendation was explicitly to include, within the definition of intention, so called 'oblique intention', that is, cases where it is not the defendant's purpose to cause a particular result, but where it is a near inevitable byproduct (or a 'virtually certain' consequence) of his activity.
- 3.08 In 1980 the Criminal Law Revision Committee, in its Report on offences against the person, <sup>69</sup> examined the mental element in murder in the light of the *Hyam* decision. The Committee rejected a test based on knowledge of a high probability that death will result from one's actions. This formula was felt to be unsatisfactory because a test expressed in terms of probability was so uncertain in result. However, the Committee felt that it would be too narrow to confine intent to cases where the accused *desires* a certain result, preferring to include cases where the accused *knows* a particular result will follow. Therefore, according to the Committee a person intends a result when he "(i)...wants the particular result to follow from his act or (ii)...though he may not want the result to follow, knows that in the ordinary course of things it will do so."<sup>70</sup>
- 3.09 The English Law Commission, in its 1985 Report on codification of the criminal law, 71 proposed the following definition of murder:

"A person who kills another-

- (a) intending to kill; or
- (a) intending to cause serious injury and being aware that he may kill;for
- (c) intending to cause fear of death or serious injury and being aware that he may kill]<sup>72</sup>

<sup>67</sup> The Law Commission of England and Wales, Report on the Mental Element in Crime (Law Com. No. 89, 1978).

Ibid. at para. 44. (Clause 2 of the Commission's Draft Criminal Liability (Mental Element) Bill is based on this recommendation).

Criminal Law Revision Committee of England and Wales, Offences against the Person (Cmnd 7844, 14th Report, 1980).

<sup>&</sup>lt;sup>70</sup> *Ibid.* at para. 10.

<sup>71</sup> The Law Commission of England and Wales, Codification of the Criminal Law (Law Com. No. 143, 1985).

This provision was intended to deal with terrorist-type situations.

# is guilty of murder ...."73

- 3.10 The definition of intention provides that someone "intends" a result when:
  - "...he wants it to exist or occur, is aware that it exists or is almost certain that it exists or will exist or occur."<sup>74</sup>
- 3.11 The Report of the House of Lords Select Committee on Murder and Life Imprisonment (Nathan Committee)<sup>75</sup> reconsidered the question as to the appropriate mental element in murder in English law. The Committee considered whether the mental element in murder should be broadened to embrace reckless killings. It had been argued before the Committee that the existing law regarding murder was defective in failing to encompass the outrageously reckless killer, such as the terrorist who intends to damage property or instil fear among the public, but does not necessarily intend to cause death. Although possibly not intending to kill, such defendants are nevertheless aware of the fact that lives may well be lost. Inherent in this argument is a belief that killers who display such outrageous recklessness possess the requisite degree of moral culpability to be classified as murderers.
- 3.12 However, the Nathan Committee decided not to recommend expanding the mens rea requirement for murder beyond intention. The Committee based its decision on the fact that a precise, infallible definition of the necessary level of recklessness required to bring a killing within the offence of murder was unattainable and that, in general, reckless killings should remain within the province of manslaughter. They rejected both the Scottish and U.S. formulae (discussed further below) because of their potentially "emotive" effect.

"The practice in England is for the criminal law to define offences in precise terms and for the jury, having been instructed in the relevant law by the judge, to decide whether the facts of the case fall within the legal definition. 'Wicked' [as used in the Scots law concept of wicked recklessness] is not a term used in English criminal law and has no precise meaning. It is true that the jury is often called upon to make a moral judgment (as when it is called on to decide whether certain conduct should be characterised as 'dishonest') but it is not generally part of its function to decide whether the defendant's behaviour was so 'wicked' that it should amount to the crime charged."

3.13 Instead, the Committee recommended the definition of intention set out by the Law Commission of England and Wales in the *Draft Criminal Code* proposal of 1989, namely that a person acts intentionally with respect to a result:

Law Commission of England and Wales, Codification of the Criminal Law (Law Com. No. 143, 1985), 202, Draft Criminal Code, article 56.

Draft Criminal Code in Law Commission of England and Wales, Codification of the Criminal Law (Law Com. No. 143, 1985), 183, article 22(a).

House of Lords Select Committee on Murder and Life Imprisonment, Report of the Select Committee on Murder and Life Imprisonment (HL Paper 78-1, 1989).

<sup>76</sup> *Ibid.* at paras. 72-76.

<sup>&</sup>lt;sup>77</sup> *Ibid.* at para. 73.

- "...when he acts either in order to bring it about or being aware that it will occur in the ordinary course of events." 78
- 3.14 The Law Commission of England and Wales revisited the question of defining 'intention' in its 1993 Report, Legislating the Criminal Code: Offences against the Person and General Principles, <sup>79</sup> proposing the following definition:

"[A] person acts....'intentionally' with respect to a result when-

- (i) it is his purpose to cause it; or
- (ii) although it is not his purpose to cause that result, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result."80
- 3.15 The Report states that "results are intentional, or intentionally caused, on [the accused's] part when he has sought to bring them about, by making it the purpose of his acts that they should occur". This, they believed, was "the central nature of intention".<sup>81</sup>
- 3.16 Sub-paragraph (ii) deals with the special case where the actor does not act in order to cause, or with the purpose of causing, the result in question, but where it is nevertheless a virtually certain by-product of his activity (*ie* oblique intention):
  - "If [the accused] acts in order to achieve a particular purpose, knowing that that cannot be done without causing another result, he must be held to intend to cause that other result."82
- 3.17 The phrase "in the ordinary course of events" is used to capture cases of oblique intention, that is cases where the result is a near inevitable by-product of the defendant's activity. In order to rebut criticism that the use of this phrase carries an element of recklessness (in other words, labeling as 'intention' foresight by the actor of a result being highly likely to occur) the Report states:

"The point of the phrase...is to ensure that 'intention' covers the case of a person who knows that the achievement of his purpose will *necessarily* cause the further result in question in the absence of some wholly improbable supervening event."83

Section 18.(b)(ii) of the *Draft Criminal Code* in The Law Commission of England and Wales, A Criminal Code for England and Wales (Law Com. No. 177, Vol. 1, 1989), 51.

The English Law Reform Commission, Legislating the Criminal Code: Offences against the Person and General Principles (Law Com. No. 218, 1993).

lbid. at para. 7.1. This is essentially the same definition as contained in The Law Commission of England and Wales, Legislating the Criminal Code: Offences against the Person and General Principles (Consultation Paper No. 122, 1992), with only minor alterations.

The English Law Reform Commission, Legislating the Criminal Code: Offences against the Person and General Principles (Law Com. No. 218, 1993), para. 7.5.

<sup>82</sup> Ibid. at para. 7.7.

<sup>83</sup> *Ibid*.at para. 7.9.

3.18 This definition, it was felt, would also deal with problems associated with the former (Nathan Committee) proposal - *ie* when the actor knows that death will result if the *merely possible* sought-after event occurs. It was also felt that this definition would indicate that a result which it is the actor's purpose to *avoid* cannot be intended. Lord Goff<sup>84</sup> had argued that the original Draft Code definition above would mean that where the agent acted with the intention of avoiding death, but was aware that it would occur in the ordinary course of events, he could be convicted.

#### (ii) Grievous Bodily Harm

3.19 In England, both the Criminal Law Revision Committee<sup>85</sup> and the Nathan Committee<sup>86</sup> proposed to reform the English law relating to grievous bodily harm by adding a requirement that the accused be aware of the risk of causing death. The Nathan Committee reasoned that:

"A person is not generally liable to conviction of a serious crime where the prohibited result was not only unintended but also unforeseen. This seems to the Committee to be a good rule of moral responsibility which should certainly apply to the most serious crime of all, murder. While the law continues to have two categories of homicide, unforeseen but unlawful killings are properly left to the law of manslaughter."

3.20 The rule which the Law Commission of England and Wales ultimately proposed in the English *Draft Criminal Code*, and which was supported by the Nathan Committee<sup>88</sup> is this:

"A person is guilty of murder if he causes the death of another -

- (a) intending to cause death; or
- (b) intending to cause serious personal harm and being aware that he may cause death..." (italics added). 89
- 3.21 While such a rule would not eliminate the element of constructive liability from the current rule, it would minimise its effects. The formulation recommended by the Criminal Law Revision Committee had been slightly different, namely that an offence should be considered murder if, *inter alia*:

Lord Goff, "The Mental Element of Murder" (1988) Vol. 104 LQR 30.

Criminal Law Revision Committee, Offences against the Person (Cmnd 7844, 14th Report, 1980).

House of Lords Select Committee on Murder and Life Imprisonment, Report of the Select Committee on Murder and Life Imprisonment (HL Paper 78-1, 1989).

<sup>87</sup> Ibid. at para. 68.

<sup>88</sup> *Ibid.* at para. 71.

Article 54(1) of The Law Commission of England and Wales, A Criminal Code for England and Wales (Law Com. No. 177, Vol. 1, 1989), 66.

"a person causes death by an unlawful act intended to cause serious injury and known to him to involve a risk of causing death". 90

- 3.22 Consideration was given by both the Criminal Law Revision Committee and the Law Commission of England and Wales to the respective meanings of the terms 'injury' and 'harm' in the context of the law of assault. In the Draft Code the Law Commission had employed the term 'harm' in preference to 'injury' on the basis that it clearly meant harm to either body or mind, and included pain and unconsciousness. Glanville Williams objected to this on the basis, *inter alia*, that 'injury' was a more natural colloquial expression than 'harm' to express actual damage to body or mind. Subsequently, the Commission reverted to using the term 'injury'.
- 3.23 The Law Commission also considered the term 'serious' and decided that no attempt should be made to define this term. 91

#### B. Canada

#### (a) Law

3.24 The Canadian law on homicide is contained in the *Criminal Code*, 1892.<sup>92</sup> This was inspired by the English *Draft Code* of 1879. This, in turn, had incorporated a mini-code on homicide drafted by Stephen in 1874<sup>93</sup> which, ironically, had never taken root in Stephen's own jurisdiction. In 1955 the Canadian *Criminal Code* became exhaustive; all offences at common law were abolished.

# (i) Intention

3.25 The Canadian *Criminal Code, 1892* does not use the specific term 'intention' but states that:

"culpable homicide is murder:

where the person who causes the death of a human being

Criminal Law Revision Committee, Offences against the Person (Cmnd 7844, 14th Report, 1980), para. 31.

Glanville Williams in "Force, Injury and Serious Injury" (1990) Vol. 140 New LJ 1227, 1229 had proposed a definition of 'serious injury' which, the Commission stated, was long and complex and actually illustrated the difficulties of definition in this context. Williams' definition is discussed below in Chapter Four.

Canadian law also draws a distinction between first-degree murder and second-degree murder. As this is not central to the present paper, however, the Commission does not propose to explore this question any further.

Stephen, English Draft Code in Report of the Commission Appointed to Consider the Law Relating to Indictable Offences with an Appendix Containing a Draft Code Embodying the Suggestions of the Commissioners (London: HMSO, 1879).

- (i) means to cause his death, or
- (ii) means to cause him bodily harm that he knows is likely to cause his death, and is reckless whether death ensues or not."<sup>94</sup>
- 3.26 Unlike their English counterparts, the Canadian courts have not been at pains to define intention in murder. However, speaking outside the realm of homicide, the Ontario Court of Appeal has held that:
  - "...as a general rule, a person who foresees that a consequence is certain or substantially certain to result from an act which he does in order to achieve some other purpose, intends that consequence. The actor's foresight of the certainty or moral certainty of the consequence resulting from his conduct compels a conclusion that if he, nonetheless, acted so as to produce it, then he decided to bring it about (albeit regretfully), in order to achieve his ultimate purpose." 95
- (ii) Constructive Murder Abolished
- 3.27 Traditionally under the Code it was considered murder:
  - [in section 229(c)] when a person, for an unlawful object, did anything that he knew or ought to have known was likely to cause death, and thereby caused death to a human being, notwithstanding that he desired to effect his object without causing death or bodily harm to any human being;
  - [in section 230] when a person caused the death of a human being while committing or attempting to commit high treason or treason or one of a number of offences (including escape from prison, assault on a police officer, sexual assault, kidnapping and forcible confinement or robbery), whether or not the person meant to cause death to any human being and whether or not he knew that death was likely to be caused to any human being, if:
  - (a) he meant to cause bodily harm for the purpose of
    - (i) facilitating the commission of the offence; or
    - (ii) facilitating his flight after committing or attempting to commit the offence, and the death ensues from the bodily harm;
  - (b) he administered a stupefying or overpowering thing for a purpose mentioned in paragraph (a), and the death ensued therefrom;
  - (c) he wilfully stopped, by any means, the breath of a human being for a purpose mentioned in paragraph (a), and the death ensued therefrom; or
  - (d) he used a weapon or has it upon his person

Canadian Criminal Code, 1892, section 229(a).

Regina v Buzzanga and Durocher [1980] 25 OR (2d) 705, 720-721.

- (i) during or at the time he commits or attempts to commit the offence,
- (ii) during or at the time of his flight after committing or attempting to commit the offence, and the death ensued as a consequence.
- 3.28 Section 230(d) (then section 213(d)) was held to be unconstitutional in 1987<sup>96</sup> and the remainder of section 230 (then section 213), was held to be unconstitutional in 1990.<sup>97</sup> In this latter decision, the majority of the court stated, obiter, that in their opinion section 229(c) (then section 212(c)) was also repugnant to the Canadian Charter of Rights. The Supreme Court held in both cases that it is a principle of fundamental justice under the Charter that a murder conviction cannot rest on anything less than proof of subjective foresight of death. The Court explained that foresight means knowledge of the likelihood of death resulting.
- 3.29 Section 230(d) has since been abolished by the legislature. The remainder of section 230 and Section 229(c), however, remain on the statute book. 98

### (b) Proposals for Reform

- (i) Purpose
- 3.30 A series of papers published by the Canadian Law Reform Commission culminated in a recommendation to introduce 'purpose' as a criterion of *mens rea* for various crimes including murder.
- 3.31 In 1986 the Canadian Law Reform Commission proposed a purpose-based definition of murder, as follows:
  - "Everyone commits the crime of murder who purposely kills another person." 99
- 3.32 The Commission proposed a definition of 'purposely':
  - "...A person acts purposely as to a consequence if he acts in order to effect:
    - (i) that consequence; or
    - (ii) another consequence which he knows involves that consequence." 100

<sup>96</sup> R v Vaillancourt [1987] 2 SCR 636.

<sup>97</sup> R v Martineau [1990] 2 SCR 633.

For discussion see Stuart, Canadian Criminal Law – A Treatise (3<sup>rd</sup> ed., Carswell, 1995).

Section 40(1) of the Law Reform Commission's proposed Criminal Code in Law Reform Commission of Canada, *Recodifying Criminal Law* (Report 30, Vol. I, 1986), Appendix A, 108.

Law Reform Commission of Canada, Recodifying Criminal Law (Report 31, 1987), Recommendation 2(4)(b)(ii), Appendix A, 143.

### 3.33 The rationale for this approach had been explained in an earlier report:

"The term 'purpose' replaces the more usual term 'intent' because of the difficulties surrounding this concept. Those difficulties stem from the blurring of the distinction in the case law between intention and recklessness....To obviate such difficulties the Draft substitutes the common-sense term 'purpose', which can refer either to the accused's ultimate objective or to an intermediate objective constituting a means adopted by him to achieve that objective." <sup>101</sup>

#### (ii) Grievous Bodily Harm

3.34 The Law Reform Commission of Canada recommended that the *mens rea* in relation to grievous bodily harm should not be relevant on a charge of murder. <sup>102</sup> A minority of the Commissioners, however, were in favour of retaining the Criminal Code approach "on the basis that this kind of reckless killing is more akin to killing on purpose than to ordinary reckless homicide. The reason is that such a killer not only exposes the victim to a risk of death, but also purposely takes unwarranted liberties with his physical person."

#### C. Australia

#### (a) Law

3.35 Murder is defined by statute in New South Wales, <sup>104</sup>Queensland, <sup>105</sup>Western Australia, Tasmania, <sup>106</sup> the Australian Capital

"Murder shall be taken to have been committed where the act of the accused, or thing by him omitted to be done, causing the death charged, was done or omitted [1] with reckless indifference to human life, or [2] with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or [3] during or immediately after the commission, by the accused, or some accomplice with him, of a crime punishable by penal servitude for life or for 25 years." (numeration added).

"Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say, --

(a) If the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;...is guilty of murder."

The Code also contains a felony murder provision.

Law Reform Commission of Canada, The General Part: Liability and Defences (Working Paper 29, 1982), 32-33.

Law Reform Commission of Canada, Recodifying Criminal Law (Report 30, Vol. I, 1986), Recommendation 6(3).

Law Reform Commission of Canada, Recodifying Criminal Law (Report 31, 1987), 58.

Section 18(1)(a) of the Crimes Act, 1900 provides:

Section 302 of the Criminal Code of Queensland provides as follows:

In Tasmania, section 157(1)(b) of the Criminal Code Act provides that "an intention to cause to any person, whether the person killed or not, bodily harm which the offender knew to be likely to

Territory<sup>107</sup> and the Northern Territory. Victoria and South Australia depend on common law, except in relation to the felony-murder rule which is dealt with by statute.

- (i) Common Law: Victoria and South Australia
- 3.36 In both Victoria and South Australia, the crime of murder is governed by common law (except for a new statutory form of murder akin to felony murder).

#### Intention

3.37 The *mens rea* of intentional murder is an intention to cause death or grievous bodily harm. Intention is given its 'ordinary' meaning relating to purpose or desire. There is no need for a special instruction to juries on its meaning. The inquiry is as to the actual state of mind of the accused; there is no equivalent of the type of presumption which applies in Irish law pursuant to section 4(2) of the *Criminal justice Act*, 1964. <sup>108</sup>

#### Recklessness

3.38 At common law reckless murder is committed:

"when D does an act foreseeing, when he or she commits this act, that it will probably cause death or grievous bodily harm to a person, although D does not intend that either event should happen. D may be indifferent as to whether the specified harm occurs, or D may even wish that it should not occur," 109

and in *The Queen v Crabbe*<sup>110</sup> the High Court of Australia held that, in respect of this head of murder, there must be foresight of a probability, and not a mere possibility, that death or grievous bodily harm will result. In some cases, 'probable' has been explained as "more than 50 per cent likely". In *Boughey v The Queen*, <sup>111</sup> however, the High Court of Australia considered and rejected the contention that 'likely' (to cause death) in the Tasmanian *Criminal Code* meant "more likely than

cause death in the circumstances, although he had no wish to cause death" [emphasis added] suffices for the *mens rea* of murder.

Section 12(1) of the Crimes Act, 1900 (as amended), provides:

<sup>&</sup>quot;A person commits murder if he or she causes the death of another person –

<sup>(</sup>a) intending to cause the death of any person; or

<sup>(</sup>b) with reckless indifference to the probability of causing the death of any person."

See para. 2.25 above.

Gillies, Criminal Law (4th ed., Law Books Co., 1997), 630.

The Queen v Crabbe [1985] 156 CLR 464.

Boughey v The Queen [1986] 161 CLR 10.

not". The Court held that 'likely' could be equated with 'probable', which in turn meant "a substantial – a real and not remote – chance". It stated that it was inappropriate to try to express the relevant degree of probability mathematically and that one should avoid over-definition, thereby "submerging the ordinary meaning of a commonly used word in a circumfluence of synonym, gloss and explanation".

### Grievous Bodily Harm

- 3.39 As we have just seen, under Australian common law the *mens rea* of murder includes intent to cause grievous bodily harm and foresight that grievous bodily harm is a probable result of one's action.
- 3.40 'Grievous bodily harm' means, as in England, 'really serious harm', although the courts in South Australia have decided that the former term should be used, and not the latter, because it is a stronger expression.<sup>113</sup>
- 3.41 The Supreme Court of South Australia considered the term 'serious bodily harm' in the context of a murder charge in  $R \ v \ Perks$ . The court explained that use of the words 'serious bodily harm', without more, would not constitute a misdirection to the jury where the assault is of such a nature that 'grievous' (or 'very serious') bodily harm could ordinarily be expected to result. An example given by the Court was a situation where the victim is assaulted with a gun, a knife or a club which is aimed at a vital part of the body so that grievous bodily harm could ordinarily be expected to result in the circumstances.

### (b) Proposals for Reform

#### (i) Intention

- 3.42 A review of Commonwealth criminal law entitled *Interim Report:* Principles of Criminal Responsibility and Other Matters (the Gibbs Committee Report<sup>115</sup>) carried out by the Department of the Attorney General in Australia reviewed many of the above proposals and recommended that the term 'intentionally' should be given a statutory definition, although the definition of the mens rea for murder was not addressed.
- 3.43 The Interim Report defines 'intention' by stating that an actor intends to produce a result "when he or she means it to exist or occur or knows that it will probably exist or occur". The reasoning of the Committee is revealed in the Interim Report:

Boughey v The Queen [1986] 161 CLR 10, 21.

For discussion see Gillies, Criminal Law (4th ed., Law Books Co., 1997), 629.

<sup>114</sup> R v Perks [1986] 41 SASR 335.

Review Committee of Commonwealth Criminal Law, Interim Report: Principles of Criminal Responsibilty and Other Matters (July 1990).

"It is true that foresight of probable consequences is, strictly speaking, different from intention, but for the practical purposes of the criminal law they can be assimilated and in the light of recent Australian cases it seems more appropriate to make the test whether the consequences are probable, rather than highly probable." <sup>116</sup>

3.44 By contrast, the Australian Criminal Law Officers Committee disagreed with the Gibbs Committee's decision to define intention to include advertence to probability. The Criminal Law Officers Committee proposed instead the following definition of intention: "a person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events." The Committee equated the phrase "in the ordinary course of events" with moral or virtual certainty.

### (ii) Grievous Bodily Harm

3.45 The Law Reform Commission of Victoria, in its Discussion Paper on homicide, 118 and subsequently in its Report on the subject, 119 recommended the abolition of the category of murder based on recklessness as to grievous bodily harm. In their view this category should instead be treated as manslaughter. 120 The Commission further recommended in its Discussion Paper that in relation to the category of murder based on intent to do grievous bodily harm, the current requirement of intent to inflict grievous bodily harm be replaced with a requirement of:

"intent to inflict a serious injury which the defendant knows to be life endangering; or intent to cause serious injury being aware that he or she may kill." 121

3.46 The Commission noted that in addition to the principle-based argument for this recommendation which emphasised the concept of knowledge on the part of the actor of the life-threatening nature of the intended injury, there is also an argument that the outcome of a case based on grievous bodily harm is unacceptably uncertain. For example, should the defendant be convicted of murder where the jury is satisfied that he intended to put a pillow over the victim's mouth in order to render the victim unconscious, or to shoot the victim in the arm, leg or foot, or to punch and kick the victim so as to knock him out? On the other hand, it was noted that if

Review Committee of Commonwealth Criminal Law, *Interim Report: Principles of Criminal Responsibilty and Other Matters* (July 1990), para. 5.34(b).

Criminal Law Officers Committee of the Standing Committee of Attorneys-General, Final Report (AGPS, 1993), cl.203.1

The Law Reform Commission of Victoria, *Homicide* (Discussion Paper No. 13, March 1988).

Law Reform Commission of Victoria, *Homicide* (Report No. 40, 1990 - 1991).

The Law Reform Commission of Victoria, Homicide (Discussion Paper No. 13, March 1988),
 Recommendation 11, 51. Law Reform Commission of Victoria, Homicide (Report No. 40, 1990 - 1991),
 Recommendation 18, 62.

The Law Reform Commission of Victoria, Homicide (Discussion Paper No. 13, March 1988), Recommendation 6, 47.

the 'grievous bodily harm category' of murder is abolished, people might too easily avoid a murder conviction by claiming that they did not intend to kill, but only to cause grievous bodily harm. Furthermore, it was argued that the inclusion of this category of murder accorded with community perception.

3.47 In its Discussion Paper the Commission accepted that:

"the combination of the intent to cause serious injury with foresight by the defendant of the possibility of death makes the level of culpability sufficiently comparable with that of the intentional killer to warrant a conviction of murder." 122

3.48 However, in its Report the Commission considered that, on balance, this level of blameworthiness was still not on a par with that appropriate for a murder conviction and they recommended that this category of murder based on intent to do grievous bodily harm should accordingly be abolished. 123

### (iii) Recklessness

- 3.49 The Victorian Law Reform Commission, in its Report on homicide, recommended the continuation in that jurisdiction of the classification of certain species of reckless killing as murder. When the defendant foresees that death is probable or likely, this constitutes the *mens rea* of murder. As we have seen, the contention that foresight of death as merely probable constitutes a sufficient *mens rea* for murder has been rejected in England since  $R \nu Moloney$ . <sup>124</sup>
- 3.50 The Commission then considered the question as to whether reckless murder should ever include foresight of possible (as opposed to probable) consequences and answered this question in the negative. It considered the classic hypothetical of the game of Russian roulette. The Commission presented its analysis as follows:

"At the heart of the problem is an unspoken assumption about the culpability of the conduct in question. The conduct is totally unredeeming. Nonetheless, general policy cannot be formulated on the basis of the highly unusual case. Any formulation of recklessness that was based on the possibility of harm rather than its probability would be too far removed from intentional killing and would result in the inclusion within murder of numerous cases which it has never covered." 125

The Law Reform Commission of Victoria, Homicide (Discussion Paper No. 13, March 1988), para. 115.

<sup>123</sup> Ibid. at Recommendation 14, 56. Between publication of the Commission's Discussion Paper and drafting of the Report on Homicide, they received several submissions advocating the abolition of this category of murder altogether, which the Commission accepted.

<sup>&</sup>lt;sup>124</sup> R v Moloney [1985] 1 All ER 1025. See paras. 2.11 – 2.13 above.

Law Reform Commission of Victoria, *Homicide* (Report No. 40, 1990 - 1991), para.139.

#### D. India

## (a) Law

3.51 The Indian *Penal Code* has attracted much attention as a kind of model for codification of the criminal law. Although complex, the Code's treatment of murder clearly has its roots in the historical concept of malice aforethought, which, as seen in Chapter One, never lent itself to reduction to a simple definition.

# 3.52 Section 299 of the Indian *Penal Code* defines culpable homicide thus:

"Whoever causes the death by doing an act (a) with the intention of causing death or (b) with the intention of causing such bodily injury as is likely to cause death or (c) with the knowledge that he is likely by such act to cause death, commits the offence of culpable homicide."

### 3.53 Section 300 then defines murder:

"Except in the cases hereinafter excepted, culpable homicide is murder, if the act by which the death is caused is done with the intention of causing death, or secondly, if it is done with the intention of causing such bodily injury as the offender knows to be likely to cause the death of the person to whom the harm is caused, or thirdly, if it is done with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death, or fourthly, if the person committing the act knows that it is so imminently dangerous that it must, in all probability, cause death, or such bodily injury as is likely to cause death, and commits such act without any excuse for incurring the risk of causing death or such injury as aforesaid."

### 3.54 Intention has been explained by the Indian Supreme Court as follows:

"... 'intention' requires something more than the mere foresight of consequences, namely, the purposeful doing of a thing to achieve a particular end... 'intention' is a conscious state in which mental faculties are aroused into activity and summoned into action for the purpose of achieving a conceived end. It means shaping of one's conduct so as to bring about a certain event." <sup>126</sup>

# (b) Proposals for Reform

3.55 The Indian Law Reform Commission conducted a review of the Code<sup>127</sup> and although certain structural alterations were proposed, it recommended leaving the substantive law largely intact.

Jai Prakash v State (Delhi Administration) 1991 2 SCC 32, 42.

Law Commission of India, Indian *Penal Code* (42<sup>nd</sup> Report, 1971).

## E. Scotland: Wicked Recklessness

- 3.56 The distinctive feature of Scots law on which the this paper shall focus is the concept of 'wicked recklessness'. Under Scots law a murder conviction may be established by "evidence of such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences." For conduct to be regarded as 'wicked' it must pass a high threshold. According to Sheriff Gordon it must be "recklessness so gross that it indicates a state of mind which is as wicked and depraved as the state of mind of a deliberate killer." It appears, however, that it cannot be murder unless the defendant intended to cause *some* personal injury. 130
- 3.57 Gordon explains this second category of murder as follows:

"To say that 'A is guilty of murder when he kills with wicked recklessness' means only 'A is guilty of murder when he kills with such recklessness that he deserves to be treated as a murderer'. The main claim to acceptance which this circular formula has is that it recognises that when it comes to a choice between murder and culpable homicide the result does not depend on mathematical assessments of probability measured against the standard of reasonable foreseeability, but depends on a moral judgment which, so far as capital murder was concerned, and the law grew up when all murders were capital, could be summed up in a question 'Does A deserve hanging?'."

3.58 The Scottish Law Commission directly addressed this statement in their Consultative Memorandum on attempted homicide:

"If Gordon is right in his suggestion that the definition of murder owes more to a moral judgment of an offender's behaviour than to any logical or rational analysis of the mental element that should characterise such a crime, the result is that a very fine and, according to Gordon, flexible line will separate the crime of murder from that of culpable homicide." <sup>132</sup>

- 3.59 The leading modern Scottish authority on the *mens rea* for murder is Cawthorne v Her Majesty's Advocate. 133
- 3.60 The accused lived with two women, Brown and Cawthorne, the latter being his mistress, with whom he quarreled on the occasion in question. He fired

<sup>&</sup>lt;sup>128</sup> Cawthorne v H.M. Advocate [1968] JC 32, 193.

Gordon, Criminal Law (2nd ed., W. Green & Son Ltd., 1978), para.23-17. In the decision H.M. Advocate v Hartley ([1989] SLT 135, 136) Lord Sutherland described conduct as wickedly reckless if a person acts in such a way "as to show that you don't really care whether the person you are attacking lives or dies".

Gordon, Criminal Law (2<sup>nd</sup> ed., W. Green & Son Ltd., 1978), para. 23-15.

Gordon, Criminal Law (2nd ed., W. Green & Son Ltd., 1978), para. 23-19.

The Scottish Law Commission, Attempted Homicide (Consultative Memorandum No. 61, 1984), para. 3.10.

Cawthorne v Her Majesty's Advocate [1968] JC 32.

two shots outside the house from a rifle to frighten Brown. Brown and Cawthorne, together with two men from whom they had sought help, barricaded themselves into the house. The accused knew the four were in the study and fired at least twice into the room, through the door and window at the level of a person. The only injury sustained was a slight graze. The accused was convicted of attempted murder of the occupants.

- 3.61 In his direction the trial judge stated that:
  - "... the law holds it to be murder if a man dies as a result of another acting with utter and wicked recklessness, and that because of the very nature of the attack, the utter and wickedly reckless attack displays a criminal intention." <sup>134</sup>
- 3.62 While the Court of Criminal Appeal reached the same conclusion overall, inconsistencies emerged as some of the judges suggested that wicked recklessness was not a distinct *mens rea* for murder, being instead an evidential criterion from which intent, in the sense of desire, might be inferred. Gordon states that the court does, in fact, support the former, and in his opinion, better view as set out in Lord Justice-General Clyde's speech in *Cawthorne*:

"The mens rea which is essential to the establishment of [murder] may be established by satisfactory evidence of a deliberate intention to kill or by satisfactory evidence of such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences." <sup>136</sup>

- 3.63 The test appears to be objective in nature. There is no requirement that the accused have a subjective appreciation of the risk of death resulting from his actions. 137
- 3.64 A number of factors may be relevant in determining if wicked recklessness has been displayed, including the use of a weapon, with particular reference to its type and the circumstances surrounding its use. Similarly, an intention to commit an assault may support a finding of wicked recklessness, the nature and gravity of the assault being "all-important".

Cawthorne v Her Majesty's Advocate [1968] JC 32, 33-34. This extract was quoted by the Scottish Law Commission in the Scottish Law Commission, Attempted Homicide (Consultative Memorandum No. 61, 1984), para. 2.2.

See the Scottish Law Commission, Attempted Homicide (Consultative Memorandum No. 61, 1984), para. 2.8.

Cawthorne v Her Majesty's Advocate [1968] JC 32, 35-36. Quoted in the Scottish Law Commission, Attempted Homicide (Consultative Memorandum No. 61, 1984), para. 2.4.

Her Majesty's Advocate v Hartley [1989] SLT 135; Her Majesty's Advocate v McGuinness [1937] JC.37; Her Majesty's Advocate v Frazer [1920] JC 60. See also Jones, "The Scottish Law of Murder" (1989) Vol. 105 LQR 516.

The Scottish Law Commission, *Attempted Homicide* (Consultative Memorandum No. 61, 1984), para. 3.5.

In the Cawthorne case Lord Avonside and Lord Guthrie stated that a third form of mens rea for murder was an intention to do grievous bodily harm. However, the Scottish Law Commission has suggested that this is not really a separate kind of mens rea, but rather just a factor from which an inference of wicked recklessness may be drawn (see the Scottish Law Commission,

## (a) Reform Considered and Rejected

The Commission's Consultative Memorandum on attempted homicide expresses satisfaction with the scheme of Scots law with regard to the *mens rea* of murder. In this respect the absence of appeals was noted. Indeed, the Nathan Committee concluded that no change in the Scots law of murder was necessary or desirable.

#### F. United States of America: The Model Penal Code.

The definition of murder is a matter which falls within the jurisdiction of the individual states. In order to promote a measure of uniformity and consistency, however, the American Law Institute introduced a *Model Penal Code* for the assistance of state legislatures. This Code has been described as the "central document of American criminal justice".

### (a) Purposely or Knowingly

- 3 67 By providing that homicide committed "purposely or knowingly" constitutes murder, the American *Model Penal Code* avoids the need to define 'intention' 'Purposely' and 'knowingly' are defined in §2 02 of the Code
  - "(a) A person acts purposely with respect to a material element of an offence when
  - (1) If the element involves the nature of his conduct or a result thereof, it is his conscious object to engage in conduct of that nature or to cause that result,
  - (b) A person acts knowingly with respect to a material element of an offence when
  - (11) If the element involves a result of his conduct, he is aware that it is practically certain that his conduct will cause such a result
- Therefore, in the case of murder committed purposely the accused must be shown to have had the conscious object of causing death, and in the case of murder committed knowingly, the accused must be shown to have been aware that his conduct was practically certain to cause death

Attempted Homicide (Consultative Memorandum No 61, 1984, para 36)

The Commission quotes Alison as stating that there must be an intention to inflict an injury "of such a kind as indicates an utter recklessness as to the life of the sufferer, whether he live or die" See Alison, *Principles of the Criminal Law of Scotland* (Butterworths, 1989), 1

Fletcher, "Dogmas of the Model Penal Code" (1998) 2 Buff Crim L Rev 3

American Law Institute, Model Penal Code and Commentaries (Official Draft and Revised Comments) (1980) Part 1, §2 02 The Code's test was adopted in 1962

# (b) Reckless Indifference to Human Life

- 3.69 The American Law Institute, in its *Commentaries on the Model Penal Code*, outlined the common law applying in the United States of America<sup>143</sup> and noted that the category of murder includes unintentional killing under circumstances evincing a "depraved mind": "The essential concept was one of extreme recklessness regarding homicidal risk". <sup>144</sup>
- 3.70 The *Model Penal Code* includes a form of recklessness as sufficient *mens* rea of murder, relying on American legal history as a basis for this arrangement:

"This provision reflects the judgment that there is a kind of reckless homicide that cannot fairly be distinguished in grading terms from homicides committed purposely or knowingly." 145

- 3.71 Criminal homicide, according to the *Model Penal Code*, §210.2(b), constitutes murder when "it is committed recklessly under circumstances manifesting extreme indifference to the value of human life". Such recklessness and indifference is presumed where the actor is:
  - (1) engaged or
  - (2) an accomplice in
    - (a) the commission of or
    - (b) an attempt to commit or
    - (c) flight after committing or attempting to commit robbery, rape or deviate sexual intercourse by force or threat of force, arson, burglary, kidnapping or felonious escape.
- 3.72 The Code defines 'recklessness' as the conscious disregard of a substantial and unjustifiable risk that death will result from the actor's 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, his disregard involves a gross deviation from the standard of conduct that a law-abiding person would observe in the actor's situation. <sup>146</sup>
- 3.73 As already mentioned, the American Law Institute explains in its commentary on the Code that this provision is a reflection of the concept that there is a body of reckless homicide that cannot justifiably be differentiated from, in grading terms, homicides committed purposely or knowingly. Ordinary recklessness is made sufficient for manslaughter. In a prosecution for murder, however:

See the discussion in America Law Institute, Model Penal Code and Commentaries (1980), Part II, §§210.0 to 213.6, 13 et sec.

American Law Institute, Model Penal Code and Commentaries (1980), Part II, 15.

<sup>145</sup> Ibid. at 21.

American Law Institute, Model Penal Code and Commentaries (Official Draft and Revised Comments) (1980) Part 1, §2.02(2)(c).

American Law Institute, *Model Penal Code and Commentaries*, (1980), Part II, 21. See para. 3.70 above.

"the Code calls for the further judgment whether the actor's conscious disregard of the risk, under the circumstances, manifests extreme indifference to the value of human life. The significance of purpose or knowledge as a standard of culpability is that, cases of provocation or other mitigation apart, purposeful or knowing homicide demonstrates precisely such indifference to the value of human life." <sup>148</sup>

- 3.74 By demonstrating such indifference to the value of human life the reckless killer, therefore, deserves to be bracketed with a killer who kills purposely or knowingly.
- 3.75 The standard set out in §210.2 is subjective; it does not extend to inadvertent risk-taking (however culpable). The accused must realise the danger and then act in conscious disregard thereof.
- 3.76 The American Law Institute, in its *Commentaries on the Model Code*, gives examples of findings under the comparable common law rule on extreme recklessness. Findings of murder arose in the following situations:
- On the third try the defendant shot his friend dead in a game of Russian roulette. 149
- The defendant shot a person dead. The defendant claimed he intended to shoot over the victim's head in order to scare him. The court held that, even crediting this assertion, the jury could find the defendant guilty of murder on the ground that his act showed "such a reckless disregard for human life as was the equivalent of a specific intent to kill". 150
- A defendant fired several times into a house he knew to have several occupants. He was convicted of murder on the "depraved mind" ground of murder.<sup>151</sup>
- The defendant shot into a moving automobile. 152
- The defendant threw a heavy beer glass at a woman carrying a lighted oil lamp. She caught fire and died. 153
- 3.77 Perkins and Boyce, in the context of a discussion on malice aforethought, explain the operation of this head of murder as follows:

American Law Institute, Model Penal Code and Commentaries, (1980), Part II, 21-22.

Commonwealth v Malone [1946] (Pennsylvania) 354 Pa 180.

<sup>&</sup>lt;sup>150</sup> Myrick v State [1945] (Georgia) 199 Ga 244.

<sup>&</sup>lt;sup>151</sup> People v Jernatowski [1924] 238 (New York) NY 188.

<sup>152</sup> Hill v Commonwealth [1931] (Kentucky) 239 Ky 646.

<sup>&</sup>lt;sup>153</sup> Mayes v The People [1883] (Illinois) 106 II1 306.

"[T]he intent to do an act in wanton and willful disregard of the obvious likelihood of causing death or great bodily injury is a malicious intent .... [A] motorist who attempts to pass another car on a 'blind curve' may be acting with such criminal negligence that if he causes the death of another in a resulting traffic accident he will be guilty of manslaughter. And such a motorist may be creating fully as great a human hazard as one who shoots into a house or train 'just for kicks', who is guilty of murder if loss of life results. The difference is that in the act of the shooter there is an element of viciousness -an extreme indifference to the value of human life - that is not found in the act of the motorist. And it is this viciousness which makes the act 'wanton' as well as 'willful'. Of course, if the facts are gross enough to show extreme indifference a resulting death could be murder rather than manslaughter."

### G. South Africa: Dolus Eventualis

3.78 A clear statement of the current law on intention is given in the *Draft Criminal Code* for South Africa:

- "A person has the intention to bring about a result of his conduct if
- (a) it is his aim to bring about the result;
- (b) he knows that his conduct would of necessity bring about the result;
- (c) he foresees the possibility of the result flowing from his conduct and reconciles himself to this possibility."
- 3.79 Provision (a) reflects the South African legal concept of 'dolus directus'.
- 3.80 Provision (b) reflects the concept of 'dolus indirectus'. This concerns foresight of a consequence as "substantially certain" or "virtually certain".
- 3.81 Provision (c) reflects the concept of 'dolus eventualis'. In the common law tradition this would be regarded as a branch of recklessness. There is some disagreement as to whether dolus eventualis is limited to foresight of probability. The majority view is that foresight of possibility suffices. 155
- 3.82 Snyman<sup>156</sup> gives the following example of *dolus eventualis*:
  - "X wants to burn down a building. He foresees the possibility that Y may be inside it, but nevertheless decides to proceed with his plan, and sets fire to the building. Y is indeed inside, and dies in the flames. In the eyes of the law X intentionally caused Y's death."
- 3.83 This is precisely the kind of case which distinguishes South African law (which reflects the overall approach of the civil law jurisdictions from English or

Perkins and Boyce, Criminal Law (3rd ed., Mineola, 1982), 60.

See Burchell and Milton, Principles of Criminal Law (Juta & Co, 1991).

Snyman, Criminal Law (3rd ed., 1995).

Irish criminal law. These jurisdictions take a much wider view of the mens rea necessary to support a murder conviction).

# H. Italy: Dolo Eventuale 157

- 3.84 Under article 43 of the Italian Codice Penale all serious crimes require proof of the mental element known as dolo, which means that the prohibited result must be both preveduto (foreseen) and voluto (wanted). However, a result may be voluto even though it is not desired if, having contemplated the possibility of bringing it about by pursuing a course of conduct, the defendant is prepared to run the risk of doing so (dolo eventuale). Even a small risk may be voluto if the defendant has reconciled himself to, or accepted, the risk in question. The risk in question must, however, be concrete rather than merely speculative.
- 3.85 Italian law also recognises what is termed *preterintenzione* (literally 'beyond intention') which is a form of constructive intention whereby a person who intends to produce one outcome is deemed to have intended a worse outcome even if he cannot be proved to have realised the risk of that worse outcome. For example, a person who intentionally commits a serious assault upon another, as a result of which that other dies, has committed the offence of *omicidio preterintenzionale*.

# I. Germany: Bedingter Vorsatz<sup>158</sup>

- 3.86 In German law most offences can only be committed with *Vorsatz* (which translates roughly into 'intent'). There are three types of *Vorsatz*. The first two, both types of *direkte Vorsatz* or *dolus directus*, are more or less equivalent to 'purpose' and 'knowledge'. The third type of *Vorsatz* is called *bedingter Vorsatz* (which roughly translates as 'conditional' or 'contingent' intent) or *dolus eventualis*.
- 3.87 In order for bedingter Vorsatz to exist the defendant must have been aware at the time he acted that he might cause the prohibited result or circumstance. There are conflicting views as to what degree of risk the defendant must foresee. According to the 'possibility theory' he must recognise a "concrete possibility". The probability theory, by contrast, requires awareness of a higher degree of risk, specifically that the defendant must consider the prohibited result to be likely. Another view, which has been compared to the Model Penal Code's definition of

The following discussion of Italian criminal law is based on McAuley and McCutcheon, *Criminal Liability* (Round Hall Press, 2000), 301-302.

The following discussion of German law is based on the discussion contained in Michaels, "Acceptance: The Missing Mental State", (1998) 71 S Cal L Rev 953, 1024-1027.

See Lenckner, Cramer, Esser & Stree, Kommentar von Schonke-Schroder zum Strafgesetzbuch (24th ed., 1991), 240. See also Jescheck, Lehrbuch des Strafrechts, Allgemeiner Teil (4th ed., 1988), 271.

recklessness, <sup>160</sup> is that *bedingter Vorsatz* exists where the defendant is aware of a "no longer tolerable risk from the normative perspective." <sup>161</sup>

3.88 In addition, the defendant must be shown to have reconciled himself to the forbidden result. In deciding whether a defendant has reconciled himself to a particular result, a test outlined by Reinhard Frank is often used. According to Frank, if the defendant is aware of the possibility of the result, the proper enquiry is as follows:

"How would the perpetrator have behaved with sure knowledge of the circumstances of the offence?...If one comes to the result that the perpetrator would also have acted with certain knowledge, then *Vorsatz* is to be affirmed; if one comes to the result that with certain knowledge he would have refrained from action, then *Vorsatz* is to be rejected." <sup>162</sup>

3.89 Fletcher outlines a similar test: "the best way to define *dolus eventualis* is to ask 'if the actor knew that the side effect was going to occur, would he act in the same way?". 163

See Michaels, "Acceptance: The Missing Mental State" (1998) 71 S Cal L Rev 953, 1025.

Lenckner, Cramer, Esser & Stree, Kommentar von Schonke-Schroder zum Strafgesetzbuch (24<sup>th</sup> ed., 1991), 240.

Reinhard Frank, Das Strafgesetzbuch für das Deutche Reich (18th ed., 1931), 190.

Fletcher, Rethinking Criminal Law (Little, Brown and Co., 1978), 446, citing A. Eser, Strafrecht I 54-55 (2nd ed., Beck Junishscher VLG, 1976).

### **CHAPTER 4: ISSUES FOR REFORM**

4.001 Under section 4 of the *Criminal Justice Act, 1964* the mental element for murder is an intention to kill or an intention to cause serious injury. This chapter examines a number of issues relating to the reform of the present rule. The chapter is divided into two main parts.

4.002 Part One considers the first limb of the mental element for murder in Ireland, namely intention to kill, and examines whether it should be expanded to embrace other fault elements.

4.003 Part Two considers the second limb of the mental element for murder, namely intention to cause serious injury, and discusses whether it should be retained, and if so, whether it should be refined in any way.

#### Part I. Intention to Kill

### A. Introduction

4.004 Under section 4 of the Criminal Justice Act, 1964 the first limb of the mental element for murder is an intention to kill. Intention has not been defined in Ireland, either by statute or judicially. In R v Woollin, 164 however, the House of Lords held that intention comprehends foresight of a virtual certainty in the sense that a jury may find intention if, but only if, such foresight exists. Thus, it seems that anything less than foresight of a virtual certainty is insufficient. In R v Woollin the House expressly rejected a direction based on a 'substantial risk' of death occurring, as according to Lord Steyn this blurred the line between intention and recklessness. 165

4.005 It does not necessarily follow, of course, that intention bears the same meaning in Irish law as it does in English law. It may well be that intention in Irish law bears a much wider meaning than that ascribed to it in England. Conceivably the meaning of the term 'intention' in the context of murder could range from

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R v Woollin [1998] 4 All ER 103.

R v Woollin [1998] 4 All ER 103, 112. It is not clear whether foresight "of a very high degree of probability", the direction to the jury which was upheld by the Court of Appeal in the Walker and Hayles case [1990] 90 Cr App R 226, has survived the decision in Woollin. J C Smith submits that it must now be regarded as wrong in Smith, "Case and Comment: R v Woollin" (1998) Crim LR 890. However, Walker and Hayles post-dates the decision in Nedrick [1986] 83 Cr App R 267, and the court expressly held in that case that the difference in degree, if any, between a virtual certainty on the one hand and a very high degree of probability on the other was insufficient to render the verdict unsafe. McAuley and McCutcheon suggest there is no material distinction between the two phrases - McAuley and McCutcheon, Criminal Liability (Round Hall Press, 2000), 299 – 300.

purposeful killings on the one hand, to killings committed with foresight of a risk of death on the other. In view of the relative scarcity of reported Irish authority on the meaning of intention it is difficult to express any firm view on this question.

# B. Should the *Mens Rea* for Murder be Expanded to Include other Fault Elements?

4.006 Confining the *mens rea* of murder to intention runs the risk of excluding from the definition of murder many killings which ought to be properly punishable as murder. A defendant who, while not intending to kill, is prepared to act with reckless disregard for the loss of human life, and consciously ignores even a high probability that death will result, would not be guilty of murder if death did in fact result under the current English rule. To take the much quoted example, a terrorist who plants a bomb in a public building, not intending to kill but merely to damage property, but who is nonetheless aware of a high probability of death resulting, <sup>166</sup> would not be guilty of murder if death resulted <sup>167</sup> on a *Woollin*-type definition of intention. <sup>168</sup> Such a result seems unsatisfactory. As McAuley and McCutcheon point out:

"the presence or absence of intention in the English sense should not be allowed to trump the underlying moral issue of whether the defendant deserves to be branded as a murderer...". 169

4.007 There are other examples of such inexcusable risk-taking where, for example, the defendant does not intend to kill, but nevertheless foresees a socially unacceptable level of risk of death resulting. Thus, the arsonist who sets fire to an occupied building, the defendant who discharges a firearm into an occupied house <sup>170</sup> or moving automobile, <sup>171</sup> or the defendant who drives a heavy truck into a bar having being thrown off the premises, <sup>172</sup> would probably all escape liability for murder if the mental element runs no further than foresight of a virtual certainty.

4.008 These examples illustrate that some reckless killings may be no less heinous than intentional ones, and accordingly deserve to be treated as murder rather than manslaughter. At some point a person's preparedness to run a known risk of killing another is so culpable as to be equivalent to that of an intentional

As where, for example, the bomb goes off prematurely or there is a failure to evacuate the building in time.

As it cannot be said that there was foresight of a 'virtual certainty' of death resulting.

There have been bombing cases in Northern Ireland where defendants have escaped murder convictions on the grounds that, although death or serious injury was foreseen, it could not be proved to have been foreseen to a sufficiently high degree of probability: R v McFeely [1977] NI 149, and R v Bateson [1980] 9 NIJB, cited by Stannard, "Murder, Intention and the Interference of Intention" (1999) 34 Ir Jur (ns) 202, 209.

McAuley and McCutcheon, Criminal Liability (Round Hall Press, 2000), 308.

<sup>&</sup>lt;sup>170</sup> People v Jernatowski [1924] (New York) 238 NY 188.

<sup>171</sup> Hill v Commonwealth [1931] (kentucky) 239 Ky 646.

<sup>&</sup>lt;sup>172</sup> The Queen v Crabbe [1985] 156 CLR 464.

killer. The type of recklessness required could be tailored to reflect this social judgment by confining it to only the most heinous killings. As Yeo argues:

"This is a more responsible response than one which dismisses recklessness out of hand on the ground that to recognise it would erode the murder/ manslaughter distinction. Such a dismissal fails to account for the fact that there are different levels of recklessness and that the type of recklessness selected for murder can be adequately distinguished from the type required for manslaughter." <sup>173</sup>

4.009 The fault element for many other serious offences is intent or recklessness, and there is no reason why this should not also apply to murder. Indeed, as we have seen, most other legal systems recognise some form of recklessness as sufficient to ground a murder conviction. Thus, under Australian law foresight of probability of death will suffice to establish a murder conviction. In Canada foresight of a likelihood of death resulting is sufficient. Similarly, in the United States under the *Model Penal Code* reckless killings manifesting an extreme indifference to human life are punishable as murder. In Italian law under the concept of *dolus eventualis* proof of foresight of a possibility of death resulting may suffice, provided the defendant is shown to have accepted or reconciled himself to that risk. The concept of *dolus eventualis* also prevails in South African law where foresight of death as a possible result will be sufficient to justify a murder conviction.

### C. OPTIONS FOR REFORM

- 4.010 There are two ways of ensuring that the mental element in murder comprehends foresight of a risk of death resulting:
  - (a) The first option would be to widen the mental element to include foresight of a probability of death; or
  - (b) The second option would be to extend the definition of murder to embrace reckless killings manifesting an extreme indifference to the value of human life in line with the provisions of the American *Model Penal Code*.

# (a) Foresight of Probability of Death Resulting

4.011 As has been seen in Chapter One, historically malice aforethought embraced knowledge that an act would probably cause the death of some person. 175

Yeo, Fault in Homicide (The Federation press, 1997), 39.

Horn [1958] (3) SA 457 (A).

Under article 223 of Stephen's Digest of the Criminal Law (6<sup>th</sup>ed., Macmillan and Co., 1904), malice aforethought included "Knowledge that the act which causes death will probably cause the death of, or grievous bodily harm to, some person...although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused". This provision was also incorporated into the 1879 Draft Criminal Code in section 174. See above Chapter One, para. 1.06.

Indeed, the existence of this head of murder in English law was affirmed by the House of Lords as recently as  $Hyam \ v \ DPP$ , <sup>176</sup> before being abandoned in  $R \ v \ Moloney$ . <sup>177</sup> This test is also applied in Australia, and is similar to the test applied in several European countries. <sup>178</sup>

4.012 Under Australian law foresight of a probability<sup>179</sup> (but not a possibility) of death occurring will suffice to ground a murder conviction. As the High Court of Australia explained in *The Queen v Crabbe*:

"The conclusion that a person is guilty of murder if he commits a fatal act knowing that it will probably cause death or grievous bodily harm but (absent an intention to kill or do grievous bodily harm) is not guilty of murder if he knew only that his act might possibly cause death or grievous bodily harm is not only supported by a preponderance of authority but is sound in principle. The conduct of a person who does an act, knowing that death or grievous bodily harm is a probable consequence, can naturally be regarded for the purposes of the criminal law as just as blameworthy as the conduct of one who does an act intended to kill or to do grievous bodily harm." <sup>180</sup>

4.013 In contrast to the concept of *dolus eventualis* as applied in both Italian and South African law, <sup>181</sup> this approach emphasises the higher degree of moral culpability present in an accused who foresees death as a probable consequence of his actions, compared to an accused who merely foresees death as a possible consequence of his actions. As the High Court of Australia has put it, "there is a great difference in moral and social content between the first state of mind and the second…" <sup>182</sup>

4.014 The justification for this approach would also appear to rest on the fear that the mental element for murder would be too all-embracing if it extended to foresight of a possibility of death, and would arguably undermine the distinction between murder and manslaughter. Treating as murder a homicide caused by an unlawful act that the offender knew would possibly cause death would have "a very drastic operation". While a death in such circumstances might attract a

<sup>&</sup>lt;sup>176</sup> Hyam v DPP [1974] 2 All ER 41.

<sup>&</sup>lt;sup>177</sup> R v Moloney [1985] 1 All ER 1025.

See the formulations listed in the House of Lords Select Committee on Murder and Life Imprisonment, Report of the Select Committee on Murder and Life Imprisonment (HL Paper 78-1, 1989), Appendix 5.

A majority of the Australian High Court has, however, held that 'probable' here does not mean more likely than not. Rather it means that the risk in question must be "substantial - a real and not remote - chance": Boughey v The Queen [1986] 161 CLR 10, 21 per Mason, Wilson and Deane JJ. Brennan J (at 41-42) disagreed, arguing that probability means that there is an expectation that an event will occur. Under this view probability would mean there is a greater than 50 per cent chance of an event occurring, in other words, more likely than not.

The Queen v Crabbe [1985] 156 CLR 464, 469.

Under which foresight of a possibility may be sufficient to ground a murder conviction.

<sup>182</sup> La Fontaine v R [1976] 11 ALR 507.

Boughey v The Queen [1986] 161 CLR 10, 14.

manslaughter conviction "it would be draconian to call it murder" <sup>184</sup> If knowledge of a possibility of death were sufficient to ground a murder conviction, the distinction between murder and manslaughter as a result of an unlawful act would be difficult to maintain <sup>185</sup>

4015 An advantage of this approach is that it would bring within the definition of murder outrageously reckless killings, while at the same time excluding less reckless killings based on a mere possibility of death. It may be thought that a provision which allowed foresight of possibility to suffice would be potentially too all-embracing, as it would encompass many situations which occur in everyday life. The reckless motorist provides an obvious example

## (1) Criticisms of an Approach Based on Foresight of Consequences

4016 A possible weakness of this approach is that any model based simply on foresight of consequences may be too crude. The degree of foreseeable risk required to ground a murder conviction may well depend on the justifiability of the risk-taking in question. Thus, the required degree of risk may be minimal where there is little or no social premise for the risk-taking in question, by contrast, it may be much higher where the defendant's conduct possesses some moral justification or social virtue.

4 017 A test based on foresight alone does not cater for a defendant who takes a statistically low, but highly culpable risk. Arguably, where the defendant's conduct is completely unconscionable, with no social value, a lower degree of risk should suffice to establish liability. 186

4 018 Thus, to take the example discussed earlier, a terrorist who plants a bomb foreseeing a 30 per cent risk of death would not be guilty of murder on a foresight of probability approach if death in fact results. Similarly, an arsonist who sets fire to an occupied building would not be guilty of murder as long as he or she foresees the possibility of loss of life as less than 50 per cent. In culpability terms it is difficult to see why such defendants should not be convicted of murder. In both cases the conduct is completely anti-social, and in both cases the defendant has knowingly and wilfully chosen to proceed with an unlawful course of conduct which he or she realises creates a substantial risk of death resulting.

4019 The arbitrariness of an approach based purely on degree of risk is illustrated by the American decision of *Commonwealth v Malone*, <sup>187</sup> a 'Russian roulette' case where the defendant pulled the trigger three times, knowing the bullet was in one of the five chambers <sup>188</sup> A 60 per cent chance the gun would fire was

Boughey v The Queen [1986] 161 CLR 10, 14-15

See, for example the comments of Brennan J in *Boughey v The Queen* [1986] 161 CLR 10, 42-43

Thus, in such a situation even a low level of possibility may suffice to ground a conviction

<sup>&</sup>lt;sup>187</sup> Commonwealth v Malone [1946] (Pennsylvania) 354 Pa 180, 47 A 2d 445

This type of case was considered by the Criminal Law Commissioners of 1833 who discussed the hypothetical example of a defendant who selects a pistol at random from a number of

sufficient for the court, applying the degree of risk approach, to designate the killing as murder. If, however, the gun had discharged on the first pull there only would have been a 20 per cent chance of killing. As Michaels comments:

"With the odds of the gun firing only twenty or thirty, rather than sixty, percent, the court might have felt that only a manslaughter conviction should follow. Yet, it is impossible to see why the design of the gun or the slightly earlier death of Malone's companion should change the outcome of the case. In terms of moral culpability, there is no reason for punishing the discharge on the third pull any differently from the discharge on the first." <sup>189</sup>

4.020 Taking an approach based purely on degree of risk, cases identical in every respect, save for a lesser degree of risk, would fall to be treated as manslaughter instead of murder. Terrorist A, who times a bomb to explode at 4.00 p.m. on a city street, would be guilty of murder; terrorist B, whose motives and attitudes are identical to A's, but who times the bomb to explode at 4.00 am, would be guilty of manslaughter. A distinction may admittedly be made between the two defendants on the basis that the second has exposed the public to a much lower degree of risk, and so is less culpable than the first. However, both defendants foresee a risk of death resulting from their actions, yet both are prepared to run this risk as a necessary price of achieving their objectives. Both are willing to kill in pursuit of their objectives, and so the two killings may be said to be morally indistinguishable from one another.

4.021 In addition to excluding risk-taking which arguably ought to fall within the definition of murder, a probability-based approach may also inadvertently bring within its scope cases where the degree of risk is greater than 50 per cent, but where there is some justification for the risk-taking in question. Thus, a defendant using explosives to blast a tunnel through a mountain may foresee a probability of causing death to his fellow workers, despite taking all available precautions. Should a worker be killed by a rock fall it is suggested that the defendant should not be guilty of murder. The social value in constructing the tunnel justifies a level of risk-taking. An approach centred purely on the probability of the risk in question may not allow for such an evaluation. It may be contended that such examples are better dealt with by way of defences. However, in the context of murder, defences tend to be strictly defined and it is not clear whether the above example would fit within any recognised defence.

4.022 A further criticism that can be made of an approach based on foresight of probability of death resulting is that such an approach may be artificial. Defendants do not necessarily pause to fix a precise mathematical percentage to the risk in

pistols, and fires, knowing one of them to be loaded. The Commissioners considered that the outcome should be murder, irrespective of the number of pistols from which the choice was made. "The probability of a fatal result would be diminished as the number from which the selection was made was increased, but still there would be a wilful risking of life attended with a fatal result, and it seems a total absence of any intelligible principle of distinction for penal purposes [to argue to the contrary]": 7th Rep. (1843), Parl.Pap. xix 28.

Michaels, "Defining Unintended Murder" (1985) 85 Col LR (No. 4) 786, 798.

This example is given by Michaels, *ibid.* at 791-792.

question. Thus, while a defendant may foresee that a serious or substantial risk of death will result from his actions, he may not have actually considered whether the risk in question amounted to a probability of death resulting. In many cases this may be difficult or impossible for him (or the jury)<sup>191</sup> to determine as it may depend on a range of factors beyond his knowledge or control. Thus a defendant who sets fire to an occupied building at night may foresee a substantial risk of death resulting, however he may not necessarily stop to consider whether this risk amounts to a probability of death. Indeed, it would be difficult for him to do so, as it would depend on a range of factors not necessarily within his knowledge, such as how many people were in the building, whether there was a fire alarm, the number of exits or fire escapes, how quickly the fire was likely to spread, whether the occupiers were asleep or not and so on.

4.023 An American case which further illustrates this point is *People v Causey*. <sup>192</sup> The defendant struck the victim on the side of the head with a jar of pennies, causing a blood clot in the brain. The State of Illinois follows the degree of risk approach. A conviction for murder was affirmed, although the record discloses no testimony as to the chances of such a fatal clot developing. It is difficult to see how the defendant, or the jury, could have calculated such a risk accurately.

4.024 Thus, there appears to be difficulties with any test based on foresight of a probability of death resulting. In Australia the courts have attempted to meet these difficulties by defining probability as meaning a 'substantial risk' of death resulting. They have rejected the view that 'probable' means more likely than not. These difficulties have also been recognised by Australian law reform bodies. Thus, the Australian Criminal Law Officers Committee proposed the following definition of recklessness:

"A person is reckless with respect to a result when he or she is aware of a substantial risk that it will occur and it is, having regard to the circumstances known to him or her, unjustifiable to take that risk." 194

4.025 The Committee proposed that 'substantial' should replace 'probable'. It explained that it had:

"defined recklessness in terms of a 'substantial risk' rather than in terms of probability or possibility because they invite speculation about mathematical chances and ignore the link between the [acceptable] degree

Strictly speaking, the only question is whether the *defendant* actually foresaw a probability of death resulting. But since it is necessary to look at the surrounding circumstances in order to ascertain the defendant's state of mind it may be necessary for the jury to estimate objectively the degree of risk in order to evaluate his testimony.

People v Causey [1978] (Illinois) 66 Ill App 3d 12, 383 N E 2d 234. Discussed by Michaels, "Defining Unintended Murder", (1985) 85 Col LR (No. 4) 786, 798.

The risk in question must be "substantial - a real and not remote - chance": Boughey v The Queen (1986) 161 CLR 10, 21; per Mason, Wilson and Deane JJ.

Criminal Law Officers Committee of the Standing Committee of Attorneys-General, Final Report (AGPS, 1993), Chapter Two: General Principles of Criminal Responsibility.

of risk and the unjustifiability of running that risk in any given situation." <sup>195</sup>

4.026 This definition is based on the American *Model Penal Code* and is formulated in terms of unjustifiable risk-taking. Thus, in this respect it seems that the Criminal Law Officers Commission were moving away from a test based merely on foresight of a probability of death resulting, and towards a more general recklessness provision based on unjustifiable risk-taking.

(ii) Summary of Advantages and Disadvantages of Approach based on Foresight of Probability of Death

## Advantages

- 4.027 The following are the advantages of an approach based on foresight of probability of death:
- 1. It would offer a clear and definite test of liability;
- 2. It would capture killings where the defendant has no purpose to kill but are nonetheless heinous, for example the arsonist who sets fire to an occupied building.

### Disadvantages

- 4.028 The following are the disadvantages of such an approach:
- 1. An approach which puts the focus on foresight of the probability of death resulting would fail to capture culpable risk-taking which falls short of a probability of death resulting;
- 2. Defendants do not necessarily fix or ascribe a precise mathematical percentage to a given risk. In many cases precise or even approximate calculation will be difficult or impossible;
- 3. It ignores the inter-relationship between the justifiability of a particular risk and the degree of risk required to ground a murder conviction. In the case of completely anti-social acts, for example shooting into a car or building, even a relatively low degree of risk may be sufficient to justify a murder conviction.

Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Final Report* (AGPS, 1993), Chapter Two: *General Principles of Criminal Responsibility*.

# (b) Reckless Killings Manifesting an Extreme Indifference to the Value of Human Life

4.029 A second option for reform would be to adopt a provision along the lines of the American *Model Penal Code* formula which includes within the definition of murder reckless killings which manifest an extreme indifference to the value of human life. Under the *Model Penal Code*, §210.2(b), criminal homicide constitutes murder when "it is committed recklessly under circumstances manifesting extreme indifference to the value of human life." Under the *Model Penal Code*, §202.2(c), 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 definition goes on to state: "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 culpability of high degree." Recklessness in this context is clearly subjective, in that the accused must advert to the risk in question.

4.030 As the American Law Institute explains in its commentary on the Code this provision "reflects the judgment that there is a kind of reckless homicide that cannot fairly be distinguished in grading terms from homicides committed purposely or knowingly." Ordinary recklessness is sufficient for manslaughter. In a prosecution for murder, however:

"...the Code calls for the further judgment whether the actor's conscious disregard of the risk, under the circumstances, manifests extreme indifference to the value of human life. The significance of purpose or knowledge as a standard of culpability is that, cases of provocation or other mitigation apart, purposeful or knowing homicide demonstrates precisely such indifference to the value of human life. Whether recklessness is so extreme that it demonstrates similar indifference is not a question, it is submitted, that can be further clarified. It must be left directly to the trier of fact under instructions which make it clear that recklessness that can fairly be assimilated to purpose or knowledge should be treated as murder and that less extreme recklessness should be punished as manslaughter." <sup>198</sup>

4.031 Adoption of such a provision would have the advantage of bringing within the definition of murder a killer who, while not necessarily intending to kill, is nonetheless indifferent as to whether or not death results from his actions. Take, for example, the terrorist who plants a bomb in a city street intending simply to damage property, but who is indifferent as to whether or not death results: he may be found guilty of murder if death results even though he neither knew nor cared whether the bomb would kill anyone.

4.032 In addition to embracing the terrorist in the last example, the provision also extends to other equally reckless or culpable killers. For example, a defendant who

This definition was approved by Henchy J. in *People v Murray* [1977] IR 360, 403.

<sup>&</sup>lt;sup>197</sup> American Law Institute, *Model Penal Code and Commentaries* (2<sup>nd</sup> ed., 1980), Part II, 21.

American Law Institute, Model Penal Code and Commentaries (2<sup>nd</sup> ed., 1980), Part II, 21-22.

shoots into a moving automobile or occupied house could be convicted under this provision if the jury were satisfied that a sufficient degree of indifference existed. <sup>199</sup>

An advantage of the approach adopted in the Code is that by placing emphasis on a "substantial and unjustifiable risk" rather than simply on the degree of risk, this allows a broader enquiry into the moral culpability of the defendant. This allows for an assessment of the degree of risk, the social value or social utility of the defendant's conduct, as well as the gravity of the potential harm. Any test based on degree of probability alone is arguably unsatisfactory because degree of probability is "only one of the factors which should determine whether conduct is properly characterised as reckless". 200 The concept of a substantial and unjustifiable risk (as distinct from mere foresight) requires an evaluation as to whether the risk in question is reckless, having regard to the social value of the defendant's conduct relative to the probability of occurrence and the gravity of harm that might result. The weight to be given to any one factor will probably depend on the facts of the particular case. A key factor may be the gravity of the potential harm. In a number of States in the USA indifference may be shown by carrying out an act which threatens the lives of many. 201 Thus, the formulation contained in the American Model Penal Code may seem preferable to an approach based simply on foresight of consequences, in that it allows for an assessment of the culpability of the defendant's risk-taking.

4.034 As LaFave and Scott point out, homicide cannot be reduced simply to a question of mathematical percentages:

"When the defendant fired two bullets into the caboose of a passing train, thereby killing a brakeman, the chances were doubtless much greater that he would not kill than that he would kill. Perhaps the chances of killing were no more than 5 per cent, taking into account the area of the side of the caboose in relationship to the space taken up by the vital parts of its occupants. In view of the lack of social utility in shooting into the side of the caboose, the risk of 5 per cent was held enough for murder in that case. Banks v State, 85 Tex.Crim. 165, 211 SW 217 (1919)."<sup>202</sup>

4.035 On a foresight of probability approach the defendant would in this case be acquitted of murder. In contrast, the *Model Penal Code*, by use of the phrase "substantial and unjustifiable" risk, does not fix any minimum degree of foresight. As this case illustrates, foresight of a possibility may suffice to ground a conviction, at least in circumstances where the defendant's conduct lacks any useful purpose or social value. In this respect the doctrine may be compared in its operation to the concept of *dolus eventualis* in South African and Italian law, where foresight of a possibility will suffice to ground a murder conviction (although the possibility in question must be a concrete one, and not merely remote or fanciful).

See discussion at para 3.77 above and the cases cited therein.

<sup>&</sup>lt;sup>200</sup> JC Smith, "Case and Comment: R v Adomako" (1994) Crim LR 757, 760.

This approach is defended by Michaels, "Defining Unintended Murder" (1985) 85 Col LR (No. 4) 786, 799 where he says at footnote 72: "It is reasonable to treat a killing more severely because it could have resulted in many deaths. It may be more important to deter such acts."

LaFave and Scott, Criminal Law (2<sup>nd</sup> ed., 1986), 619.

# (i) Criticisms of the Model Penal Code Formula

4.036 A criticism sometimes made of this test is that its inherently flexible subjective nature may carry the risk of inconsistent jury verdicts, or possibly verdicts based on irrelevant or discriminatory factors such as the defendant's background, allegiance or other activities.<sup>203</sup>

4.037 However, this risk is one that is present in any area of the law which leaves an element of discretion to the jury, or which requires the jury to make an evaluation. An argument can be made on the lines that:

"While not wishing to discount the significance of these factors, they arguably apply in any and every context in which the meaning of a key legal term leaves a margin of discretion, however small, to judge or jury; and on this view their influence on terms like 'virtual certainty' should not be discounted. Indeed, given that juries are not required to justify their verdicts, there is no reason to suppose that factors of this kind do not apply even where no such discretion exists."

4.038 The risk that juries may be influenced by background factors is present in every area of the law, and is not confined to a formula relating to culpability. Even concepts like 'probability' or 'virtual certainty' are arguably open to being affected by background factors. Indeed, the whole evidential process may be open to a similar objection involving (as it necessarily does) the subjective weighing and evaluation of the available evidence. While it is obviously desirable to keep this risk to a minimum, there is no reason to suppose that appropriate judicial directions coupled with the availability of appellate review would be inadequate to prevent injustice occurring.

4.039 The flexibility inherent in the concept of 'extreme indifference' may be defended on the ground that it allows the jury the freedom to assess whether the defendant has shown a sufficient degree of culpability according to general community standards such as to warrant a conviction for murder. In so far as an imprecise term such as 'extreme' is used, it seems designed to work in favour of the accused by requiring a high degree of culpability before a conviction will lie.

4.040 Furthermore, it should be remembered that the test is carefully formulated so as to capture only the most heinous of killings. In order for a conviction to be valid under this head it must be shown:

- (1) Firstly, that the defendant was reckless, in the sense of disregarding a substantial and unjustifiable risk. Such risk must involve a gross deviation from the standard of conduct that a law-abiding person would observe;
- (2) Secondly, that this recklessness manifests an "extreme indifference" to the value of human life.

Ashworth, *Principles of Criminal Law* (2<sup>nd</sup> ed., Clarendon Press, 1995), 262-263.

McAuley and McCutcheon, Criminal Liability (Round Hall Press, 2000), 307.

4.041 Instances of where extreme indifference has been found would seem to bear out this point. Activities which have been held to justify a conviction under this head include shooting into a moving automobile, shooting into an occupied house and shooting over a person's head in order to scare.<sup>205</sup>

4.042 A second related objection to the approach adopted in the *Model Penal Code* is that the concept of unjustifiable risk-taking is inherently imprecise and uncertain. Yeo argues:

"Leaving the jury to decide on the justifiability or otherwise of taking a risk introduces an unacceptable degree of uncertainty over the outcome of a case. One jury might consider that the lack of social utility of an accused's conduct was so great as to warrant a murder conviction even though the foreseeable risk of causing death was only a possibility. Another jury deliberating on exactly the same facts might decide against a murder conviction on the ground that a higher degree of foreseeable risk was required." <sup>206</sup>

4.043 Admittedly, the concept of justifiability in the taking of a risk is uncertain. However, some degree of imprecision may be inevitable as the concept of justifiability is necessarily value laden.<sup>207</sup>

4.044 Despite these criticisms, the test, or a variation on the test, is employed in most United States jurisdictions.<sup>208</sup> At present, at least forty-two of fifty-one United States jurisdictions<sup>209</sup> have some version of 'depraved heart' murder (the common law forerunner of 'extreme indifference murder'). Of these, fourteen codify a formula of 'extreme indifference' similar to the definition contained in the *Model Penal Code*. Seven codify common law type language, such as 'depraved heart'. Four contain a mixture of the two language styles, such as 'depraved indifference'. Sixteen have not codified the common law more precisely than the terms 'murder' or 'malice aforethought.' Of the nine jurisdictions which have no statutory version of the offence, 'depraved heart' type killings may nevertheless lead to convictions in many of them. Five of these states define 'knowledge' in more expanded terms than the *Model Penal Code's* 'practical certainty' formula.<sup>210</sup> These states thus treat what would normally be called reckless killings as knowing ones.

See para. 3.77 above.

Yeo, Fault in Homicide (The Federation press, 1997), 83.

This point is acknowledged by Yeo, *ibid*. at 87.

The following information is taken from Michaels, "Acceptance: The Missing Mental State", (1998) 71 S Cal L Rev 953, 1005-1006.

Fifty States and the District of Colombia.

For example, Indiana ('high probability'), Montana ('highly probable'), Ohio ('probably cause'), Tennessee ('reasonably certain'), Texas ('reasonably certain').

(ii) Summary of Advantages and Disadvantages of Approach Contained in Model Penal Code

### Advantages

- 4.045 The following are the advantages of the approach contained in the *Model Penal Code*:
- 1. This approach would capture heinous killings where the defendant had no purpose to kill, such as a terrorist who plants a bomb in a public building or an arsonist who sets fire to an occupied building. Such killers would fall outside the present test of intention as determined by the House of Lords in  $R \ v \ Woollin^{211}$ ;
- 2. By requiring the risk in question to be 'substantial and unjustifiable' it allows for an assessment of the culpability of the risk in question, and avoids confining it to any fixed mathematical percentage.

## Disadvantages

- 4.046 The following is a disadvantage of the *Model Penal Code* approach:
- 1. Its inherently flexible formulation may be somewhat uncertain in practice, carrying the risk of inconsistent jury verdicts, or verdicts based on irrelevant or discriminatory factors, such as the defendant's background, allegiance or other activities.
- (iii) Constitutional Concerns in Relation to the 'Extreme Indifference' Formula
- 4.047 The extreme indifference formulation in the *Model Penal Code* has been challenged as being unconstitutionally vague in a number of US states, primarily on grounds of due process and equal protection. Although a few such challenges have been partly successful, <sup>212</sup> the validity of the extreme indifference formulation has been almost uniformly upheld. <sup>213</sup> In *State v Hanson* the North Dakota Supreme

<sup>&</sup>lt;sup>211</sup> R v Woollin [1998] 4 All ER 103.

See, for example, *People v Marcy* [1981] (Colorado) 628 P2d 69, where a statutory formulation incorporating the extreme indifference provision was held to violate equal protection because the offence described (first degree murder) could not reasonably be distinguished from the offence of second degree murder under the statute. However, it is suggested that this decision must be regarded as turning on the construction of the particular statutory formulations in question, as the Court found that the mental requirement for second degree murder was more blameworthy than that required for first degree murder, thus providing no rational basis for distinguishing first degree murder from second degree murder. Indeed, in the later case of *People v Jefferson* [1988] (Colorado) 748 P2d 1223, the Colorado Supreme Court upheld the constitutional validity of an "extreme indifference" provision in an amended murder statute.

See, for example, the following cases where the constitutionality of extreme indifference provisions was upheld: *State v Walton* [1982] (Arizona) 650 P2d 1264 (although there was some overlap between the statutes relating to murder and manslaughter, they were held to be sufficiently distinguishable). This case was affirmed in *State v Palomarez* [1982] (Arizona) 657 P2d 899 (here it was held that there was a sufficient distinction between the provisions relating

Court held that the extreme indifference provision was not unconstitutionally vague and thus did not violate due process or equal protection rights:

"We cannot say that the circumstances employed in the grading of the statute are arbitrary, unreasonable, or unwarranted. We believe that the grading phrase 'extreme indifference to the value of human life' is an understandable and distinct definition of what circumstances are necessary to bring the act within the felony offence. As such, it is a reasonable and rational method of distinguishing the greater crime from the lesser crime." <sup>214</sup>

4.048 In Ireland if any such constitutional challenge were to arise it would presumably be taken under Article 40.1 (equality) or Article 38.1 (trial in due course of law). However, the decision in *King v Attorney General* notwithstanding, <sup>215</sup> this is not a vein of constitutional law which is highly developed in Ireland, and in view of the large number of American State court decisions upholding the validity of the *Model Penal Code* formulation, it is doubtful whether any such challenge would succeed.

(iv) Examples of the Operation of the 'Extreme Indifference' Provision in the United States<sup>216</sup>

4.049 The following is a summary of cases illustrating the operation of the 'extreme indifference' provision in a number of American State courts. The cases referred to below are mainly taken from States whose definition of murder uses the precise term 'extreme indifference' to the value of human life. Some of the cases mentioned below, however, are taken from states that define the mental element for murder with the related phrase 'depraved indifference' to human life. It is submitted that the difference between the two formulations is sufficiently slight to justify inclusion of cases from these states.<sup>217</sup>

to extreme indifference and recklessness based manslaughter); State v Robinson [1997] (Kansas) 934 P2d 38; Frey v State [1993] (North Dakota) 509 NW 2d 261. For a fuller citation of cases where the constitutionality of this provision has been upheld see Jeffrey Ghent, "Validity and Construction of 'Extreme Indifference' Murder Statute" (1999) 7 ALR (5<sup>th</sup>) 758.

- State v Hanson [1977] (North Dakota) 256 NW 2d 364, 369, approved in State v Tweed [1992] (North Dakota) 491 NW 2d 412, 419, where the Court accepted that the statute provided adequate warning as to the conduct proscribed and established sufficient guidelines to govern law enforcement.
- King v Attorney General [1981] IR 233, where the Supreme Court held that no citizen shall be tried on a criminal charge save in due course of law and with regard to the principle of equality before the law declared in Article 40.1.
- For a more comprehensive account of cases arising under 'extreme indifference' murder statutes in Unites States case law, see: Jeffrey Ghent, "Validity and Construction of 'Extreme Indifference' Murder Statute" (1999) 7 ALR (5th) 758. For a discussion of the operation of the term 'depraved indifference' in murder statutes see: Dale Agathe, "Validity and Construction of Statutes Defining Homicide by Conduct Manifesting 'Depraved Indifference' " (2000) 25 ALR (4th) 311.
- In so far as there is a difference between the two formulations it would seem that the 'depraved murder' formulation represents a higher threshold than the extreme indifference formulation, as 'depraved' in this context is usually taken as meaning "a wanton and wilful disregard of an unreasonable human risk" American Law Institute, Model Penal Code and Commentaries (2<sup>nd</sup>

4.050 In examining these cases it should be remembered that a number of States do not include an intention to cause serious injury within the definition of murder, as most cases involving an intention to cause serious injury would fall within the 'extreme indifference' formulation. Thus, some of the cases listed below might also amount to murder under Irish law if an intention to cause serious injury was found to be present.

4.051 In a number of cases causing an explosion has been held to amount to 'extreme indifference' murder. In *State v Hokenson*<sup>218</sup> a defendant who brought an explosive into a drug store was found guilty of murder when it subsequently went off killing a police officer. The Court held that the defendant's act of carrying an active bomb into the store, knowing it to be extremely dangerous, manifested an extreme indifference to the value of human life.

4.052 The extreme indifference head has also been held to be capable of applying to drunken driving killings, at least where the conduct of the defendant was sufficiently heinous. In Slaughter v State<sup>219</sup> a conviction of extreme indifference murder was affirmed where the defendant had been drinking all day, had not eaten, had been arrested on four previous occasions for drunken driving and was exceeding the speed limit when he hit a woman with his car. In Holifield v State<sup>220</sup> an intoxicated defendant who borrowed a car and accepted a challenge to race, ignored the pleas of his passengers and drove through town at speeds of 80-100 miles per hour was held guilty of murder. According to the Appellate Court he had proceeded with reckless disregard for the probable consequences of his acts. Similarly, in Stiegele v State of Alaska<sup>221</sup> an intoxicated driver who was driving a truck at 85 miles per hour, with passengers in the back, and who was seen driving in a wild and reckless fashion,<sup>222</sup> ignoring the pleas of his passengers to stop, was found guilty of murder.

4.053 Although it is rare for the extreme indifference provision to apply to non-intoxicated reckless driving, if the conduct is particularly culpable a conviction may be appropriate. Thus, in *Holman v State*<sup>223</sup> a conviction for murder was upheld. The defendant forced a woman into a car, drove with one hand on the steering wheel while holding a knife to her throat with his other hand, ran red lights, almost hit several people, drove on the wrong side of the road, pushed a car blocking his way into the oncoming lane of traffic, failed to stop for a police siren, drove in excess of 100 miles per hour when fleeing the police, ran a police blockade (where he would have hit a police officer had he not jumped out of the way) and finally crashed into a parked car which resulted in the death of a man.

ed., 1980), Part II, 15, quoting the formulation used by Perkins in R. Perkins, *Criminal Law* (2<sup>nd</sup> ed., 1969), 36.

<sup>218</sup> State v Hokeson [1974] (Idaho) 527 P2d 487.

<sup>&</sup>lt;sup>219</sup> Slaughter v State [1982] (Alabama) 424 So 2d 1365.

<sup>220</sup> Holifield v State [1987] (Alabama) 520 So 2d 240.

<sup>221</sup> Stiegele v State of Alaska [1986] (Alaska) 714 P2d 356.

For example, by performing 360 degree spins and driving on the wrong side of the road.

<sup>223</sup> Holman v State [1986] (Alabama) 495 So 2d 115.

4.054 Discharging a firearm at a person may also support a finding of extreme indifference. In King v State<sup>224</sup> the defendant, following a verbal dispute with the victim in a nightclub, followed a car for several miles before pulling up alongside and firing two or three shots at the car. The Court held that the defendant had acted with a "don't give a damn" attitude, in total disregard for public safety. Similarly, a conviction was affirmed in People v Fernandez<sup>225</sup> where the defendant indiscriminately fired two shots at the doorway of a poolhall. The defendant stated that he fired when he saw all "them dudes come running out" to frighten and stop them. In State v Michaud<sup>226</sup> the defendant's conduct in firing two shots into a house, knowing there were two adults and five children inside, was held to manifest "depraved indifference" within the meaning of the governing statute.<sup>227</sup>

4.055 Stabbing or slashing at a person may support a finding of extreme indifference murder. In State v Watkins<sup>228</sup> a conviction for extreme indifference murder was affirmed where the defendant stabbed the victim four times. Striking a victim, particularly with a dangerous instrument, may also support a finding of extreme indifference murder. In Divanovich v State<sup>229</sup> a defendant who caused the death of a woman by striking her with a rubber mallet and cutting her with a knife in the course of robbing her, was held properly convicted of murder. The victim's skull had been fractured, with contusions and lacerations covering her head. In State v Dow<sup>230</sup> a conviction for extreme indifference murder was also affirmed where the defendant struck the victim with a solid pine log, strangled her, inflicted a series of bruises and lacerations, broke bones in her face, neck and shoulders, filled her mouth and throat with pine needles and leaves and pushed these materials down her throat with a stick, causing death by asphyxiation.

4.056 In State  $v Joy^{231}$  a defendant who set fire to an occupied apartment building was found guilty of depraved indifference murder. The Appellate Court held that in instructing the jury that a defendant could be convicted of depraved indifference murder for conduct creating a high, but less than certain, degree of risk of death or bodily injury the trial judge had not made a manifest error.

4.057 In a number of cases the physical abuse of children has been held to be a valid ground for a murder conviction. In *People v Poplis*<sup>232</sup> repeated physical beatings of a three and a half-year-old child were held to manifest depraved

<sup>&</sup>lt;sup>224</sup> King v State [1987] (Alabama) 505 So 2d 403.

<sup>&</sup>lt;sup>225</sup> People v Fernandez [1994] (Colorado) 883 P2d 491.

<sup>226</sup> State v Michaud [1986] (Maine) 513 A2d 842.

Similarly, in *People v Register* [1982] (New York) 456 NYS 2d 562, a conviction for murder under the depraved indifference formulation was upheld where the defendant fired three shots into a crowded bar room.

<sup>228</sup> State v Watkins [1980] (Arizona) 614 P2d 835.

Divanovich v State [1980] (Arkansas) 607 SW2d 383.

<sup>&</sup>lt;sup>230</sup> State v Dow [1985] (New Hampshire) 489 A2d 650.

<sup>231</sup> State v Joy [1982] (Maine) 452 A2d 408. The defendant stated that he started the fire because he was "mad" at some of the occupants.

<sup>&</sup>lt;sup>232</sup> People v Poplis [1972] (New York) 30 NY 2d 85.

indifference to human life. In *People v Lilley*<sup>233</sup> the Court concluded that vicious and brutal injuries inflicted on a baby evinced a depraved indifference to human life. The medical evidence revealed that the baby had sustained multiple injuries to her head, body, extremities and brain.

## (c) Wicked Recklessness

4.058 A variation on the extreme indifference formulation worth considering is the analogous Scottish concept of 'wicked recklessness'. In Scots law a murder conviction may be established by "evidence of a deliberate intention to kill or by evidence of such wicked recklessness as to imply a disposition depraved enough to be regardless of the consequences." For conduct to be regarded as 'wicked' it must pass a high threshold. According to Gordon it must be "recklessness so gross that it indicates a state of mind which is as wicked and depraved as the state of mind of a deliberate killer." It appears, however, that it cannot be murder unless the defendant intended to cause *some* personal injury.

4.059 Two main objections may be made to the concept of wicked recklessness. First, the phrase 'wicked' has been criticised as being emotive and inherently imprecise. Thus, the House of Lords Select Committee on Murder and Life Imprisonment, in rejecting the concept, stated:

"'Wicked' is not a term used in English criminal law and has no precise meaning. It is true that the jury is often called upon to make a moral judgment (as when it is called on to decide whether certain conduct should be characterised as 'dishonest') but it is not generally part of its function to decide whether the defendant's behaviour was so 'wicked' that it should amount to the crime charged."<sup>237</sup>

4.060 A second criticism of the test is that it appears to be objective in nature.<sup>238</sup> It is not necessary that the defendant have a subjective appreciation of the risk of death resulting from his actions at the relevant time. In this respect it differs from the *Model Penal Code* formulation which requires subjective advertence on the part of the defendant. This objective element to the test has been criticised as leading to a return to the principles of *DPP v Smith*.<sup>239</sup> According to Glanville Williams

<sup>&</sup>lt;sup>233</sup> People v Lilley [1979] (New York) 422 NYS2d 986.

<sup>&</sup>lt;sup>234</sup> Cawthorne v H.M. Advocate [1968] JC 32, 35.

Gordon, Criminal Law (2<sup>nd</sup> ed., W. Green & Son Ltd, 1978), para. 23-17.

See Gordon, ibid. at para. 23.15, quoting Viscount Hailsham LC in R v Hyam [1975] AC 55, 77-78

House of Lords Select Committee on Murder and Life Imprisonment, Report of the Select Committee on Murder and Life Imprisonment (HL Paper 78-1, 1989), para. 74.

<sup>238</sup> H.M. Advocate v Hartley [1989] SLT 135; H.M. Advocate v McGuinness [1937] JC 37; H.M. Advocate v Frazer [1920] JC 60; discussed by Timothy H. Jones in Jones, "The Scottish Law of Murder" (1989) 105 LQR 516.

<sup>&</sup>lt;sup>239</sup> DPP v Smith [1960] 3 All ER 161.

"acceptance of [this] proposal will land us back in the morass from which we thought we had wearily escaped." 240

4.061 In considering these objections, however, it must be borne in mind that Scots law has no doctrine of implied malice. An intention to cause serious injury will not of itself ground a murder conviction, although it may be a factor from which an inference of wicked recklessness may be drawn. Further, it cannot be murder unless the defendant intended to cause some personal injury,<sup>241</sup> and only then if the assault exhibits sufficient wickedness or depravity. Thus, it appears that in this respect the concept of wicked recklessness in Scots law serves much the same function as the doctrine of implied malice serves in Irish and English law.

4.062 When these considerations are taken into account the concept of wicked recklessness is a good deal less severe, at least in practice, than might appear at first. Nevertheless, the Commission provisionally prefers the formulation contained in the *Model Penal Code*. In particular, the Commission is concerned that the objective nature of the Scottish test could, potentially at least, operate harshly in practice.<sup>242</sup> Secondly, the Commission would prefer to avoid the use of the term 'wicked' which may be undesirably emotive.

4.063 Accordingly, the Commission does not recommend adoption of the wicked recklessness formula into Irish law.

## D. Socially Justifiable Risk-Taking

4.064 An important issue that arises is whether any test of recklessness should include a reference to unjustifiable risk-taking. In particular, it may be argued that the concept of justifiable risk-taking is best dealt with by way of defence. The Law Reform Commission of Victoria, in its Report on homicide, <sup>243</sup> concluded that any formulation of recklessness should not contain a reference to justifiable risk-taking on the grounds that it would be preferable to provide for a general defence of necessity.

4.065 This conclusion is open to question. There may well be certain forms of risk-taking (usually undertaken in the course of a lawful activity possessing social value) which, although insufficient to ground a recognised criminal defence, may nevertheless mitigate or diminish the degree of recklessness in the particular case. As Fisse points out, "to say that D took a socially justified or tolerated risk is not necessarily to claim that there was any compelling necessity for D's conduct." <sup>244</sup>

Glanville Williams, "The Mens Rea for Murder: Leave it Alone" (1989) 105 LQR 387, 395.

See Gordon, Criminal Law (2<sup>nd</sup> ed., W. Green & Son LTD, 1978), para. 23.15.

The Commission does acknowledge, however, that examples where the doctrine has operated harshly in Scottish law are difficult to find.

Law Reform Commission of Victoria, *Homicide* (Report No. 40, 1990 - 1991), paras. 140-143.

Howard, Criminal Law (5th ed., The Law Book Co. Ltd, 1990), 493.

4.066 Defences to murder tend to be strictly defined and delimited. There may be many examples from everyday life where no defence of necessity would be available on the facts, yet a conviction for murder would seem inappropriate.

4.067 In other words, the social utility of the defendant's conduct may render the risk less culpable and so would justify reducing the conviction from murder to manslaughter. Conversely, where there is no social utility to the defendant's conduct, even a low level of risk may be enough to support a conviction for murder.<sup>245</sup>

4.068 This is not to suggest that a risk undertaken in the course of a lawful activity possessing social value will automatically or necessarily preclude a murder conviction. If the degree of risk involved is high or the gravity of the potential consequences severe, a conviction for murder may well be appropriate.

#### E. Recommendation

4.069 It is recommended that the fault element in murder be clearly defined as embracing a wide conception of 'intention'. If the fault element for murder is confined to a narrow construction of intention, as it is in English law, it follows that no matter how clearly a defendant foresees death as a consequence of his actions, it cannot be murder unless such foresight amounts to a virtual certainty. This would appear to be too narrow a fault element for murder as it excludes all risk-taking which falls short of a virtual certainty, no matter how culpable the risk-taking actually is.

4.070 It would be unsatisfactory if arsonists or terrorists, for example, who foresee a substantial risk of death resulting from their actions are guilty only of manslaughter. Such defendants have deliberately and intentionally pursued a course of conduct which exposes members of the public to a substantial risk of death. Although neither may specifically intend to cause death, both have evinced a willingness to kill in the pursuit of their objectives. Such defendants have reconciled themselves to, or accepted, the risk that death may result.

4.071 It is notable too that most other jurisdictions allow some form of recklessness to ground a murder conviction. Thus, in Australia foresight of a probability of death resulting will ground a murder conviction. In Scotland wicked recklessness suffices and in most American States reckless risk-taking will ground a murder conviction. In Italy and South Africa foresight of a possibility of death resulting will suffice. In Canada it appears that subjective foresight of a likelihood of death resulting is enough.

4.072 Therefore, it is recommended that the fault element for murder be expanded to embrace elements of foresight of a risk of death resulting.

An example would be a defendant who shoots into a house which is obviously occupied by a family.

- 4.073 The next question is what form such a provision should take. Two main options have been outlined above. The first would be to expand the fault element for murder to embrace foresight of a probability of death. The second option would be to introduce a provision along the lines of that contained in the American *Model Penal Code*, providing for the prosecution as murder of reckless killings which manifest an extreme indifference to human life.
- 4.074 Provisionally the Commission favours adoption of the formulation contained in the *Model Penal Code*. An approach formulated in terms of foresight of a probability of death resulting would offer a clear and definite test for liability. However, such an approach does not appear to cater for a defendant whose risktaking, although highly culpable, nevertheless falls short of a probability of death resulting. In addition, there may often be practical difficulties in calculating the degree of risk required. The *Model Penal Code* formulation would, in the Commission's view, appear to be the better approach as it is not tied to fixed mathematical percentages and allows for some evaluation of the justifiability of the risk-taking in question. By simply requiring that the risk in question be 'substantial' the Code avoids tying it down to any fixed mathematical percentage, while at the same time excluding remote or trivial possibilities.
- 4.075 Therefore, it is recommended that, in addition to intention, the fault element for murder be expanded to include reckless killing which manifests an extreme indifference to the value of human life.
- 4.076 If intention does *not* bear the same meaning in Irish law as it does in English law this raises the further question as to what exactly 'intention' means in Irish law. In view of the scarcity of reported Irish decisions on this point it is difficult to give a concrete answer to this question. The Commission is of the view that greater certainty and clarity is desirable in this important area of the law.
- 4.077 Therefore, it is recommended that, in any event, section 4 of the Criminal Justice Act, 1964 be amended so as to provide more clarity and certainty in relation to the meaning of 'intention' in Irish law.

# Part II: Should the *Mens Rea* for Murder Include an Intention to Cause Serious Injury?

4.078 Under section 4 of the *Criminal Justice Act*, 1964, an intention to cause serious injury is sufficient to ground a murder conviction, even where the accused does not actually intend to kill.

4.079 This rule has been the subject of much criticism. In  $Hyam \ v \ DPP^{246}$  a minority of the House of Lords, Lords Diplock and Kilbrandon, sought to limit the scope of the rule to an intention to cause grievous bodily harm where the accused realised that his act was likely to endanger life. The majority of the House, Lord Hailsham of St. Marleybone, Viscount Dilhorne and Lord Cross of Chelsea, however, were of the opinion that to establish the *mens rea* for murder it was sufficient to prove that the accused knew it was probable that his acts would result in grievous bodily harm, even though he did not desire to bring about that result. In the later case of  $R \ v \ Cunningham$ , <sup>247</sup> the House of Lords reaffirmed this rule. In  $R \ v \ Powell^{248}$  Lord Steyn criticised the rule as follows:

"The fault element does not correspond to the conduct leading to the charge, *ie* the causing of death. A person is liable to conviction for a more serious crime than he foresaw or contemplated...There is an argument that, given the unpredictability whether a serious injury will result in death, an offender who intended to cause serious bodily injury cannot complain of a conviction of murder in the event of a death. But this argument is outweighed by the practical consideration that immediately below murder there is the crime of manslaughter for which the court may impose a discretionary life sentence or a very long period of imprisonment. Accepting the need for a mandatory life sentence for murder, the problem is one of classification. The present definition of the mental element of murder results in defendants being classified as murderers who are not in truth murderers."<sup>249</sup>

4.080 The serious injury rule has also been criticised by academics. Professor Ashworth<sup>250</sup> has argued that the rule violates the principle of correspondence: namely that the fault element in a crime should relate to the consequences which the definition of the offence seeks to prevent. Similar criticisms are expressed by Glanville Williams<sup>251</sup> and by Lord Goff who has argued that as the law of murder is concerned with unlawful killings of a particularly serious kind:

<sup>246</sup> Hyam v DPP [1974] 2 All ER 41.

<sup>&</sup>lt;sup>247</sup> R v Cunningham [1981] 2 All ER 863.

<sup>&</sup>lt;sup>248</sup> R v Powell [1997] 4 All ER 545.

Ibid. at 551-552. Lord Mustill concurred in these observations at 549. Lord Steyn went on to endorse as a "precise and sensible solution" the proposals of the Criminal Law Revision Committee of England and Wales, Offences against the Person (Cmnd 7844, 14th Report, 1980), requiring an intention to cause really serious bodily harm coupled with awareness of risk of death.

Ashworth, *Principles of Criminal Law* (2<sup>nd</sup> ed., Clarendon Press, 1995), 260-265.

Glanville Williams, Textbook of Criminal Law (2nd ed., Stevens & Sons, 1983), 250-251.

"it seems very strange that a man should be called a murderer even though not only did he not intend to kill the victim, but he may even have intended that he should not die." <sup>252</sup>

4.081 Reform of the rule has been considered by a number of law reform bodies. Bodies that have recommended the abolition of the rule include the Victorian Law Reform Commission, <sup>253</sup> the Law Commission of England and Wales<sup>254</sup> and the Law Reform Commission of Canada. <sup>255</sup> Bodies which have recommended modifying the existing rule include the House of Lords Select Committee on Murder and Life Imprisonment (the Nathan Committee), <sup>256</sup> the Criminal Law Revision Committee <sup>257</sup> and the New Zealand Crimes Consultative Committee. <sup>258</sup>

### A. Options for Reform

- 4.082 If it is decided to replace the existing rule, there are four main options:
  - (a) Abolish the existing rule completely;
  - (b) Retain the existing rule but clarify the meaning of the term 'serious injury' so as to exclude slight or trivial injuries;
  - (c) Modify the existing rule by requiring that (in addition to intending to cause serious injury) the offender be aware of the risk of death;
  - (a) Replace the existing rule with the concept of reckless killings manifesting an extreme indifference to the value of human life, in

Lord Goff, "The Mental Element in the Crime of Murder" (1988) 104 LQR 30, 48.

Law Reform Commission of Victoria, *Homicide* (Report No. 40, 1990 - 1991), paras. 122-131.

The Law Commission of England and Wales, *Imputed Criminal Intent* (Director of Public Prosecutions v Smith) (1967), paras. 15-17.

Law Reform Commission of Canada, Recodifying Criminal Law (Report 31, 1987), 57-58.

<sup>256</sup> House of Lords Select Committee on Murder and Life Imprisonment, Report of the Select Committee on Murder and Life Imprisonment (HL Paper 78-1, 1989). At para. 195 the Committee proposed the following alteration to the rule: "A person is guilty of murder if he causes the death of another...(b)intending to cause serious personal harm and being aware that he may cause death.." This definition was incorporated into the Law Commission of England and Wales's Draft Criminal Code: Law Commission of England and Wales, A Criminal Code for England and Wales (Law Com. No. 177, Vol. 1, 1989), para. 54(b). The Draft Criminal Code sets out virtually the whole law relating to indictable criminal offences. The main aim of the exercise was to restate in a rational form the complex and confusing mixture of common law and statute which comprised the criminal law in England and Wales at the time. Various proposals for reform of the criminal law were also incorporated into the Draft Criminal Code. The Draft Code lays the foundation for further work by the Law Commission of England and Wales, whose objective in this area of the law is to produce a series of Bills, each of which will contain proposals for the immediate reform of a major area of criminal law. The Commission has not yet published a Draft Bill in relation to fatal offences.

See the Criminal Law Revision Committee, Offences against the Person (Cmnd 7844, 14<sup>th</sup> Report, 1980), 14 which recommended that there should be a finding of murder "if a person causes death by an unlawful act intended to cause serious injury and known to him to involve a risk of causing death."

The New Zealand Crimes Consultative Committee, Crimes Bill, 1989: Report of the Crimes Consultative Committee (April 1991) recommended that it should be held to be murder when the accused inflicts "any injury knowing it to be likely to cause death".

line with the provision contained in the American Model Penal Code.

# (a) Abolishing the Existing Rule

4.083 The main arguments in favour of abolition are as follows:

- 1. Murder involves an unlawful killing, so following the ordinary doctrine of *mens rea* the mental element should envisage death. By allowing an intent to cause serious injury to suffice, the law runs the risk of turning its most serious crime into a constructive offence. In other words, the fault element does not correspond to the conduct leading to the charge, namely, the causing of death.
- 2. There is a significant moral difference between someone who intends to cause death and someone who intends merely to cause serious injury, but does not intend or foresee death. The purpose of the offence of murder is to mark out and identify the most heinous killings. By treating an intentional killer on a par with a killer who neither intends nor foresees death, the law may blur this distinction. By so doing the law fails to distinguish clearly between the moral blameworthiness of the intentional killer and the lesser culpability of the unintentional killer.
- 3. Including an intention to cause serious injury within the *mens rea* of murder is unnecessary as the crime of manslaughter is adequate to deal with the intentional infliction of serious injury resulting in death. The crime of manslaughter allows the imposition of lengthy terms of imprisonment (up to and including life imprisonment) to reflect the seriousness of a particular offence. Indeed, to some extent manslaughter may be a more flexible way of dealing with such killings as the judge is not bound to impose a mandatory life sentence and may impose such level of punishment as is appropriate to the wrongdoing.
- 4. The concept of 'serious injury' may be unacceptably uncertain. As the Law Reform Commission of Victoria has pointed out, this may leave open the possibility of differing verdicts from juries based on the same or broadly similar facts. The Commission highlighted<sup>259</sup> a number of examples where it may be difficult for a jury to draw the line between a murder conviction and one of manslaughter:<sup>260</sup>
  - Stifling a victim's cries by putting a pillow over the mouth to suffocate the victim to the point of unconsciousness;
  - Shooting the victim with a gun in the arm, leg or foot;
  - Punching the victim with the intention of knocking him or her out;
  - Applying a cigarette lighter briefly a number of times to the victim's body.

Law Reform Commission of Victoria, *Homicide* (Report No. 40, 1990 - 1991), para 125. Although in Victoria the relevant phrase is 'grievous bodily harm', the examples given are equally applicable to the term 'serious injury.'

All these examples assume that the accused meant to do only what is described and did not intend to kill.

There is no doubt that a crime has been committed in each case, or that it deserves to be punished as such. However, it is less clear whether a jury would find an intention to cause serious injury in all these cases, and, if they do, whether it is correct to describe the crime committed as murder.

- 5. The rule leaves too much scope for discretion on the part of the prosecution. Glanville Williams suggests that, in practice, deaths involving this type of mens rea are generally treated as manslaughter, unless the accused was engaged in a "villainous enterprise". Thus, whether the accused is convicted of murder or manslaughter may depend to some extent on the choice of the charge by the prosecution.
- 6. It appears that, in practice, juries may be reluctant to convict for murder under this head. The Law Reform Commission of Victoria, in its Report on homicide, referred to submissions made to it by "experienced practitioners" that juries were generally reluctant to convict under the rule.<sup>262</sup>
- 4.084 The main arguments in favour of retaining an intent to cause serious injury as part of the *mens rea* of murder are:
- 1. Anyone who intentionally inflicts serious injury, and thereby puts another's life at risk, deserves to be convicted of murder if death results. 263 The human body is fragile and no one can ever predict whether death will result from serious injury, since it may depend on a range of individual and medical factors beyond the perpetrator's control. A person who is willing to inflict serious injury on another human being therefore possesses a degree of moral culpability comparable to an intentional killer. By choosing to inflict serious injury on a person the defendant crosses a moral threshold, and sufficient disregard for life has been shown to justify a conviction of murder if death results. This public policy argument has been articulated by the Indian Supreme Court:

"No one has a licence to run around inflicting injuries that are sufficient to cause death in the ordinary course of nature and claim that they are not guilty of murder. If they inflict injuries of that kind, they must face the

Glanville Williams, Textbook of Criminal Law (2nd ed., Stevens & Sons, 1983), 250-251.

Law Reform Commission of Victoria, *Homicide* (Report No. 40, 1990 - 1991), para 131. Further confirmation of this tendency is provided by Lord Goff who records a case from his own experience where a jury refused to convict the defendant for murder in a case where the accused stabbed the victim with broken glass, despite the fact it was "plain" that the defendant intended to cause serious bodily harm because, according to Lord Goff, "not merely could it never have crossed the assailant's mind that there was any risk of causing death to his victim, but he was horrified when he died" (this is Lord Goff's interpretation of the jury's reasoning as, clearly, he could not have known the actual reasons for the jury's verdict): Lord Goff, "The Mental Element in the Crime of Murder" (1988) 104 LQR 30, 48-49.

In Italian Law, by virtue of the doctrine of *omicidio preterintenzionale*, an intention to inflict any injury that results in death will suffice to ground a murder conviction. It should be noted, however, that the verdict is one of *omicidio preterintenzionale* (constructive intention whereby a person who intends to produce one outcome is deemed to have intended a worse outcome, even if he cannot be proved to have realised the risk of that outcome) and not *omicidio simpliciter* (ordinary intention): see McAuley and McCutcheon, *Criminal Liability* (Round Hall Press, 2000), 302-305.

consequences; and they can only escape if it can be shown, or reasonably deduced, that the injury was accidental or otherwise unintentional."<sup>264</sup>

- 2. Abolition of the rule might facilitate defendants who wish to escape a murder conviction by allowing them to claim that they only intended to cause serious injury when, in fact, they did intend to kill. They would be convicted of manslaughter when they should be convicted of murder. In practical terms it would become more difficult for a prosecution to establish a conviction for murder as the accused could simply make the claim that he or she only intended to cause serious injury.
- 3. In response to the argument that there is a lack of correspondence between the lesser degree of fault in a particular intent and the more dire fatal result, it may be contended that the doctrine of 'common knowledge' applies. A defendant who intentionally inflicts serious injury must be taken to know that he is putting life at risk in view of the inherent vulnerability of the human body. That death may occur is a basic element of the body of knowledge that goes hand in hand with ordinary human experience and one cannot meaningfully claim not to know or believe that one's actions could have such a result. Accordingly, a defendant who knowingly inflicts personal violence must bear the consequences of it, even if he failed to acknowledge those consequences at the point of assault. <sup>265</sup>

Therefore, there is an argument that the *mens rea* for murder should not be restricted to conscious advertence, but rather should also extend to unconscious awareness – a rationalisation of our actions by the knowledge of certain things that may not be in actual contemplation at the moment the action is carried out. For example, most people know that a car will not start without turning the ignition, and although they would not think about this fact when starting their car, knowledge rationalises the action of turning the ignition. If one accepts this analysis, the critical question then is whether an action was in fact carried out (rationalised) on the basis of tacit knowledge or intent which can be said to amount to the necessary mental state in question.

As the English decision of  $R \ v \ Parker^{266}$  illustrates, insisting on conscious or front of the mind awareness may cause difficulties in practice. In  $R \ v \ Parker$  the defendant caused damage to a telephone by slamming it down in rage. The Court of Appeal upheld his conviction for recklessly<sup>267</sup> causing criminal damage, despite his defence that it did not occur to him that he might damage the telephone. The Court held that he must have known that he was dealing with breakable material even if fragility was not at the forefront of his mind

Virsa Singh AIR [1958] SC 465, 467.

For further discussion of the principle of common knowledge, see McAuley and McCutcheon, Criminal Liability (Round Hall Press, 2000), 304.

R v Parker [1977] 1 WLR 600. Although this case is concerned with criminal damage to property, it illustrates the difficulty of requiring a strict conscious advertence to the risk of death in the context of intention to cause serious injury.

The Court in *Parker* was concerned with subjective recklessness. Subsequently, in *R v Caldwell* [1982] AC 341, the House of Lords recognised an objective test of recklessness in English law, albeit in the context of the *Malicious Damage Act*, 1861.

when he slammed the receiver down. In the opinion of the court he had closed his mind to the obvious.

Insisting on conscious awareness of a risk of death excludes certain types of misconduct. Thus, a defendant who claims that he was in such a rage that he 'acted without thinking', or a defendant who is so indifferent as to whether his victim lives or dies that he does not consider the risk of death, or a defendant who claims that he was preoccupied by another aspect of what he was doing, would escape liability if conscious appreciation is a necessary ingredient of the mental element of murder.

# (b) Retaining the Existing Rule but Clarifying the Meaning of 'Serious Injury' so as to Exclude Slight or Trivial Injuries

4.085 If it were decided to retain the present provision, a further option would be to clarify the meaning of the term 'serious injury'. As Lord Edmund Davies pointed out in *R v Cunningham*, it seems strange:

"that a person can be convicted of murder if death results from, say, his intentional breaking of another's arm, an action which, while undoubtedly involving the infliction of 'really serious harm' and, as such, calling for severe punishment, would in most cases be unlikely to kill." <sup>268</sup>

4.086 The term 'serious injury' is not defined by section 4 of the *Criminal Justice Act, 1964*, although it is clearly objective in nature, in that the accused does not have to be aware of the risk of death.<sup>269</sup>

4.087 Possible definitions of serious injury are discussed in greater detail below.<sup>270</sup>

#### (c) Serious Injury which the Defendant Realises Involves a Risk of Death

4.088 A third option for reform, which would meet many of the above objections to the current rule, would be to confine the scope of the present rule to an intention to cause serious injury which the defendant knows is likely to endanger life. The essential feature of this provision is an awareness on the part of the accused that the injury he is causing may place the victim's life at risk. Various formulations are possible.

4.089 The Criminal Law Revision Committee, in its 14th Report, recommended that a killing should be classified as murder "if a person causes death by an unlawful act intended to cause serious injury and known to him to involve a risk of causing death". A second formulation, favoured by the House of Lords Select

<sup>271</sup> Criminal Law Revision Committee, Offences against the Person (Cmnd 7844, 14<sup>th</sup> Report,

<sup>&</sup>lt;sup>268</sup> R v Cunningham [1981] 2 All ER 863, 871.

See the comments of Henchy J. in *People v Murray* [1977] IR 360, 401-402 where he says "the offence of murder is basically one of intention which need not encompass the resulting death".

See Chapter Five, paras. 5.18 – 5.42 below.

Committee on Murder, is that a person would be guilty of murder if he causes the death of another "intending to cause serious personal harm and being aware that he may cause death..." A third possible formulation, along the lines of section 300(2) of the *Indian Penal Code*, is: an "intention of causing such bodily injury as the offender knows to be likely to cause death".

4.090 The main difference between the two English proposals and section 300(2) of the Indian *Penal Code* lies in the degree of risk of death required. The English formulations simply require foresight of a possibility (awareness that he may cause death), while section 300(2) requires foresight of probability (likelihood).

4.091 The essential feature of these formulations is that there must be an intention to cause bodily injury, but this alone is not sufficient. In addition, the defendant must have been aware of a risk of death. This approach may be justified on the basis that a person who inflicts serious injury on another while being aware of the risk of death possesses a degree of moral culpability close to, or comparable with, that of an intentional killer. One advantage of these provisions is that they satisfy the principle of correspondence, by requiring foresight on the part of the accused that his conduct may result in death. In other words, the accused cannot be held criminally liable for consequences that are not foreseen or contemplated. Such an approach would mitigate the perceived harshness of the present rule which allows a conviction for murder in cases where death was neither foreseen nor intended.

4.092 The main arguments against the Indian *Penal Code* approach, based on foresight of probability of death, are:

1. Any attempt to redefine serious injury as "such bodily injury as the offender knows to be likely to cause death" (or some similar provision) would introduce practical difficulties. In particular, it might impose too onerous a burden on the prosecution by requiring proof, beyond all reasonable doubt, that the defendant knew that such injury would be likely to cause death. Furthermore, defendants who actually intended to kill may seek to escape a murder conviction by claiming that they only intended to cause serious injury and were unaware of the risk of death, thereby placing a difficult burden upon the prosecution.

<sup>1980),</sup> para. 31.

House of Lords Select Committee on Murder and Life Imprisonment, Report of the Select Committee on Murder and Life Imprisonment (HL Paper 78-1, 1989), para. 195.

For a general discussion of this provision see Yeo, Fault in Homicide (The Federation Press, 1997), 120-123. A variation on this formulation, adopted by the Law Reform Commission of Victoria in its Discussion Paper, but rejected in its final Report, is "an intent to inflict a serious injury which the defendant knows to be life-endangering" - The Law Reform Commission of Victoria, Homicide (Discussion Paper No. 13, March 1988), para. 115. See also Law Reform Commission of Victoria, Homicide (Report No. 40, 1990 - 1991), para. 128-131.

This argument was made in a submission by the Crown Prosecution Service to the House of Lords Select Committee on Murder and Life Imprisonment. See House of Lords Select Committee on Murder and Life Imprisonment, Report of the Select Committee on Murder and Life Imprisonment (HL Paper 78-1, 1989), paras. 59-60.

- 2. A test based on degrees of risk may be difficult to apply. The term "likely", as favoured by the Indian *Penal Code*, may be open to objection. As the Law Commission of England and Wales pointed out in its Report,<sup>275</sup> it may be difficult for a jury to determine whether there was a likelihood, as distinct from a possibility, that the injury inflicted would cause death. Whether serious injury is "likely" to cause death depends on all the surrounding circumstances including the accessibility or otherwise of medical aid. Specialist medical evidence may be required to assist the jury, further complicating court proceedings.
- 3. Insistence on conscious awareness of a risk of death can exclude certain types of misconduct by a defendant.<sup>276</sup> A defendant who is so indifferent as to whether his victim lives or dies that he does not consider the risk of death, or a defendant who claims that he was in such a rage that he 'acted without thinking', or a defendant who claims that he was preoccupied by another aspect of what he was doing, may escape liability if such an approach is followed. In policy terms it would seem undesirable that defendants could act with such impunity.

4.093 The alternative approach, embodied in the proposals of the Criminal Law Revision Committee and the House of Lords Select Committee, would be to pitch the degree of risk required at the level of foresight of possibility. Such an approach would, however, give no indication to the jury as to what degree of possibility is required, and so could embrace remote or slight possibilities.

# (d) Extreme Indifference to the Value of Human Life

4.094 A fourth option for reform would be to abolish intention to cause serious injury as part of the *mens rea* for murder and replace it with the concept of reckless killings manifesting "extreme indifference to the value of human life" in accordance with the provisions of the American *Model Penal Code*. Under the *Model Penal Code* an intention to do grievous bodily harm has no express significance, but is subsumed within the wider categories of "extreme indifference to the value of human life", murder<sup>278</sup> or reckless manslaughter. Adoption of such a provision could render the current rule as to serious injury "surplus to requirements". As the American Law Institute explains:

"That the actor intended to cause injury of a particular nature or gravity is, of course, a relevant consideration in determining whether he acted with

The Law Commission of England and Wales, *Imputed Criminal Intent* (Director of Public Prosecutions v Smith) (1967), para. 18(b).

<sup>&</sup>lt;sup>276</sup> See above para. 4.083(3).

Discussed above at para. 3.70 - 3.78.

Model Penal Code and Commentaries (Official Draft and Revised Comments) (1980) Part 1, §. 210.2(1)(b).

Model Penal Code and Commentaries (Official Draft and Revised Comments) (1980) Part 1, §. 210.3(1)(a).

Per Lord Goff, "The Mental Element of Murder" (1988) Vol. 104 LQR 30, 56.

'extreme indifference to human life' under Section 210.2(1) (b) or 'recklessly' with respect to death of another under Section 210.3(1)."<sup>281</sup>

4.095 Such a solution has been recommended by Lord Goff who sees it as providing a more just solution:

"The test whether he intended to cause really serious bodily harm does not ...provide a satisfactory answer - whereas the test whether he acted regardless of the consequences, not caring whether the victim died or not, introduces the element of indifference to death which, as I see it, provides an appropriate hallmark of murder in cases such as this." 282

4.096 Such an approach would have the advantage of providing a ground on which more heinous killings could be punished as murder, while at the same time providing a legitimate basis for the reduction of a charge of murder in respect of less heinous killings. Thus, a ruthless criminal who, while not intending to kill, is nonetheless indifferent as to whether his victim lives or dies, would be captured by this provision. By contrast, a killer who intends to inflict serious injury, but does not intend or foresee death, would fall outside the scope of the definition of murder, but might well come within the category of reckless manslaughter.

#### B. Recommendation

4.097 Provisionally, it is recommended that an intention to cause serious injury be retained as part of the mental element of murder. A defendant who deliberately inflicts serious injury must be taken to know that he is risking life in view of the inherent vulnerability of the human body and mind. Such a defendant therefore possesses sufficient moral culpability to justify a murder conviction.

4.098 Objections that the rule may apply to injuries of a relatively minor nature may be met by redefining the term 'serious injury' so as to ensure that it only applies to injuries of a particularly grave character. Possible definitions are discussed below.<sup>283</sup> A further argument against this objection is the submission that a judge and jury should be trusted, as they always have been, to interpret phrases such as 'serious injury' sensibly in the circumstances.

4.099 An objection may also be made that the rule violates the principle of correspondence, namely that the fault element does not correspond to the conduct leading to the charge, being that of causing death. However, such an objection seems to overlook the principle of 'back of mind awareness' discussed above.<sup>284</sup>

4.100 This lack of correspondence has caused some law reform bodies to propose confining the rule to serious injury which a defendant realises involves a risk of death. Such a proposal fails to take into account the principle of 'back of mind

American Law Institute, *Model Penal Code and Commentaries* (2<sup>nd</sup> ed., 1980), Part II, 28-29.

Lord Goff, "The Mental Element of Murder" (1988) Vol. 104 LQR 30, 56.

<sup>283</sup> See below paras. 5.18 - 5.42.

See above para. 4.083(3).

awareness' outlined above. It also seems undesirable in policy terms. As already discussed, <sup>285</sup> insisting on conscious advertence on the part of a defendant to the risk of death may exclude certain types of egregiously culpable misconduct by a defendant. A defendant who acts in a temper 'without thinking', or who fails to advert to the consequences out of sheer indifference to them, <sup>286</sup> or who claims he was so preoccupied in what he was doing that he gave no thought to any particular result of his actions, would escape liability on this approach. It seems socially undesirable that defendants who act in an uninhibited bad temper or with sheer indifference as to whether their victim lives or dies should escape liability for murder on this ground of lack of actual realisation of the imminent likely result of their misconduct.

4.101 Therefore, it is recommended that an intention to cause serious injury should be retained as part of the mental element for murder.

# C. Recklessness as to Serious Injury

4.102 If it is decided to retain intent to cause serious injury as a fault element for murder, as has been recommended above, a further issue which arises is whether recklessness as to serious injury should be included within the fault element to murder. This arises where the defendant does not intend to kill, or to cause serious injury, but, nevertheless, foresees the probability of serious injury resulting.

4.103 The Law Reform Commission of Victoria, in its Report on homicide, recommended against inclusion of this fault element within the definition of murder. According to the Commission:

"The steps necessary to equate such a [killer] with the intentional killer, must be (i) the defendant does something which (ii) the defendant knows will probably cause serious injury, which (iii) the jury regards as grievous bodily injury and (iv) such state of mind is morally equivalent to an intention to kill. This is too far from the cases of the intentional killer." 287

4.104 The counter argument is that once a defendant is reckless as to the infliction of serious injury, the principle of 'common knowledge' applies. As McAuley and McCutcheon have argued, if a person intends to cause serious injury he should not be allowed to claim that he failed to realise that the injury may cause death. Their argument is that he is guilty of murder because he cannot claim ignorance of the fact that serious injury entails the risk of death. An understanding of this risk is a basic part of the realm of knowledge that goes hand in hand with everyday human experience and so cannot be disavowed by defendants simply on grounds that they have failed to attend to it.

<sup>&</sup>lt;sup>285</sup> See above para. 4.083(3).

Whether his victim lives or dies is a matter of indifference to him so he gives the matter no thought.

Law Reform Commission of Victoria, *Homicide* (Report No. 40, 1990 - 1991), para. 144.

McAuley and McCutcheon, Criminal Liability (Round Hall Press, 2000), 288.

- 4.105 The human body is fragile and no one can ever predict when death will result from serious injury. On this view, a defendant who is reckless as to the infliction of serious injury, must, in view of the inherent vulnerability of the human body, be taken to know that he is risking life. A defendant who, nevertheless, elects to proceed in these circumstances assumes this risk and so may fairly and properly be convicted as a murderer.
- 4.106 An alternative approach would be to omit any express reference regarding recklessness as to serious injury, and instead to allow such killings to be dealt with under the general rubric of reckless killings manifesting an extreme indifference to human life. In other words, where a defendant is reckless as to the infliction of serious injury and death results, such recklessness may support a conviction for murder as a reckless killing manifesting an extreme indifference to the value of human life. Reckless infliction of serious injury falling short of this criterion would be dealt with as manslaughter.
- 4.107 Such an approach would have the advantage of providing a filtering device by which more serious homicides could be punished as murder, while leaving less serious killings, as appropriate, to be punished as manslaughter. Thus, where the risk of injury was relatively slight, or the projected serious injury would not be regarded as life threatening, then it would be open for a verdict of manslaughter, rather than murder, to be returned.
- 4.108 A possible weakness of this approach is that it may exclude reckless infliction of serious injury which falls short of 'extreme indifference' to human life, but this is a theoretical criticism: a clear and simple formula is to be preferred to a longer provision which tries specifically to cover every eventuality in detail. Examples in practice of cases where an accused is reckless as to serious injury, but not death, would be likely to be rare.

## D. Recommendation

4.109 Provisionally, the Commission recommends against incorporating any express reference to recklessness as to serious injury. Instead, the Commission recommends allowing such killings to fall within the more general head of reckless killings manifesting extreme indifference to the value of human life.



#### **CHAPTER 5: DEFINITIONS**

#### A. Intention

- 5.01 A number of arguments may be made in favour of defining intention.
- 1. One of the criticisms of the law regarding 'intention' at present is that it is uncertain. It is not clear whether the meaning of 'intention' in Irish law is confined to foresight of a virtual certainty, as it is in English law, or whether it embraces other categories of foresight as well. It is undesirable that the scope of one of the most serious crimes on the statute book, carrying severe consequences on conviction, should be so unclear. Defining the term would introduce a clarity and certainty into this important area of the law.
- 2. At present, the term 'intention' needs to be defined. It would seem preferable that this definition be supplied by the legislature following careful consideration of the policy issues involved. Leaving a key term such as 'intention' undefined in statute gives no guidance to the judge as to the proper meaning or scope of the term. This may result in inconsistent interpretations of the term. Similarly, it may make it difficult for the prosecution to determine whether to bring a charge of murder or manslaughter in a particular situation. In summary, if definition of the term is necessary, as it seems to be, it would seem preferable that this be done in explicit terms in legislation.
- 5.02 The main argument against defining intention is that it is an ordinary word in common use in the English language and so requires no definition. Supplying an elaborate definition may only confuse juries. However, this argument is open to objection. In practice 'intention' has no uniform meaning and may mean different things to different people. In the absence of a definition there may be a risk that juries will impose their own understanding of the term, such as, for example, premeditation or planning. Intention, in its legal signification, may be more restrictive than the ordinary understanding of the term. For example, the definition of intention propounded by the House of Lords in R v Woollin,  $^{290}$  as including foresight of a virtual certainty, may be narrower than what is sometimes taken as the ordinary understanding of the term. It is noticeable that in R v Moloney,  $^{291}$  R v Hancock  $^{292}$  and R v Nedrick,  $^{293}$  for example, the juries returned to ask for further

Defining the term 'intention' will eliminate the need for judicial construing of the term, which construction may significantly expand or reduce the scope of the crime of murder. Conceivably, 'intention' could range from foresight of a virtual certainty on the one hand, to foresight of a substantial risk of death resulting on the other. To leave the meaning of 'intention' so diffuse in this way would arguably undermine the principle of equality of treatment for every accused.

<sup>&</sup>lt;sup>290</sup> R v Woollin [1998] 4 All ER 103.

<sup>&</sup>lt;sup>291</sup> R v Moloney [1985] 1 All ER 1025.

<sup>&</sup>lt;sup>292</sup> R v Hancock [1986] 1 All ER 641.

clarification on the meaning of intention. In each case the jury had difficulty understanding the meaning of intention.

- 5.03 Therefore, in view of the desirability of introducing more clarity and certainty to this important area of the law, it is recommended that intention be defined by statute.
- 5.04 There are two approaches to defining the concept of intention. The first approach envisages the definition of intention being restricted to cases where it is the actor's conscious object or purpose to achieve a particular result. Under the second approach the definition of intention would, in addition to conscious object or purpose, also embrace and require foresight on the part of the actor that a particular result is likely to follow from, or is virtually certain to follow from, his conduct. The level of foresight required may vary according to the particular formulation employed. Thus, in  $R \ v \ Woollin$  the House of Lords held that foresight of a virtual certainty was required to establish intention.

## (a) Conscious Object or Purpose

- 5.05 One possible definition of intention would be 'conscious object or purpose'. Under this approach a consequence is not intended unless it is the defendant's conscious object or purpose to bring it about. Thus, intention may be defined as "a conscious object or purpose to bring about or cause a particular result."
- 5.06 This definition of intention would, by itself, appear to be insufficient as a fault element for murder. If intention is expressed in such limited terms it follows that, no matter how probable a particular result is, a defendant cannot be said to intend it unless it is his conscious object or purpose to achieve this result. This point is illustrated by the example of a miscreant who blows down the door of a building for the purpose of breaking in, and in so doing kills the night watchman.<sup>295</sup> No matter how clearly he foresees the death, he cannot be said to have intended it, as long as intention is expressed as being restricted to a meaning of 'conscious object or purpose', for, logically, the killing is incidental to the raider's purpose, and not his considered object.
- 5.07 Two resolutions to this difficulty are possible. One, discussed above, would be to recognise recklessness as a fault element for murder. A second

<sup>&</sup>lt;sup>293</sup> R v Nedrick [1986] 3 All ER 1.

Variations of this formulation which have been proposed include 'no substantial doubt', 'occur in the ordinary course of events', 'another consequence which he knows involves that consequence' and 'practically certain to follow'.

This example is provided in Howard, Criminal Law (5<sup>th</sup> ed., The Law Book Co. Ltd, 1990), 481. Lord Goff in Lord Goff, "The Mental Element of Murder" (1988) Vol. 104 LQR 30, 45-46 quotes Glanville Williams' example of a villain who sends an insured package with a time bomb inside on a plane with the aim of causing the plane to explode and destroy the package. His intention is merely to collect the insurance on the package and he is indifferent as to whether the passengers live or die, though he knows that success of his plan will almost certainly involve their deaths as a side-effect - Glanville Williams, Textbook of Criminal Law (2<sup>nd</sup> ed., Stevens, 1983), 84-85.

approach would be to expand the definition of intention to include foresight of the risk of death resulting.

### (b) Foresight of Consequences

- 5.08 A second way of defining intention is to expand its meaning to include not only conscious object or purpose, but also foresight of consequence. The particular level of foresight required varies according to the definition employed. In England, as a result of the decision of the House of Lords in  $R \ v \ Woollin$ , it appears that a result may be taken as intended, although it is not the actor's purpose to achieve it, where it is a "virtually certain" consequence of his act. Various other formulations are possible.
- 5.09 The Law Commission of England and Wales, in 1993, proposed the following definition of intention:

"A person acts... intentionally with respect to a result when-

- (i) it is his purpose to cause it; or
- (ii) although it is not his purpose to cause that result, he knows that it would occur in the ordinary course of events if he were to succeed in his purpose of causing some other result."<sup>296</sup>

[emphasis added]

- 5.10 Two comments may be made in relation to this definition. Firstly, the phrase "in the ordinary course of events" is somewhat ambiguous, as it does not clearly specify the level of foresight required. Does it cover cases where the result or consequence is more likely than not (in other words, a mere probability), or does it require some higher degree of probability? To take the example quoted earlier, if a defendant blowing down a wall to break into a building thought there was a 60 per cent probability of a security officer dying in the explosion, could this be said to be in "the ordinary course of events"? The Law Commission of England and Wales, in their commentary on the *Draft Criminal Law Bill*, which discussed in the aforementioned Report, submitted that this phrase should be understood as suggesting a "near-inevitability" of a result in the absence of some "wholly improbable supervening event".<sup>297</sup>
- 5.11 Secondly, part (ii) of the definition speaks of a purpose to cause a result. It can be argued that this formulation is too narrow in that an accused may have purposes other than to cause a result, for example, the venting of anger.<sup>298</sup>

The Law Commission of England and Wales, Legislating the Criminal Code: Offences against the Person and General Principles (Law Com. No. 218, 1993), 8.

<sup>297</sup> Ibid. at 9-10. See fn. 257.

This point is illustrated by the facts in R v Woollin where the accused, in a fit of temper, threw his son on to a hard surface, killing him. He had no purpose to cause such a result, but was simply venting his anger.

Accordingly, Smith and Hogan<sup>299</sup> suggest that the definition should be amended to read "he knows that it *will* occur in the ordinary course of events, *or* that it would do so if he were to succeed in his purpose of causing some other result"

5 12 Other formulations have been considered. The Canadian Law Reform Commission has proposed a purpose-based definition of murder "Every one commits the crime of murder who purposely kills another person" 'Purposely' is defined as follows

"A person acts purposely as to a consequence if he acts in order to

- (1) that consequence, or
- (11) another consequence which he knows involves that consequence  $"^{300}\!$
- 5 13 A similar criticism of imprecision may be made of this formulation. The key phrase appears to be "which he knows involves that consequence". The definition does not specify what level of knowledge is required. The level of knowledge needed may vary from knowledge of a mere probability to a high probability or a virtual certainty.
- Both the definition of the Law Commission of England and Wales and the Canadian Law Reform Commission's definition outlined above appear to be designed to deal with a case where a defendant has foresight of a virtual certainty of death resulting. However, intention could also be defined as including foresight of a probability of death resulting. Two objections may be made to this approach Firstly, it blurs the line between intention and recklessness. If intention is defined as including foresight of a probability of death resulting, what then is recklessness? Secondly, recklessness would seem a better term when dealing with conscious risk-taking, as it allows for some assessment of the unreasonableness or unjustifiability of the risk-taking in question.

## Recommendation

Provisionally, the Commission recommends that in addition to conscious object or purpose, intention should be defined to embrace foresight of a virtual certainty, leaving all forms of foresight falling short of a virtual certainty to fall within the ambit of recklessness. Defining intention to embrace foresight of a virtual certainty extends the term only very slightly beyond its primary meaning of purpose or object <sup>301</sup> It is designed to capture a situation where, although it is not

Smith and Hogan, Criminal Law (9thed, Butterworths, 1999), 60

Law Reform Commission of Canada, Recodifying Criminal Law (Report 31, 1987), 23

This point was made by the Law Commission of England and Wales in its Report Legislating the Criminal Code Offences against the Person and General Principles (Law Com No 218, 1993), para 7 9, where the Commission said that such a formulation "covers the case of a person who knows that the achievement of his purpose will necessarily cause the further result in question in the absence of some wholly improbable supervening event"

the actor's purpose or object to cause death, he nevertheless foresees it as a near inevitable by-product or 'virtually certain' consequence of his actions. Thus, for example, a defendant who plants a bomb on an aircraft, in order to claim insurance on the cargo, may not have a purpose to kill, but will foresee death as a virtually certain consequence of his actions if he succeeds in his primary purpose of blowing up the aircraft, barring the intervention of some wholly improbable supervening event. Although he does not desire the death of the passengers, he nevertheless foresees this as a virtually certain consequence of what he intends. It would seem artificial to say that such a killing was not intentional. In discussing this example the authors of *Criminal Law*<sup>302</sup> write: "It is only a philosopher who would consider that there would be any divergence between the accused's knowledge of the ultimate death of the passengers and crew of that plane, and what he meant to do." <sup>303</sup>

5.16 The objection may be made that foresight of a virtual certainty would in any event fall within the *Model Penal Code's* 'extreme indifference' head of murder. However, it would seem more realistic for the purpose of classification to label this state of mind as intention rather than recklessness. The accused has chosen to engage in conduct which he knows will almost certainly cause death, barring some wholly improbable intervention. In the *Model Penal Code* itself foresight of a practical certainty is regarded as a separate mental state distinct from recklessness. Such a definition of intention would also envisage a defendant who, although not desiring to cause serious injury, nevertheless foresees it as a virtually certain consequence of his actions. In summary, therefore, it is suggested that foresight of a virtual certainty is sufficiently close to purposeful killing to warrant being labelled intentional.

5.17 Accordingly, it is recommended that in addition to conscious object or purpose, intention be defined so as to embrace foresight of a virtual certainty.

# B. Serious Injury

5.18 The Law Reform Commission, in its Report on non-fatal offences against the person, recommended against defining 'serious harm': "We are not disposed to define 'harm' as the law operates satisfactorily without a definition at the moment". However, it is notable that the legislature, in enacting the *Non-Fatal Offences against the Person Act, 1997* (which substantially implemented that Law Reform Commission Report), expressly included a definition of 'serious harm'. 306

"This result reflects the [judgment] that purpose and knowledge should be assimilated for grading purposes, as was generally the case with prevailing law...": American Law Institute, Model Penal Code and Commentaries (2<sup>nd</sup> ed., 1980), Part II, 20.

Charleton, McDernott, Bolger, Criminal Law (Butterworths, 1999).

<sup>303</sup> *Ibid.* at para. 7.93.

Law Reform Commission, Report on Non-Fatal Offences against the Person (LRC 45-1994), para. 9.65.

Non-Fatal Offences against the Person Act, 1997, Section 1 (1) states: "'serious harm' means injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ".

- 5.19 There are two main arguments in favour of defining 'serious injury':
- 1. Providing a definition of serious injury would minimise the constructive nature of the liability by excluding injuries, such as a broken arm, which, although serious, do not normally result in death;
- The meaning of the term 'serious injury' may be unclear. Defining the term
  would provide juries with some guidance as to the proper meaning and scope of
  the term, and lessen the risk of inconsistent or conflicting jury verdicts in cases
  of similar facts.
- 5.20 There are three main arguments against defining the term 'serious injury':
- 1. Defining the term 'serious injury' might result in lengthy and complex definitions which may only serve to confuse a jury;
- 2. Whether or not a particular injury is serious may often depend on the particular context and circumstances, including, for instance, the availability or otherwise of timely medical assistance. It is essentially a matter of judgment and degree whether a particular injury is serious, and the jury is well placed to make this evaluation, bringing to bear their practical knowledge, experience and common sense;
- 3. It is very difficult to find a satisfactory definition of serious injury. The English Criminal Law Revision Committee has written (in the context of non-fatal offences):
  - "...we spent some time considering possible definitions but finally concluded that no satisfactory definition could be drawn up: some broken noses might amount to serious injury, others not. Many cases involve a multiplicity of injuries none of which alone might constitute serious injury but which together might amount to it. In the absence of definition, the court's task would be to assess whether the totality amounted to serious injury. We consider the most satisfactory solution to be to leave it to a court to decide in each case whether the harm done amounted to serious injury."

### Possible Options for Definition

5.21 Broadly speaking 'serious injury' may be defined in three ways. Firstly, it may be defined by reference to impact or effect of the particular injury upon the body. An example of this type of definition would be "injury which causes serious permanent disfigurement or protracted loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ." 308

Criminal Law Revision Committee, Offences against the Person (Cmnd 7844, 14th Report, 1980), para. 154.

This is part of the definition of 'serious injury' set out by the Oirechtas in the Non-Fatal Offences against the Person Act, 1997, Section 1(1).

Secondly, it may be defined by reference to the risk of death it creates. An example of this type of definition would be to define serious injury as injury which creates a "more than merely trivial risk of death" resulting or "a substantial" <sup>309</sup> risk of death resulting. Thirdly, a hybrid test may be adopted which defines serious injury by reference to the risk of death created or by the effect of the particular injury on the body. An example of this type of test is that contained in the Non-Fatal Offences against the Person Act, 1997, which defines 'serious harm' as "injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ."

# (a) Defining Serious Injury by Reference to the Impact or Effect it has upon the Body of the Victim

5.22 As stated above, this type of definition focuses on the impact of the particular injury on the body. Glanville Williams has proposed the following definition of serious injury:

"An injury is serious if it-

- (a) causes serious distress, and also
- (b) involves loss of a bodily member or organ, or permanent bodily injury or permanent functional impairment, or serious and permanent disfigurement, or severe and prolonged pain, or serious impairment of mental health, or prolonged unconsciousness; and an effect is permanent whether or not it is remediable by surgery". 310
- 5.23 This definition has been criticised as being unduly lengthy and complex. This is indicative of the problem of definition in this context.
- 5.24 The English Law Commission, in its Report on non-fatal offences against the person, made no attempt to define serious injury because of this difficulty, preferring only to define 'injury' as:
  - "(a) physical injury, including pain, unconsciousness, or any other impairment of a person's physical condition; or
    - (b) impairment of a person's mental health". 311

Both of these definitions include the infliction of a disease or illness, provided it is of a sufficiently serious nature.

Charleton, Offences Against the Person (Round Hall Press, 1992), para. 2.35. See also Charleton, McDernott, Bolger, Criminal Law (Butterworths, 1999), 539.

Glanville Williams, "Force, Injury and Serious Injury" (1990) Vol 140 New LJ 1227, 1229.

The Law Commission of England and Wales, Legislating the Criminal Code: Offences against the Person and General Principles (Law Com. No. 218, 1993), para. 15.2.

5.25 Both definitions also allow the impairment of mental health to be deemed a serious injury. However, whether or not the intentional causing of mental damage should be sufficient to provide the *mens rea* for murder raises difficult policy questions. A defendant who deliberately inflicts serious physical injury must, in view of the inherent vulnerability of the human body, know that he is putting human life at risk, and so may properly be punished as a murderer. In contrast, the likelihood of death resulting from the intentional infliction of mental injury, however gravely disturbing for the victim, may be less amenable to proof of foreseeability, either from an objective or subjective point of view, than proof of physical injury. In addition, there may be difficulties as to causation in respect of proving that the mental injury in question caused the death of the victim.

## (b) Defining Serious Injury by Reference to the Risk of Death it Creates

- 5.26 A second option would be to define 'serious injury' by reference to the risk of death it creates. Serious injury could be defined as injury which creates "more than a merely trivial risk that the victim may die of it." Such a definition would exclude injuries such as the breaking of an arm, which, although serious, do not normally create a risk of death.
- 5.27 An alternative option would be that contained in the section 300(3) of the Indian *Penal Code*, which states that culpable homicide is murder if the act causing death is done:

"with the intention of causing bodily injury to any person and the bodily injury intended to be inflicted is sufficient in the ordinary course of nature to cause death." 313

- 5.28 Although this test is objective in nature, it differs from the definitions set out above by requiring a level of injury which is sufficient in the ordinary course of nature to cause death. The words "ordinary course of nature" have been held to mean "in the usual course if left alone".<sup>314</sup>
- 5.29 A weakness of this approach is that it may exclude serious injury creating a substantial risk of death, but which may not be sufficient in the ordinary course of nature to cause death. Under Indian law, for the injury to be sufficient for the purposes of section 300(3) there must have been a high probability of death resulting from it. This would appear to exclude injuries creating a substantial possibility, or mere probability, of death.
- 5.30 The difficulty here would seem to be in defining a level of risk which embraces more serious injuries, while at the same time excluding less serious ones. It is noteworthy that the *Non-Fatal Offences against the Person Act, 1997* defines

Charleton, McDernott, Bolger, Criminal Law (Butterworths, 1999), para. 7.104.

For a discussion of this provision see Yeo, *Fault in Homicide* (The Federation press, 1997), 115-120.

<sup>314</sup> Ghana Padhan [1979] 47 Cut LT 575.

<sup>315</sup> Ghanshyam 1981 All Cr R 394.

'serious harm' as including "injury which creates a substantial risk of death". In the interest of consistency, therefore, it might be worthwhile to define serious injury as injury which creates a substantial risk of death resulting.

- 5.31 A further option would be to adopt a definition of serious injury based on the provisions of the Codes of Queensland and Western Australia, which define the related phrase 'grievous bodily harm' as "any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause, or be likely to cause permanent injury to health". This test appears to be objective in nature, in that it is not necessary that the defendant has a subjective awareness that the injury he is causing endangers life. Rather "it is sufficient ... for a conviction for murder to be sustained, that the offender intended to do an act or to cause physical or mental injury which was of such a nature as actually to endanger, or objectively viewed be likely to endanger life, or to cause, or objectively be likely to cause permanent injury to health." <sup>317</sup>
- 5.32 If it was felt that this definition was too broad it could be confined to 'bodily injury of such a nature as to endanger or be likely to endanger life', omitting the second clause of the original formula. An advantage of this approach is that it would minimise the constructive nature of the provision, by ensuring that it only applied to injuries of a particularly serious character. A further advantage is that it would not be necessary to show that the defendant consciously appreciated at the specific time of the assault that the injuries he was inflicting created a substantial risk that death would result, proof of which may be problematic where the defendant claims that he acted 'in the heat of the moment' without thinking, or where he was intoxicated.

## (c) A Hybrid Test

5.33 A third possible option would be to adopt a hybrid test, defining serious injury in terms of the risk of death it creates or by reference to the physical harm caused to the body. This was the approach taken by the legislature in this country with the definition of the concept of 'serious harm' under the *Non-Fatal Offences against the Person Act*, 1997. According to the Act 'serious harm' means:

"injury which creates a substantial risk of death or which causes serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ"

[emphasis added]

5.34 An advantage of this definition is that it provides the jury with concrete assistance as to what constitutes serious harm. It also adds a residual category of injury creating a substantial risk of death, to embrace injuries of a serious nature which may not neatly fit within the rest of the definition. A possible improvement to the definition might be to substitute the term 'injury' for 'harm'. Glanville

Western Australian Criminal Code, Section 1.

<sup>317</sup> Kenny Charlie v The Queen [1999] HCA 23 (High Court of Australia), per Callinan J (McHugh J concurring).

Williams has argued that 'injury' is a more natural colloquial expression than 'harm' as a means of expressing the requisite degree of damage to body and mind.<sup>318</sup> The term 'serious injury' would seem more apt to describe damage of a particular gravity than the phrase 'harm', which probably has wider and milder connotations.

5.35 The intentional infliction of an illness or disease would seem to fall within this definition, provided it creates a substantial risk of death, or causes substantial loss or impairment of bodily functions. It may not, however, cover the infliction of mental injury.

# Possible Difficulties with Defining the Term 'Serious Injury'

5.36 Under the current law a defendant must intend to cause serious injury. The 'intention' must also encompass the seriousness of the particular injury. Therefore, in whatever way 'serious injury' is defined intention must also embrace the elements of that definition. Thus, the more detail that is inserted into the definition, the further a defendant's intention has to extend. Accordingly, if serious injury is defined as injury which creates a substantial risk of death resulting, it would appear to follow that the defendant must have been aware (at the time of the assault) that the injuries he was causing 'created a substantial risk of death resulting.' Similarly, if serious injury is defined according to the definition used in the 1997 Act (see para. 5.33 above), the intention must embody the relevant elements of that definition. In other words it would have to be proved that the defendant intended to cause injury which created a substantial risk of death, or that he intended to cause serious disfigurement or substantial loss or impairment of the mobility of the body as a whole or of the function of any particular bodily member or organ.

In practice, this point may not be of great significance, as a defendant who deliberately inflicts great violence on another person will not usually be able to say with any great degree of plausibility that he did not realise that the injury which he intentionally inflicted would cause, for example, a serious disfigurement of the victim. However, the requirement that the defendant's intention embodies the specific consequences of the serious injury (such as a serious disfigurement or impairment of mobility or function of a bodily member or organ) may cause unjust disparities between defendants in different situations. Thus, a defendant who acts in a rage 'without thinking', or who fails to advert to the consequences out of sheer indifference to them, or who claims he was so preoccupied in what he was doing that he gave no thought to a particular consequence, might escape liability on this approach. From the point of view of social policy it seems undesirable that defendants who fail to control their bad temper, or act with sheer indifference as to whether their victim lives or dies, should escape liability for murder in this way. Although the possibility of such a defence succeeding in practice may be remote it would seem preferable to exclude this as a possibility.

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Glanville Williams, "Force, Injury and Serious Injury" (1990) Vol 140 New LJ 1227. This suggestion was adopted by the Law Commission of England and Wales, Legislating the Criminal Code: Offences against the Person and General Principles (Law Com. No. 218, 1993), para. 15.4.

5.38 By contrast, if the term 'serious injury' is left undefined it merely has to be shown that the defendant intended to cause some 'serious injury'; it is not necessary to show that the defendant intended or foresaw a particular or specific consequence, such as a loss of mobility or function of a bodily organ.

#### Recommendation

- 5.39 The Commission considers that there are two main options. One option would be to leave the term 'serious injury' undefined. In favour of this approach it may be argued that provision of an overly elaborate definition would only serve to confuse the jury. It is difficult to draft a definition to cater for every eventuality. Whether a particular injury is serious or not is essentially a matter of judgment that should be left to the jury with appropriate guidance, if necessary, from the trial judge. If the victim ultimately dies from the injuries inflicted this would appear to amount to strong *prima facie* evidence that those injuries were serious. Introduction of a detailed definition of 'serious injury' could cause considerable and unnecessary complication of the law.
- 5.40 A possible weakness of this approach, however, is that it could include injuries such as a broken arm or nose which, although perhaps serious, are not usually life threatening.<sup>319</sup> For example, in the English decision of *R v Saunders*,<sup>320</sup> a broken nose was held to amount to 'really serious bodily harm', albeit in the context of non-fatal offences.
- 5.41 The second option would be to define the term serious injury. The definition favoured by the Commission is that contained in the Codes of Queensland and Western Australia which defines the related term 'grievous bodily harm' as "any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause, or be likely to cause permanent injury to health". This definition would ensure that the rule only extends to injuries of a particularly serious nature and would exclude injuries of a less serious nature such as a simple broken arm. The objective element of the definition would ensure that it would not be necessary for the prosecution to show that the defendant realised at the point and time of assault that the injuries he was inflicting endangered life, proof of which may be problematic in the event that the defendant claims that he acted in rage or under intoxication.

For further discussion, see Hogan, "Non-Fatal Offences" (1980) Crim LR 542, 545, and Glanville Williams, "Force, Injury and Serious Injury" (1990) Vol 140 New LJ 1227, 1228-1279

<sup>320</sup> R v Saunders" [1985] Crim LR 230. A direction by the trial judge to the jury that grievous bodily harm meant 'serious injury' was held not to amount to a misdirection.

Western Australian Criminal Code, Section 1. The corresponding provision of the Queensland Criminal Code, 1899 states that grievous bodily harm is:

<sup>&</sup>quot;a) the loss of a distinct part of an organ of the body; or

b) serious disfigurement; or

c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger, or cause or be likely to cause permanent injury to health; whether or not treatment is or could have been available."

5.42 In considering these two options the Commission is particularly anxious that the scope of the current rule should not be unduly restricted. Submissions would be particularly welcome from practitioners as to which of these two options is to be preferred.

# C. Recklessness

5.43 The Commission has recommended expanding the mental element for murder to embrace certain types of reckless killings. Possible ways of drafting such a murder provision, including a definition of recklessness, are discussed below.<sup>322</sup>

# D. Recommended Draft Statutory Provision

5.44 In light of the above discussions, the Commission suggests the following draft formulation as a possible statutory provision to define the mental element of the offence of murder.

Where a person kills another unlawfully it shall be murder if:

- (1) The accused person intended to kill or cause serious injury to some other person, whether that other person is the person actually killed or not; or
- (2) The killing is committed recklessly under circumstances manifesting an extreme indifference to the value of human life.
- 5.45 In this section a person acts 'recklessly' with respect to a killing when he consciously disregards a substantial and unjustifiable risk that death will occur. The risk must be of such a nature and degree that, considering 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.
- 5.46 A result is intended if:
  - (i) It is the defendant's conscious object or purpose to cause it; or
  - (ii) He is aware that it is virtually certain that his conduct will cause it, or would be virtually certain to cause it if he were to succeed in his purpose of causing some other result.
- 5.47 The accused person shall be presumed to have intended the natural and probable consequences of his conduct, but this presumption may be rebutted.

see para. 5.44 – 5.54.

#### Comments on the Draft Statutory Provision

- 5.48 The above definition of recklessness is based on that used in the American Model Penal Code, which has been approved in Irish law by Henchy J. in People v Murray<sup>323</sup> in the context of a charge of capital murder. It was also the definition recommended by this Commission in our previous reports on Receiving Stolen Property<sup>324</sup> and Malicious Damage.<sup>325</sup> According to Charleton, McDermott and Bolger, it has also been used in directing juries in the Central Criminal Court.<sup>326</sup> They submit that this definition constitutes the definition of recklessness in Irish law.<sup>327</sup>
- 5.49 The Commission is mindful of the need to keep definitions clear and succinct. Concern is sometimes expressed by practitioners that juries may struggle to understand or apply overly elaborate definitions. The Commission would welcome submissions from practitioners in respect of the suggested definitions.
- 5.50 One possible improvement would be to simplify the definition of 'recklessly' by deleting the second sentence in the definition: "The risk must be of such a nature and degree that, considering 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". This sentence, contained in the Model Penal Code definition of 'recklessly', does not seem to have been intended to have any precise message in itself beyond conveying to a jury the seriousness of the departure from acceptable standards of conduct that is requisite for a finding of recklessness. In the codes of some States within the USA this second sentence is treated as serving to define 'substantial' and 'unjustifiable' rather than adding additional factors. In other State codes the second sentence is treated as adding a further requirement. A couple of States have omitted the second sentence entirely.
- 5.51 While shortening the definition might be perceived as making it simpler for judge and jury, it may risk casting the net of liability too wide. Moreover, it should be borne in mind that this definition is applied by juries in a number of American States without apparent difficulty.
- 5.52 Finally, the draft statutory provision remodels the language of section 4 of the *Criminal Justice Act*, 1964 by reformulating it in more positive terms. The Commission has been advised by a highly experienced criminal law practitioner that it is not uncommon for juries to have difficulty with the negative formulation of section 4 "shall not be murder unless" and to seek guidance on its meaning. In

<sup>&</sup>lt;sup>323</sup> People v Murray [1977] IR 360, 403.

The Law Reform Commission, Report on Receiving Stolen Property (LRC 23-1987).

The Law Reform Commission, *Report on Malicious Damage* (LRC 26-1988). Section 2(6) of the *Criminal Damage Act, 1991* provides that a person is reckless if "he has foreseen that the particular kind of damage that in fact was done might be done and yet has gone on to take the risk of it."

The People (DPP) v CM Central Criminal Court (Cyril Kelly J.), January 1999. The case in question (which concerned a charge of rape) is not reported, but it is outlined in Charleton, McDernott, Bolger, Criminal Law (Butterworths, 1999), 47. The discussion of the case by Charleton, McDermott and Bolger was drawn from the first named author's notes on the case.

Charleton, McDernott, Bolger, Criminal Law (Butterworths, 1999), 46.

an attempt to meet this difficulty, therefore, and in line with the Commission's preference for plain language in statutory drafting wherever reasonably possible, <sup>328</sup> we would favour redrafting section 4 in a more positive fashion, as follows: "...it shall be murder if...". Such an approach is consistent with that adopted by the legislature in enacting the *Non-Fatal Offences against the Person Act, 1997*, which similarly uses positive language in creating a number of new offences. <sup>329</sup>

## Alternative Draft Statutory Provision

5.53 If the draft clause outlined above is deemed to be unsatisfactory or too verbose, it may be possible to simplify it as follows:

Where a person kills another unlawfully it shall be murder if:

- (1) the accused person intended to kill or cause serious injury to some person whether the person actually killed or not; or
- (2) The killing is committed recklessly under circumstances manifesting an extreme indifference to the value of human life.
- 5.54 In this section a person acts 'recklessly' with respect to a killing when he consciously disregards a substantial and unjustifiable risk that death will occur.

<sup>328</sup> See the Law Reform Commission, Statutory Drafting and Interpretation: Plain Language and the Law (LRC 61-2000).

See, for example, section 2: "A person shall be guilty of the offence of assault who..." (emphasis added). The offences created by sections 3, 4, 5 and 6 of the Act are also defined in positive terms.

#### **CHAPTER 6: SUMMARY OF PROVISIONAL RECOMMENDATIONS**

- 6.01 The Commission provisionally recommends that the fault element for murder be broadened to embrace reckless killing manifesting an extreme indifference to human life [para. 4.075].
- 6.02 The Commission provisionally recommends that an intention to cause serious injury should be retained as part of the fault element for murder [para. 4.101].
- 6.03 The Commission provisionally recommends that the fault element for murder should not be expanded to embrace recklessness as to serious injury [para. 4.109].
- 6.04 In relation to the term 'serious injury' the Commission considers that there are two main options. One option would be to leave the term undefined in order to preserve the scope of the current rule. If that is felt to be unsatisfactory, a second option would be to define serious injury as "any bodily injury of such a nature as to endanger or be likely to endanger life, or to cause or be likely to cause permanent injury to health". Submissions are particularly welcome from practitioners and other interested persons as to which approach should be preferred [paras. 5.39 5.42].
- 6.05 The Commission provisionally recommends that statutory provision should be made as follows:

Where a person kills another unlawfully it shall be murder if:

- (1) The accused person intended to kill or cause serious injury to some person whether the person actually killed or not; or
- (2) The killing is committed recklessly under circumstances manifesting an extreme indifference to the value of human life.
- 6.06 "Recklessly": A person acts recklessly with respect to a killing when he consciously disregards a substantial and unjustifiable risk that death will occur. The risk must be of such a nature and degree that, considering 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.
- 6.07 A result is intended if:
  - (i) It is the accused's conscious object or purpose to cause it; or

- (ii) He is aware that it is virtually certain that his conduct will cause it, or would be virtually certain to cause it if he were to succeed in his purpose of causing some other result.
- 6.08 The accused person shall be presumed to have intended the natural and probable consequences of his conduct; but this presumption may be rebutted.



APPENDIX:

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