AN EVALUATION OF MANSLAUGHTER IN NIGERIA AND ENGLAND .

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2019

INTRODUCTION

Any person who causes the death of another, directly or indirectly and by any means whatever, is deemed to have killed that other person.[1] Murder and Manslaughter involve faults ranging from intention to negligence. To distinguish murder from manslaughter, it is the gravity of the assault or act that could lead to conviction of either murder or manslaughter.[2] Thus, the following exposition is provided with a view to establishing the terms with which to establish a scheme of offence definitions, which permits both a logical gradation of fault and a correlation between primary and secondary party liability.

The distinction between murder and manslaughter developed as a means of avoiding the death penalty for homicides where the offender was considered less morally culpable because of the absence of 'malice aforethought'.This paper seeks to examine manslaughter under three jurisdiction, that is Nigeria, England and Queensland.

DEFINITION

Manslaughter is an unintentional killing of a human being. Such a killing is not pre-meditated but accidental, in the sense that it was not intentional.[3]

STATUTORY PROVISION

In Nigeria, Section 317 of the Criminal Code [4]provides "A person who unlawfully kills another in such circumstances as not to constitute murder is guilty of manslaughter."

[1] Section 293 of Queensland Criminal Code 1899, on definition of killing.
[2] Alao v. State [2015] All FWLR (Pt.795) 345; Kabaka v. State [2011] All FWLR (Pt. 574) 194.
[3] Ejeka V. The State (2003) 7 NWLR (Pt.819) 408 @ 423
[4] Criminal Code Cap C Laws of the Federation of Nigeria 2004.

In Queensland, Section 303 of the Queensland Criminal Code provides for manslaughter which is similar to Section 317 of the Criminal Code.

CATEGORIES OF MANSLAUGHTER

Manslaughter could be categorized in Nigeria as Voluntary or Involuntary manslaughter.

In England it could be categorize as voluntary manslaughter, involuntary manslaughter and Unlawful manslaughter.

In Queensland, it could be Intentional manslaughter or Unintentional manslaughter.

CIRCUMSTANCES OF MANSLAUGHTER

The circumstances under which Manslaughter could occur in Nigeria are

i. Where it is voluntary manslaughter through the defense of provocation
ii. Where it is involuntary manslaughter through negligence, recklessness or accident.

Under the English law, it could be

i. Where voluntary manslaughter could occur as a result of loss of self-control, through diminished responsibility and killing in perseverance of suicide pact.
ii. Where involuntary manslaughter could occur through constructive or unlawful act manslaughter or by gross negligence manslaughter.

Under the Queensland law it could be;

i. Where it is intentional manslaughter through provocation.
ii. Where it is unintentional manslaughter through criminal negligence.

MANSLAUGHTER IN NIGERIA

Manslaughter which involves killing of another without the requisite knowledge that death will result. Section 317 of the Criminal Code provides "A person who unlawfully kills another in such circumstances as not to constitute murder is guilty of manslaughter." It could be classified into two; vis-à-vis voluntary and involuntary. For an accused to be found guilty of manslaughter under Section 317 of the Criminal Code if it is proved that he intentionally did an act which was unlawful and that, that act inadvertently caused death. It is the duty of the prosecution to adduce sufficient evidence in proof of the offence of manslaughter.[5]

In *Mareni vs The State*,[6] the court provided three ingredients that needed to be proved in an offence of manslaughter:

1. The death of a human being took place.
2. Such death was caused by the accused.
3. The accused intended such act to cause death or such bodily injury as is likely to cause death or it was caused by a rash or negligent act.

In Kabaka v. State,[7] the Court of Appeal stated that to sustain conviction for the offence of manslaughter, it must be established beyond reasonable doubt that it was the act of the accused that caused the death of the deceased. Whenever it is alleged that death has resulted from the act of a person, a causal link between the death and the act must be established and proved beyond reasonable doubt that it was the act of the accused that caused the death of the victim. In the instant case, the death of the deceased was caused by the injuries inflicted on him when he was beaten by the accused persons with planks and therefore the prosecution was able

[5] Chukwu v. State [2013] All FWLR (Pt. 666) 430; Amayo v. State [2002] FWLR (Pt. 91) 1571.
[6] (2010) 3 NWLR Pt 1181.
[7] [2011]All FWLR (Pt. 574) 194

to established causal link between the act of the accused persons and the death of the deceased, therefore, the trial court convicted the accused persons.

Voluntary Manslaughter

Voluntary Manslaughter is said to occur when a person intentionally kills in the heat of anger otherwise known as provocation. The offence is reduced from murder to manslaughter because of the defense of provocation. This is justified by the provision of Section 318 of Criminal Code which state that;

> When a person who unlawfully kills another in circumstances which, but for the provisions of the section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and there is time for his passion to cool, he is guilty of manslaughter only.

This proposition is supported by the decision of the Supreme Court in ***Ogbonna Nwaede v. The State*** where it was held that a successful plea of the defence of provocation in a murder charge reduces murder to manslaughter.

It is noteworthy that the section does not define provocation and the courts had import the common law of England into Nigeria.[8] Section 283 of Criminal Code defines provocation as;

> The term provocation used with reference to an offense of which as assault is an element, includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely when done to

[8] John v. Zaria N A [1959] N.R.N.L.R 43, where it was held that Section 283 define provocation for the purpose of Section 318.

> an ordinary person, or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial, or fraternal, relation or in the relation of master or servant to deprive him of the power of self-control and to induce him to assault the person by whom the act or insult is done or offered.[9]

Section 222(1) of the Penal Code provides as follows:- *"Culpable homicide is not punishable with death if the offender whilst deprived of the power of self-control by grave and sudden provocation causes the death of the person who gave the provocation or causes the death of any other person by mistake or accident."*

The Court of Appeal in Da'u v. State,[10] considered provision of Section 272 (1) of Criminal Procedure Code which provide thus;

> Where a person is convicted of an offence punishable with death and it appears to the court by which he is convicted that he was under the age of seventeen when he committed the offence, the court shall order that he be detained during the Governor's pleasure, and if the court so orders, he shall be detained in accordance with the provision of Section 303, notwithstanding anything to the contrary in any written law.

The trial court sentence the accused to 50 years imprisonment. The Court of Appeal considered the provision of Section 222 of the Penal Code and stated that it follows that the

[9] Okonkwo and Naish, Criminal Law in Nigeria, 2nd Edition, Spectrum Law Series, 2012), 240.
[10] [2016] 7 NWLR (Pt. 1510) 86

appellant in the circumstances of this case ought to have benefited from such defense which could have mitigated the offence from culpable homicide punishable with death to that not punishable with death under section 222 of the Penal Code.[11]

A lawful act is not provocation to any person for an assault. An act which a person does in consequence of excitement given by another person in order to induce him to do the act, and thereby to furnish an excuse for committing an assault, is not provocation to that other person for an assault.[12] In Obaji v. State,[13] the Supreme Court considered the question whether the meaning of provocation in section 318 is to be found in section 283 or in the common law and held that section 283 and 318 must be read together.

In Afosi v. State,[14] where it was held that for an accused person to avail himself of the defence of provocation, he has to establish by evidence the following conditions to wit:-

1) that the act of provocation is grave and sudden

2) that the accused lost self-control, actual and reasonable;

3) the degree of retaliation by the accused person must be proportionate to the provocation offered.

To avail himself of the defence in a charge of murder under section 318 of the Criminal Code, the accused must have done the act for which he is charged (i) in the heat of passion, (ii) this must have been caused by sudden provocation and (iii) the act must have been committed before there is time for his passion to cool. There can be no doubt that the attitude of the

[11] Kaza v. State (2008) 7 NWLR (Pt. 1085) 125
[12] Ashworth, Self Induced Provocation and the Homicide Act (1975), Crim. L.R 483.
[13] [1965] 1 All. N.L.R. 269
[14] (2013) 13 NWLR (PT 1371) 329.

Nigerian courts has been to interpret Sections 283 and 318 of the Criminal Code as impliedly including the mode of resentment or, in other words, that the retaliation must be proportionate to the provocation offered.[15]

In the case of Okoh v. State,[16] where the accused murdered his wife and pleaded not guilty to the charge of murder. During trial the accused gave a confessional statement to the Police admitting killing his wife and stating how it happen. The trial court convicted and sentences the accused to death and been dissatisfied appealed to the Court of Appeal which upheld the decision of the trial court and also still dissatisfied appealed to the Supreme Court which also affirmed the decision of the trial court and Court of Appeal. The defense of provocation raised by the accused could not avail as the Supreme Court stated that provocation cannot just be raised and acknowledged without presenting the fact that the act for which the accused is charged occurred during the heat of passion caused by sudden provocation and before the cooling of passion.

Element of Provocation

For one to succeed in manslaughter, there are element needed to be prove.

1. The provocation must be such as to cause a reasonable person to lose his self-control. The effect of the provocation must be that of a reasonable man and not the effect it had on the accused person.[17] A reasonable man is said to mean a reasonable man in the accused

[15] Mati Musa v. The State – (2014) LPELR-24026 (CA)
[16] [2016]10 NWLR (Pt.1521) 456- 457.
[17] R v. Nwanjoku (1937) 3 WACA 208, R v. Adekanmi (1944) 17 NLR 99

person's station of life and standard of civilization. In R v. Adekanmi,[18] Francis J held that in considering provocation-

The effect it would be expected to have on a reasonable man, must be taken to mean 'the effect it would be expected to have on a reasonable man of accused's standing in life,' for it would I think be improper to examine the question in the light of what would be sufficient provocation in the case of an educated and civilized person. The accused be it noted is an illiterate and primitive peasant of this country and it must be beyond doubt that the passions of such a type are far more readily aroused than those of a civilized and enlightened class.[19]

2. The act which causes death must be done in the heat of passion caused by sudden provocation and before there is time for passion to cool. If between the provocation and the killing enough time has elapsed for passion to cool a plea of provocation will fail.[20] In R v. Green,[21] the prisoner's wife having left him went to stay with her mother where she began to accept the advances of Y. the prisoner tried hard to win back his wife but failed. At about 9pm one evening, he visited his mother-in-law and found his wife and Y having sexual intercourse. He returned to his own house to brood over his misfortune. At about 1am he took a matchet and returned to his mother-in-law's house to kill Y if he was still there. He found his mother-in-law snoring and heard his wife and Y talking in a dark room. He struck twice on the bed and killed his wife. The mother-in-law was also killed when she ran into the room. On a charge of murder the prisoner pleaded provocation, but

[18] (1944) 17 NLR 99
[19] R v. Igiri (1948) 12 WACA 377, R v. Okoro (1942) 16 NLR 63
[20] Okonkwo and Naish, 244
[21] (1955) 15 WACA 73, R v. Hayward (1833) 6 C.&P 157, plea of provocation not available where after provocation if any the accused went to his home about a mile away, brought a matchet and then killed the deceased.

this was rejected because between the provocation and the killing enough time had elapsed for his passion to cool.

3. Provocation by one person is no excuse for killing another person who does not in fact offer any provocation to the accused.
4. The mode of resentment must bear a reasonable proportion to the provocation offered,[22] and in considering this question the courts take into account the nature of the instrument with which the homicide was effected and the nature of the act resulting from the provocation.[23]

The effect of a successful plea of provocation is a reduction of charge from murder to manslaughter.[24] In the instant case the appellant was being attacked and beaten by several people at the same time. The evidence is to the effect that he and the deceased were fighting and when he seemed to have the upper hand, the family members of the deceased joined in the fray and were all pitched against him. During the fight, PW6 brought out a knife and injured the appellant with it. The appellant was able to get the knife out of his hand and in an attempt to retaliate, stabbed the deceased instead. Given the circumstances of this case, I am of the view that the stabbing of the deceased occurred in the heat of passion and before his temper had time to cool.[25]

This holding reiterates the "behaviour of the average man in the community to which the accused belongs" rule in which the court in determining whether the defense will succeed applies the test of the effect the alleged provocation would have had on a reasonable man. The

[22] R v. Nwanjoku (1937) 3 WACA 208, R v. Brown [1972] 2 QB 229 at 232-234 for disapproval in directing a jury of using the words "the mode of resentment must bear a reasonable relationship to the provocation received" unless it is made clear to them that it is not a rule of law which they are bound to follow. This disapproval is based on the more precise requirement of Section 3 of the Homicide Act 1957, whether the provocation was enough to make a reasonable man do as the accused did. In considering this the jury may relevantly compare the provocation with the retaliation.
[23] R v. Akpakpan (1956) 1 FSC 1.
[24] Uluebeka v. The State (2000) 7 NWLR (665) 404;
[25] Adebiyi Famakinwa v. The State (2012) LPELR-9748(CA)

provocation must be of such nature as to incite a reasonable man of the accused's standing in life and education to lose his self-control.

Involuntary Manslaughter

Involuntary manslaughter means: an unlawful killing in which death is unintentionally caused. Unlawful killing of another without any intention to kill or do grievous bodily harm, but that is committed with criminal negligence or during the commission of a crime not within the felony – murder range. Involuntary Manslaughter arises in every other cases of killing where intention is missing. It covers all cases of killing outside Section 316 of the Criminal Code.

Involuntary manslaughter could occurred in cases of gross negligence or as a result of carrying out an unlawful act wish involves risk of harm to another

NEGLIGENCE: This also includes medical negligence. In order that negligence will result in manslaughter, it must be such criminal negligence as is required by English law.[26] A person who drives a vehicle in a reckless and dangerous manner so as to endanger the lives of other road users will be liable for manslaughter.[27] In Charles Egbirika v. The State,[28] a charge of manslaughter was upheld where the accused killed the deceased where there is no justification for the killing of the deceased where evidence has shown that at the time of the killing he was fleeing from the scene where the youth including the deceased had thrown stones.

Recklessness means gross negligence or not mere inadvertence. Recklessness is the degree of fault required in killing by gross negligence. Lord Hewart CJ in *R. v. Bateman* (1925) held that, to secure a conviction for killing by gross negligence, it must be proved that:

1. Accused owed the deceased a duty of care;

2. Accused breached that duty of care;

[26] Wigwe, C. C. Op. cit. Pg 246.
[27] Ayinla v. AG Western Nigeria (1 965) NMLR 91.
[28] (2009) WRN SC 268

3. The breach had caused the killing;

4. The Accused negligence was gross in that it went beyond a mere matter of compensation between subjects.

Lord Atkin said:

> "of all the epithets that can be applied "reckless" most nearly covers the case ….but it is probably not all embracing for "reckless" suggests an indifference to risk, whereas the accused may have appreciated the risk, and intended to avoid the risk, and yet shown in the means adopted to avoid the risk, such a degree of negligence
> as would justify a conviction."[29]

An event is said to be accidental when the act by which it is caused is not done with the intention of causing it and when its occurrence as a consequence of such act is not so probable that a person of ordinary prudence ought, in the circumstances in which it is done, to take reasonable precautions against it.[30] One is liable for reckless manslaughter if one by his/her conduct creates obvious and serious risks of physical harm, and either gives no though to it or is aware of it and determines to take it. However Section 343[31] deals with special cases where reckless and negligent act may occur.

MANSLAUGHTER IN ENGLAND

The position under English law is that all deaths which were not murder were classified as "manslaughter". However, the law now requires that the death fit a particular type of manslaughter. There are now three main forms of manslaughter in English law: voluntary manslaughter, cases which would otherwise amount to murder but for some legally recognized

[29] Andrew v. DPP (1937)
[30] Maiyaki v. State at page 204
[31] Criminal Code

mitigating factor; and involuntary manslaughter which includes cases of gross negligence manslaughter and unlawful act manslaughter.

Voluntary Manslaughter

Under English Law, there are three types of voluntary manslaughter: that resulting from loss of self-control; that resulting from statutorily defined diminished responsibility; and killing in perseverance of a suicide pact.[32]

The definition of provocation under the common law was modified in England under the statutory law. Thus, section 3 of the Homicides Act of l957'[33] provides that:

> Where in a charge of murder there is evidence on which the jury can find that the person charge was provoked (whether by things done or by things said, or by both) to loss his self-control, the question whether the provocation was enough make a reasonable man do as he did, shall be left to be determined by the jury.

i. Loss of control is defined in sections 54 and 55 of the Coroners and Justice Act.[34] Section 56 abolishes the common law defence of provocation, which also dealt only with murder. There is no mandatory life sentence for voluntary manslaughter. The defence operates whether the defendant is a principal or an accomplice. Broadly speaking, the defendant must have actually lost self-control;[35] the trigger for this must be a qualifying trigger; and it must be that a "normal" person might also have lost control in the circumstances. The loss of control need not be sudden, but cannot be in

[32] Simester A. P.; Sullivan, G. R.; Spencer, J. R.; Virgo, G. (201 0). Simester and Sullivan's Criminal Law: Theory and Doctrine (4 ed.). Oxford: Hart Publishing. 380.
[33] The Act is inapplicable in Nigeria as a post 1900 Statute
[34] Criminal Justice Act 2009
[35] R v. Clinton (201 2) EWCA Crim 2.

a "considered desired for revenge".[36] The loss of control is a subjective test which asks whether this defendant actually lost control, and if so, whether that loss of control led to their killing. The qualifying trigger may take one of two forms, or be a combination of both: that the killing was attributable to the defendant's fear of serious violence from the victim against the defendant or another identified person; or where the defendant's loss of self-control was attributable to a thing or things done or said (or both) which constituted circumstances of an extremely grave character, and caused the defendant to have a justifiable sense of being seriously wronged. The meaning of the terms "extremely grave character" and "justifiable sense of being seriously wronged" used in the second form is currently unclear. Section 51 (1(c)) requires that "a person of [the defendant]'s sex and age, with a normal degree of tolerance and self-restraint and in the circumstances of [the defendant], might have reacted in the same or in a similar way to [the defendant]."[37]

ii. Diminished responsibility occurs where the defendant has an "abnormality of mental functioning" attributable to a recognized medical condition. It must "substantially impair" the defendant's ability to either: under the nature of his or her conduct; form a rational judgment; or exercise self control. In R v. Dowd,[38] the Court held that voluntary acute intoxication can't by itself found a partial defence of diminished responsibility. It must provide an explanation for the defendant's actions. There is some sort of causal link required between the defendant's condition and his acts or omissions, a change on the previous law. A.P. Simester and G. R. Sullivan have argued that it is more clearly worded and more schematic provision than the

[36] Simester, note 14. 396 – 401 .
[37] Coroners and Justice Act 2009.
[38] (201 2) EWCA Crim 2.

earlier law, although they are worried if the wording of the section is taken to imprison those better suited to psychiatric help outside of prison.[39]

iii. A killing pursuant to a suicide pact, where the defendant had the "settled intention" of also committing suicide – although not necessarily by the same act – is a partial defence to murder. He or she must intend to fulfill that pact at the time of the killing and may renege on it later. Where the jury is not satisfied that the killing can be attributed to the defendant, a charge of encouraging or assisting suicide may be substituted to a charge of murder or voluntary manslaughter.[40]

Involuntary Manslaughter

Under English Law, Involuntary manslaughter involves the causing of the death of another person without intent to kill or intention to commit grievous bodily harm. Some cases are in form similar to murder cases; whilst, in others, had death not been caused, the defendant would only be liable for an insignificant crime.

Constructive or Unlawful act Manslaughter

Constructive or Unlawful act manslaughter results from the continuation of aspects of the felony murder rule, which was abolished in English law. Under that rule, the perpetrator of any (civil or criminal) illegality were held responsible for manslaughter for any death they caused. It had a huge scope.[41] Constructive manslaughter has been narrowed, but remains broad. It requires a criminal act that causes the death; that that act is inherently criminal; and that that act is dangerous. Civil liability is insufficient for constructive manslaughter to result. It is

[39] Simester, note 14. 720–721.
[40] Simester, note 14. 422–423.
[41] Simester, note 14. p. 402.

deemed "constructive" in the sense that a greater crime – manslaughter – is constructed from a lesser.[42]

The typical case will be of a non-fatal offence against the person that causes death. There must be a criminal act, rather than an omission, following R v. Lowe.[43] Although acts and omissions may be equally culpable, the extension to omissions – where there is no need to show intent – would have made illegal a huge class of persons. Cases such as Lowe, which there was parental neglect, can be dealt with by gross negligence manslaughter. Judges have often failed to identify a single unlawful act on which the crime of manslaughter is to be constructed, rather assuming the presence of one in particular circumstances. There is a required mental element (mens rea) for this crime, but it has in some cases not actually been formally established. This mens rea might be very low, such as recklessness. The requirement of an unlawful act also means that no lawful defence must be available to the defendant in respect of the lesser crime.[44]

The act must be inherently criminal – the case in point is that of R v. Andrews, where the defendant had killed whilst driving dangerously. It was only the fact that the driving was dangerous that made it a crime, not the driving itself. Accordingly, Andrews removed driving and regulatory offences from the scope of constructive manslaughter. There are separate rules for causing death by dangerous driving and some regulatory offences. Some commentators took Andrews as excluding strict liability and negligence cases out of constructive manslaughter, although contrary to the exact wording in the judgment there; however, a separate case also called R v. Andrews convicted the defendant of constructive manslaughter based on a strict

[42] Ashworth, Andrew Principles of Criminal Law. (Oxford: Clarendon Press, 2006). 287.
[43] (1 973) QB 702.
[44] Ashworth, note 19. 288.

liability offence and this alternative proposition cannot be supported. Gross negligence manslaughter exists as a complementary form, and, if a driver was sufficiently negligent, as well he might, he would be liable for it.[45]

The requirement that the action be dangerous was confirmed in R v. Newbury,[46] which applied the previous reasoning on R v. Church[47] "the unlawful act must be such that all sober and reasonable people would inevitably recognize it as an act which must subject the other person to at least the risk of some harm resulting therefrom albeit not serious harm". This is an (almost completely) objective test, it disregards whether the defendant in particular foresaw the danger, and requires only that it would create a risk of some harm. The ordinary person knows only what the defendant did, at least in relation to the susceptibility of the victim.[48] R v. Ball,[49] did, however, create a class of dangerous – that of the act itself – where the jury knew more than the defendant; in this case, whilst the defendant knew he was loading a blank cartridge, the jury was entitled to ascribe knowledge that it might be a live cartridge to the reasonable man. This has been criticized, and may not have been necessary. The act need not be directed at the victim: the killing of an innocent bystander by mistake could be manslaughter.

This act must be causally linked to the death. In the case of an offence against the person, it is usually obvious; however, rather more controversial cases have founded constructive manslaughter on drug possession crimes involving the subsequent injection of the drug into another.

Gross Negligence Manslaughter

[45] Simester, note 13. 405.
[46] [1 977] AC 500.
[47] [1 966] 1 QB 59.
[48] Ashworth, note 19. 290–291.
[49] [1 989] Crim LR 730.

Gross negligence manslaughter requires a much greater level of wrongdoing that the civil tort of negligence. It requires that the defendant owed a duty of care to the victim (it is for the judge to decide on which facts such a duty would be created).[50] Similar duties include those of a doctor of his patients, an electrician over a householder he has done work for, parents over their children, and, developed more recently, a police officer over persons he arrests.[51] Included, however, are those of a criminal enterprise, which would not attract tortious liability in the civil law. Where the defendant is liable through an omission and not an act, then a legal duty to act – rather than a duty of care – is needed. Andrew Ashworth has criticized the nature of the duty of care requirement as "decision-making at its retrospective worst".[52]

MANSLAUGHTER IN QUEENSLAND

Manslaughter under the English law, Section 303[53] provides for manslaughter. In order for the prosecution to prove the charge of manslaughter, it must establish that the defendant killed the deceased and that he did so unlawfully. Unlawful simply means not authorized, justified or excused by law. It is not an element of the offence that the defendant intended to kill the deceased or to do the deceased any particular harm. So it is sufficient if the prosecution proves that the accused unlawfully killed the deceased.

The actions of the defendant need not have been the only contributing cause of death. However, the defendant's acts must be a substantial or significant cause of death or have contributed substantially to the death.[54]

[50] Simester, note 13. 41 1.
[51] Ashworth, note 19. 292.
[52] Ashworth, note 19. 293.
[53] Queensland Criminal Code 1899.
[54] Royall v The Queen (1991) 172 CLR 378 at 411, R v Sherrington[2001] QCA 105 at [4].

Manslaughter is broadly defined in most Australian jurisdictions as an unlawful killing that does not constitute murder.[55]

Element of Manslaughter

The elements of manslaughter are that:

1. The accused caused the death of the victim;[56]
2. The accused did not intend to kill or intend to cause grievous bodily harm to any person (or that the circumstances were such that the offence does not constitute willful murder or murder); and
3. The killing is not authorized, justified or excused by law.[57]

There are two broad categories of manslaughter under the Code: intentional and unintentional. Intentional manslaughter involves unlawful killings where the mental element of willful murder or murder is present, but the offence is reduced to manslaughter on the basis of a partial defence. This category is comparable to voluntary manslaughter at common law. In Western Australia the only way in which an intentional killing can be reduced to manslaughter is on the basis of the partial defence of provocation.[58]

The second category—unintentional manslaughter—applies to unlawful killings where the accused did not form the required intention for willful murder or murder. This category is

[55] Crimes Act 1900 (ACT) s 15(1); Crimes Act 1900 (NSW) s 18(1)(b); Criminal Code 1899 (Qld) s 303; Criminal Code (Tas) s 159(1). In South Australia and Victoria manslaughter is defined by the common law. In the Northern Territory manslaughter is defined in s 160 of the Criminal Code 1983 (NT) as reckless or negligent conduct causing death.
[56] Section 270
[57] Section 268
[58] The Commission notes that an intentional killing may also constitute a lesser offence than willful murder or murder if the circumstances fall within the definition of the offence of infanticide

similar, but not identical, to the category of involuntary manslaughter at common law.[59] The Commission's recommendations this category will apply where the accused caused death but did not intend to kill and did not intend to cause an injury likely to endanger life.[60] Unintentional manslaughter can be divided into two further categories.[61] The first category applies where death is caused by a deliberate (voluntary) act. The second category, also known as manslaughter by criminal negligence, applies where death is caused by negligent conduct.

Manslaughter by deliberate act

In the majority of cases under this category the death-causing act will be a deliberate act of violence or a deliberate application of force; however, there may be cases where death is caused by a non-violent act[62] or even a lawful act. It has been recently stated that the requirement of unlawfulness for the offence of manslaughter is not extended beyond the requirement for an 'unlawful killing'.[63] In other words, it is not necessary to prove that the death-causing act was

[59] In relation to involuntary manslaughter at common law, see Lavender [2005] HCA 37, [2] (Gleeson CJ, McHugh, Gummow and Hayne JJ); NSWLRC, Provocation, Diminished Responsibility and Infanticide, Discussion Paper No. 31 (1993) [2.10]; Finlay MD, Review of the Law of Manslaughter in New South Wales (2003) 35. Involuntary manslaughter at common law is divided into two categories: unlawful and dangerous act manslaughter, and manslaughter by criminal negligence: see Wilson (1992) 174 CLR 313, 332 (Mason CJ, Toohey, Gaudron and McHugh JJ). Previously there was a third category of involuntary manslaughter at common law known as battery manslaughter. In Wilson, Mason CJ, Toohey, Gaudron and McHugh JJ stated that manslaughter by the 'intentional infliction of some harm' (battery manslaughter) is no longer an appropriate category of manslaughter at common law: at 332–23. It was noted that death caused by a serious assault (which would previously have fallen under the category of battery manslaughter) would,in any event, be covered by manslaughter by an unlawful and dangerous act. See also Clayton [2006] HCA 58 [91] (Kirby J).17. Felony-murder is the only exception to this general rule

[60] Felony murder is the only exception to this general rule

[61] Colvin E, Linden S & McKechnie J, Criminal Law in Queensland and Western Australia: Cases and materials (Sydney: LexisNexis Butterworths, 2005). 4.12.

[62] Stott & Van Embden [2001] QCA 313, it was alleged that the death-causing act was either the supply of a fatal dose of heroin to the deceased or the injection of a fatal dose of heroin into the deceased's arm. The two accused were convicted of manslaughter under the Queensland Code and therefore the jury were not satisfied beyond reasonable doubt that the accused had an intention to kill or cause grievous bodily harm. McPherson JA observed that if the accused had supplied the dose of heroin to the deceased, criminal responsibility could not be determined by reference to s 289 of the Queensland Code (criminal negligence) because the accused were no longer in charge or in control of a dangerous thing: at [22]. Therefore, the supply of heroin does not fit within the category of criminal negligence under the Code and it is also not an act of intentional violence

[63] Roberts [2007] WASCA 48, [118] (Roberts-Smith JA)

unlawful in addition to the requirement to prove that the killing was not authorised, justified or excused by law.[64]

In cases where death has been caused by a deliberate act the defence of accident is commonly raised.[65] Section 23 of the Code provides that, subject to the express provisions of the Code 'relating to negligent acts and omissions', a person is not criminally responsible 'for an event which occurs by accident'. An event (such as death) occurs by accident if it was not intended or foreseen by the accused and was not reasonably foreseeable by an ordinary person. Therefore, criminal responsibility for this category of manslaughter is ultimately determined objectively because the accused will be held criminally responsible if the prosecution can prove beyond reasonable doubt that death was reasonably foreseeable in all of the circumstances.

Manslaughter by criminal negligence

Under the Code and at common law an accused may be convicted of manslaughter on the basis of criminal negligence. Manslaughter by criminal negligence may arise as a result of either a negligent act or a negligent omission. Generally, there is no criminal liability for failing to act.[66] However, both the Code and the common law recognize 'a series of specific duties to act

[64] In Houghton [2004] WASCA 20 the Court of Criminal Appeal considered the meaning of the word 'unlawfully' in s 297 of the Code, which provides for the offence of unlawfully doing grievous bodily harm. The word 'unlawfully' is not defined for the purposes of s 297. In contrast, the word 'unlawfully 'is defined by s 268 of the Code in the context of an unlawful killing. The majority of the court distinguished the offences of unlawfully doing grievous bodily harm and unlawful killing on that basis. In other words, because 'unlawfully' is not defined for the purposes of s 297, it should be interpreted according to its ordinary meaning; that is, 'contrary to law and not excused'. It was observed that if the legislature had intended the word 'unlawfully' in s 297 to mean not authorised, justified or excused by law then the legislature would have said so, just as it did for the purposes of an unlawful killing: see [99] & [121](Steytler and Wheeler JJ). Murray J held that the word 'unlawfully' under s 297 has the same meaning as the term 'unlawful' in the context of an unlawful killing: at [49

[65] Colvin E, Linden S & McKechnie J, Criminal Law in Queensland and Western Australia: Cases and materials (Sydney: LexisNexis Butterworths, 2005). 4.12.

[66] Law Commission (England and Wales), Legislating the Criminal Code: Involuntary manslaughter, Report No. 237 (1996) [2.23]. In Coney (1882) 8 QBD534, 557–58 it was stated that it 'is no criminal offence to stand by, a mere passive spectator of a crime, even of murder': see Colvin E, Linden S & McKechnie J, Criminal Law in Queensland and Western Australia: Cases and materials (Sydney: LexisNexis Butterworths, 2005) [3.11]. It has

based on special relationships or understandings between the parties or upon responsibility for a dangerous situation'.[67]

Sections 262 to 267 of the Code provide for two different types of duties. The first category (found in Section 262–263) imposes a duty where there is a special relationship between two people so that one person owes a duty to provide the necessaries of life to the other. The second category (found in Sections 265, 266 & 267) provides for particular duties in relation to dangerous conduct. In order to provide a basis for criminal liability there must be a duty to act and a breach of that duty – the 'duty is to do whatever would be reasonable to prevent harm from occurring'.48 The effect of failure to perform the duty is that the accused is held to have caused any consequences resulting to the life or health of another person by reason of the failure to comply with the duty.

In Callaghan,[68] the High Court considered section 266 of the Code which defines the duty of persons in charge of dangerous objects. The court held that the degree of negligence required under section 266 is the same as the degree of negligence required for manslaughter at common law.[69] The common law test for manslaughter by criminal negligence, as pronounced in

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been observed that the law has resisted attaching criminal responsibility for failing to act: see Blokland J, 'Dangerous Acts: A critical appraisal of section 154 of the Northern Territory Criminal Code' (1995) 19 Criminal Law Journal 64, 79. See also MCCOC, Fatal Offences Against the Person, Discussion Paper (1998) 151.

[67] Note 42, 3.13.

[68] (1952) 87 CLR 115.

[69] In Bateman (1927) 19 Cr App R 8, 11–12 as cited in Macfarlane I, 'R v Pacino: Extending the limits of criminal negligence?'[1998] Murdoch University Electronic Law Journal 9 [3] it was stated that in order to establish criminal negligence at common law there must be negligence that 'went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment'. This test was approved in Young [1969] Qd R 417, 444 (Lucas J; Hoare J concurring). See also Scarth [1945] St R Qd 45–46(Macrossan SPJ), 56 (Stanley AJ); E v. Geniou [1964] 37 ALJR 508, 509 (McTiernan and Menzies JJ), 513 (Windeyer J); Griffiths (1994) 76 A Crim R 164,166 (Brennan, Dawson and Gaudron JJ). In Agnew [2003] WASCA 188, [52] Murray J confirmed that the degree of negligence required under s 266 of the Code is 'gross' negligence, that is, a 'degree of recklessness involving serious moral guilt, something for which the jury thinks it to be appropriate that the accused ought to be punished as for the commission of a criminal offence'. In Roberts [2007] WASCA 48, [104] Roberts-Smith J stated that Callaghan 'stands as

Nydam,[70] is that there must have been such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.[71]

Duties where there is a special relationship

Sections 262 and 263 of the Code set out the duty to provide the necessaries of life in particular circumstances. Section 262 provides that:

> It is the duty of every person having charge of another who is unable by reason of age, sickness, mental impairment, detention, or any other cause, to withdraw himself from such charge, and who is unable to provide himself with the necessaries of life, whether the charge is undertaken under a contract, or is imposed by law, or arises by reason of any act, whether lawful or unlawful, of the person who has such charge, to provide for that other person the necessaries of life; and he is held to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty.

Section 263 provides that:

> It is the duty of every person who, as head of a family, has the charge of a child under the age of 16 years, being a member of his household, to provide the necessaries of life for such child, and he

authority in Western Australia for the proposition that the common law standard of "criminal negligence" is applicable to negligence under the WACode'. See also [236] (McLure JA)

[70] [1977] VR 430.

[71] This test was approved of in Wilson (1992) 174 CLR 313, 332–33

> is held to have caused any consequences which result to the life or health of the child by reason of any omission to perform that duty whether the child is helpless or not.

'Necessaries of life' is not defined in the Code,[72] but it has been observed that it includes the provision of food, clothing, shelter and medical aid.[73] Failure to perform the duties in sections 262 and 263 will constitute an omission and an accused will be held criminally responsible for any consequences that are caused by the omission to the life or health of another person.[74]

CONCLUSION

Manslaughter is a form of homicide, however, distinct from murder. The major distinction between manslaughter and murder is the absence of 'mens rea' in manslaughter. Other jurisdictions considered have developed manslaughter to have various degrees. For manslaughter to be proven most elements in murder except 'intention' must be present and proven before a suspect can be found guilty. Though in the three jurisdictions discussed above there are two types of Manslaughter which could either be voluntary and involuntary or intentional and unintentional manslaughter.

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[72] Section 146 of the Criminal Code (Tas) defines necessaries of life as including in certain circumstances medical and surgical aid

[73] Colvin E, Linden S & McKechnie J, Criminal Law in Queensland and Western Australia: Cases and materials (Sydney: LexisNexis Butterworths, 2005)[3.13]. See also Macdonald & Macdonald [1904] St Qd R 151, 177 (Chubb J) as cited in Whitney K, Flynn M & Moyle P, The Criminal Codes: Commentary and materials (Sydney: Law Book Company, 5th ed., 2000) 89; Nielsen [2001] QCA 185 [33] (Ambrose J; Williams JA and Davies JA concurring); Young[1969] Qd R 417; O'Brien [2003] NSWCCA 121. In O'Brien the deceased was the 14-month-old child of the accused and the accused was convicted of manslaughter on the basis of criminal negligence for failing to provide her child with essential medical treatment.

[74] Under the present structure of homicide offences, if by failing to provide the necessaries of life an accused intended to kill the deceased the accused would be held criminally responsible for wilful murder. If the accused intended to cause grievous bodily harm then he or she would be convicted of murder. If the failure to provide necessaries of life was criminally negligent then the accused will be convicted of manslaughter.

It is worthy of note that in the three jurisdiction the punishment for Manslaughter is imprisonment for life