

W201 The Individual and the State

Study notes on murder and special defences (diminished responsibility loss of control and suicide pacts)

Murder

The definition

Murder is when a person unlawfully kills a human being with malice aforethought.

Actus reus

The unlawful killing of a human being.

Unlawful means without justification eg self defence or court order as in **Airedale NHS Trust v Bland** 1993 Lords (discontinuing medical treatment).

Death occurs following the irreversible death of the brain stem which controls basic bodily functions such as breathing **R v Malcherek and Steel** 1981 C A.

It can occur any length of time after the unlawful act but after three years the Attorney General's consent is required. His consent is also required if the accused has already been prosecuted for an offence connected with the death.

A foetus in the womb is not a human being. It becomes a human being in law after being born when it has drawn breath and has independent circulation. **R v Poulton** 1832. A foetus is protected by the separate offence of child destruction punishable with life imprisonment.

Causation is required eg factual causation - apply the 'but for' test - then apply the legal causation 'operating and substantial' test.

Mens Rea

Intent to kill or cause GBH.

Direct intent (consequence desired)

The judge will simply tell the jury to consider all the evidence.

Oblique or indirect intent (consequence not desired but virtually certain)

The judge will explain that the jury may find that the accused had the necessary intention if "death or serious bodily harm was a virtual certainty ... and the accused appreciated that such was the case" **R v Nedrick** 1986 C A and **R v Woollin** 1998 Lords.

Proposals for reform

Should the mens rea for murder be restricted to an intent to kill only?

Over the years the mens rea for murder has been narrowed.

Up to 1957 you could commit murder if you only had the mens rea of a felony. This was known as the felony/murder rule or the constructive malice rule. It operated a little like unlawful dangerous act manslaughter. If an accused caused the death of someone while carrying out a felony such as rape or burglary the intent to further the felony was sufficient for murder!

Subsequently we have seen the intent for murder narrowed further as the test for indirect intent has changed from the natural consequence rule to the 'virtual certainty' rule.

The proposals for reform focus on the intent to commit GBH. Is it logical to convict of murder if the accused never intended to kill?

Lord Edmund Davies in **R v Cunningham** 1982 Lords said

"I find it passing 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 calling for severe punishment would in most cases be unlikely to kill".

The Law Commission Draft Criminal Code meets this objection by proposing that the new mental element should be:

- a) intending to cause death
- or b) intending to cause serious injury **and** being aware he may cause death.

The accused who intended GBH but was not aware he may cause death would be liable to be convicted of manslaughter instead.

The real problem with a murder conviction is that the life sentence is mandatory (the judge has no choice) whereas with a conviction for manslaughter the judge can choose any sentence including probation suspended sentence or a discharge. Some senior judges favour a change in the law providing for a discretionary life sentence for murder. As long as there is a mandatory life sentence the argument for keeping the mens rea of murder as narrow as possible remains.

The Law Commission in 2006 produced detailed proposals for reform of the law of murder and manslaughter in Report No 304 which are set out in the study note on Manslaughter.

Special defences to murder

Diminished responsibility (sometimes called partial insanity)

Remember this will only reduce a murder conviction to manslaughter. The same punishment eg life imprisonment may be imposed for manslaughter as for murder see **R v Byrne** 1960 CCA (Conviction for murder reduced on appeal to manslaughter but sentence of life imprisonment remained as the accused was a sexual psychopath).

This is a statutory defence created and set out in Section 52 Coroners and Justice Act 2009 which has been inserted into Section 2 of the Homicide Act 1957 replacing the original partial defence of the same name.

The partial defence requires:

- an abnormality of mental functioning
- arising from a recognised medical condition
- substantially impairing the accused's ability to understand the nature of his conduct and/or to form a rational judgment and/or to exercise self control
- where the abnormality causes (or is a significant contributory factor in causing) the accused's conduct.

The burden of proof on a balance of probabilities is on the accused.

Intoxication

The following cases are based on the original partial defence from the Homicide Act 1957 but may be a guide to how this issue will be treated in future.

Voluntary intoxication could not be the cause of the abnormality **R v Tandy** 1989 C A (mother drunk on vodka strangles 11 year old daughter) but if the accused suffered from alcoholism this might qualify as a 'disease'.

If an accused is drunk and has an abnormality of mind (both at the same time) **R v Dietschmann** 2003 Lords decided first that the jury have to disregard the drink and decide whether the abnormality of mind on its own led to substantial impairment of mental responsibility. Dietschmann was followed on this point in **R v Wood** 2008 C A. Dietschmann decided secondly that the jury should consider what caused the death separately. Here (construing Section 2(1) of the Homicide Act 1957) it does not matter that both mental abnormality and the drink are the cause. The mental abnormality does not have to be the sole cause of the killing.

In Dietschmann the accused was both drunk and had a mental abnormality due to a 'grief reaction' on his girlfriend's death.

Loss of control (Sections 54 and 55 Coroners and Justice Act 2009)

Provocation has been renamed Loss of control and is substantially redefined.

It has three elements (Section 54(1)):

- 1 A killing results from the accused's loss of self control.
- 2 The loss of self control has a qualifying trigger.
- 3 A person of the accused's sex and age with a normal degree of tolerance and self restraint, and in the circumstances of the accused, might have so acted.

It does not matter whether the loss of control was sudden Section 54(2).

The court should **not** take into account matters whose only relevance to the accused's conduct is that they bear on the accused's general capacity for tolerance or self restraint Section 54(3).

The partial defence will not be available if the accused acts in considered desire for revenge Section 54(4).

Once the partial defence is raised the burden of proof beyond reasonable doubt to disprove it is on the prosecution Section 54(5).

The 'qualifying trigger' is explained in Section 55:

The loss of self control must be attributable to either a fear of serious violence to the accused or another from the deceased **or** to words or conduct of an extremely grave character causing an accused to have a justifiable sense of being seriously wronged **or** to a combination of these two alternatives.

Fear of serious violence is judged subjectively. In contrast the requirement that words or conduct cause a "justifiable sense of being seriously wronged" relies on an objective test imported by the use of the word "justifiable".

In determining whether a loss of control had a qualifying trigger the following are to be disregarded Section 55(6):

- inciting a thing to be done or said as an excuse to use violence
- responding to a thing done or said which constituted sexual infidelity.

Excessive use of force in self defence may now offer a partial defence to murder if it is covered by 'fear of serious violence' in the new definition.

Suicide Pacts

Section 4 of the Homicide Act 1957 allows a partial defence where an accused kills another following a suicide pact between them as long as the accused has a settled intention of dying in pursuance of the pact.

The burden of proof is on the accused on a balance of probabilities.