CRIMINAL LAW GUIDEBOOK: QUEENSLAND AND WESTERN AUSTRALIA

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ASSESSMENT PREPARATION

CHAPTER 6

ACTIVE LEARNING QUESTIONS

1. What is the difference between murder and manslaughter?

The essential difference between murder and manslaughter is the fault element: for murder it is intention and for manslaughter either recklessness or negligence. However, the elements of murder differ across jurisdictions in Australia. The difference between the Queensland and Western Australian murder provisions can be seen by comparing s 302(1)(a) Qld with ss 279(1)(a) and (b) WA below.

> Section 302(1)(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.

> Section 279(1)(a) the person intends to cause the death of the person killed or another person; or (b) the person intends to cause a bodily injury of such a nature as to endanger, or be likely to endanger, the life of the person killed or another person.

In Queensland, the fault element is an intention to kill or to inflict grievous bodily harm. In Western Australia, an intention to inflict grievous bodily harm is insufficient, and instead the intention of causing the bodily injury must be such as to endanger life.

'Grievous bodily harm' is defined in s 1 (Qld) as:

> (a) the loss of a distinct part or 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

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> life, or cause or be likely to cause permanent injury to health, whether or not treatment is or could have been available.

'Grievous bodily harm' is defined in s 1 (WA) 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.

Manslaughter is a residual offence by virtue of the wording of s 303 (Qld) and s 280 (WA) which casts manslaughter as an unlawful killing in circumstances other than murder. Thus, absent the fault element of intention for murder, what is the requisite fault element for manslaughter under the Codes given that no fault element is specified for manslaughter? Under the reasonably foreseeable consequences test in s 23(1)(b) (Qld) and accident under s 23B(2) (WA), the underlying fault element in the Codes is negligence. This conclusion is reinforced by the wording of s 23(2) (Qld) and 23(1) (WA) which state:

> Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

As intention to cause a particular result is immaterial, and 'unlawful' is defined as without authorisation, justification or excuse, the Codes of Queensland and Western Australia have the threshold of criminal responsibility set at negligence.

2. What are the different categories of murder and manslaughter?

There are two main categories of murder: (1) murder; and (2) constructive murder as set out in s 302(a) and (b) of the *Criminal Code* (Qld) below.

> 302 Definition of murder
>
> (1) 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;
> >
> > (b) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;
> >
> > (c) if the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;

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(d) if death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph (c);

(e) if death is caused by wilfully stopping the breath of any person for either of such purposes;

is guilty of murder.

(2) Under subsection (1)(a) it is immaterial that the offender did not intend to hurt the particular person who is killed.

(3) Under subsection (1)(b) it is immaterial that the offender did not intend to hurt any person.

(4) Under subsection (1)(c) to (e) it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.

In Western Australia, murder is defined in s 279(1)(a) and (b), and constructive murder in s 279(1)(c) of the *Criminal Code* (WA) below.

279 Murder

(1) If a person unlawfully kills another person and —

(a) the person intends to cause the death of the person killed or another person; or

(b) the person intends to cause a bodily injury of such a nature as to endanger, or be likely to endanger, the life of the person killed or another person; or

(c) the death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life,

the person is guilty of murder.

For constructive murder, it is not necessary for the prosecution to prove the subjective fault element of intention to kill or to cause grievous bodily harm. Rather, the fault element is imputed to the accused where the victim has been killed during the course of a crime that endangers human life. For the physical elements, the accused must have caused the death of the victim and the death must be connected to the commission of a specified offence.

There are two major types of manslaughter:

(1) Voluntary manslaughter where the person intended to kill or cause grievous bodily harm or a bodily injury that endangers life, but where a partial defence applies such as provocation or diminished responsibility or killing in an abusive relationship or excessive self-defence.
(2) Involuntary manslaughter where the person lacked the necessary intent for murder. The category of involuntary manslaughter can be sub-classified into (a) an unlawful

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> intentional act lacking the intent for murder, and (b) a death caused by negligence lacking any intentional violence.

Such a division for involuntary manslaughter follows by virtue of 23(1) in Qld and s 23A(1) in WA which commence with the words: 'Subject to the express provisions of this Code relating to negligent acts and omissions …' Therefore, in the case of an unlawful intentional act, a conviction for manslaughter will be sustained if the Crown can negative accident under s 23(1)(b) (Qld) and s 23B(2) (WA), which means proving the killing was either foreseen or foreseeable. Another way of putting this proposition is that if negligence is involved, then the defence of accident is not engaged. By contrast to an unlawful intentional act, a death caused by a negligent act or omission will fall to be considered against the criminal standard for negligence which subsumes issues of foresight and foreseeability. Thus, under the duty provisions (ss 285–290 Qld and ss 262–267 WA) the excuse of accident is not available in the Codes.

3. Explain the operation of causation under the Codes.

In any charge of homicide, there has to be a causal connection between a defendant's conduct and the death of the victim. Causation is an element of an offence against the person. The general causation provision is s 293 (Qld) and s 270 (WA) which is then extended by the terms of ss 294 to 298 (Qld) and ss 271-275 (WA). These sections have the effect of deeming the defendant to have caused the death in particular circumstances. However, the test for causation is not defined in the Griffith Codes and judges have had recourse to decided cases. The leading case is *Royall v The Queen* (1991) 172 CLR 378 where the High Court identified four basic tests for establishing legal causation: the operating and substantial cause test; the natural consequences test; the reasonable foresight of consequences test; and the *novus actus interviens* test. Cases in the Griffith Codes would appear to favour the use of the substantial or significant contribution test: see *Krakouer v The State of Western Australia* [2006] WASCA 81 [39] per Steytler P.

> In the end, it seems to me that, on the present state of authority, it is enough to satisfy the requirement of causation for the purpose of attributing criminal responsibility if the act of the accused makes a significant contribution to the death of the victim, whether by accelerating the victim's death or otherwise, and that it is for the jury to decide whether or not the connection is sufficiently substantial.

Causation is determined by an objective test, and the jury should not be allowed to confuse the causation question with the subjective mental state of the defendant. The well-known passage from the judgment of Burt CJ in *Campbell v The Queen* [1981] WAR 286, 290, is often quoted in support of the view that causation is a matter of common sense for the jury to determine.

4. Why is negligence the underlying fault element in the Codes?

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Under the reasonably foreseeable consequences test in s 23(1)(b) (Qld) and accident under s 23B(2) (WA), the underlying fault element in the Codes is negligence. This conclusion is reinforced by the wording of s 23(2) (Qld) and 23(1) (WA) which state:

> Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

As intention to cause a particular result is immaterial, and 'unlawful' is defined as without authorisation, justification or excuse, the Codes of Queensland and Western Australia have the threshold of criminal responsibility set at negligence.

5. Why was the offence of Unlawful assault causing death introduced into the *Criminal Code* (WA) and how does it differ from manslaughter? How does the Western Australian and Queensland 'one punch' legislation differ?

Following amendments to the *Criminal Code* (WA) in 2008, s 281 Unlawful assault causing death was added to the Code.

> (1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for 10 years.
>
> (2) A person is criminally responsible under subsection (1) even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.

Section 281 requires neither intention nor foresight even in circumstances where the death was not reasonably foreseeable, thereby avoiding the operation of accident under s 23B. Section 281 only requires an intention to commit an assault (effectively a partial *mens rea* offence). Section 281 is an alternative offence to both murder (s 279) and manslaughter (s 280). The WA Attorney-General described the new offence as reinforcing 'community expectations that violent attacks, such as a blow to the head, are not acceptable behaviour and will ensure that people are held accountable for the full consequences of their violent behaviour': Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 March 2008, 1210 (Mr James McGinty, Attorney-General).

In the *State of Western Australia v JWRL* [2010] WASCA 179 [137], Martin CJ summed up the elements of s 281:

> '[T]he offence created by s 281 comprises two components: the culpable conduct of the offender, which lies in the commission of an unlawful assault, and the consequences of that conduct, namely, death, which need be neither foreseen nor reasonably foreseeable. If the consequence of death was foreseen or reasonably foreseeable, the offence of manslaughter would apply.'

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Thus, it can be seen that the difference between s 281 Unlawful assault causing death and manslaughter is that under s 281 the result of the assault (death) need neither be foreseen nor reasonably foreseeable, unlike manslaughter, because under s 281 the defence of accident has been excluded.

In 2014, Queensland followed suit and introduced s 314A Unlawful striking causing death into the *Criminal Code* (Qld).

> 314A Unlawful striking causing death
>
> (1) A person who unlawfully [without authorisation, justification or excuse] strikes another person to the head or neck and causes the death of the other person is guilty of a crime.
>
> Maximum penalty — life imprisonment.
>
> (2) Sections 23(1)(b) and 270 [Prevention of repetition of insult] do not apply to an offence against subsection (1).
>
> (3) An assault is not an element of an offence against subsection (1) …
>
> (7) In this section— causing means causing directly or indirectly; strike, a person, means directly apply force to the person by punching or kicking, or by otherwise hitting using any part of the body, with or without the use of a dangerous or offensive weapon or instrument.

The key section is s 314A(2) which specifically excludes the defence of accident under s 23(1)(b). A notable difference between the Queensland and Western Australian 'one punch' legislation is the presence of s 314A(3) in the Queensland Code, which states that assault is not an element of the offence. By contrast, s 281 (WA) requires an intention to commit an assault. The consequence of s 314A(3) is that s 268 and s 269 of the *Criminal Code* (Qld), which deal with provocation have no application to the new offence of Unlawful striking causing death.

PROBLEM QUESTION 1

ASSUME THE FOLLOWING FACTS

Lucien and Hannah have been married for three years, have no children and live in an apartment in Brisbane. The marriage has been a very stormy one. Lucien has a quick temper, is very prone to jealousy and takes offence easily. Lucien is particularly sensitive about his poor command of the English language and a stammer when he becomes nervous or excited. Lucien is self employed as a taxi driver and Hannah works as a receptionist for a local builder.

Hannah has been unhappy in her marriage for some time and has recently met and fallen in love with Richard who is a foreman at the building firm where Hannah works.

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On the evening of 26 June 2014, Hannah tells Lucien she no longer loves him and plans to leave him for Richard. Lucien, over a period of days, attempts to persuade Hannah to change her mind and endlessly tells Hannah he will be better in the future. Finally, Lucien follows Hannah to her work and waits until Hannah and Richard emerge to have lunch together. Enraged at seeing his wife with another man, Lucien returns home to wait for Hannah. Over the next few hours Lucien sharpens a large kitchen knife and cuts in half their wedding photographs.

When Hannah finally returns home, Lucien confronts her with his seeing Hannah with Richard at lunchtime. Hannah does not deny Lucien's accusation and instead is relieved hoping that Lucien will begin to understand their marriage is over. But this simply fuels Lucien's jealousy and he flings the cut wedding photographs in Hannah's face.

Hannah snaps and yells at Lucien: 'You stupid wog, you just don't get it do you. I can't stand having to listen any more to you butchering the English language or st-st-st-stuttering every time you lose control of yourself. I can do better than you and Richard is twice the man you are in every way.'

Lucien is stunned into silence. He broods darkly on Hannah's outburst for some twenty minutes before seizing the large kitchen knife he has been sharpening and then advances on his wife. 'You are no longer fit to be my wife. I'll show you butchering. There will be nothing left of you for your lover Richard!'

Hannah is terrified and in her panic to escape falls over a table and smashes her head on the tiled floor. Hannah does not move and Lucien believes that he has killed her. Lucien decides to dispose of Hannah's body in one of the large rubbish skips on a local building site. Lucien covers Hannah's body with material already in the skip.

It subsequently emerges from the forensic evidence that Hannah was not dead when Lucien dumped her in the skip and she actually suffocated some time later. Lucien is subsequently arrested and charged with the murder of Hannah.

Advise Lucien as to his criminal responsibility.

THE ISSUES

This question raises three issues: (1) the elements of murder; (2) causation and concomitance; and (3) the partial defence to murder of provocation (in Queensland only).

THE RELEVANT LAW

In order to be convicted of homicide, a person must have caused the death of another person. Whether the conviction is for murder or manslaughter depends on the Crown's capacity to prove, beyond reasonable doubt, the differing mental elements of these offences, as well as whether the partial defences to murder such as provocation or diminished responsibility are available.

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For murder, the three elements are: (1) intention; (2) kills; and (3) unlawfully.

Under the Griffith Codes the fault element for murder is intention, as common law reckless murder is precluded by the statutory language in s 302(1)(a) of the *Criminal Code* (Qld), and s 279(1)(a) and (b) of the *Criminal Code* (WA) below.

> 302 Definition of murder (Qld)
>
> (1) 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.
>
> 279 Murder (WA)
>
> (1) If a person unlawfully kills another person and —
>
> (a) the person intends to cause the death of the person killed or another person; or
>
> (b) the person intends to cause a bodily injury of such a nature as to endanger, or be likely to endanger, the life of the person killed or another person.

The definition of 'killing' is very broad in both the Codes (s 293 in Queensland and s 270 in Western Australia), and applies to 'any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that person'. Note the use of a deeming provision to make it difficult for the chain of causation to be broken, which is re-enforced by another deeming provision which covers causing death by threats, intimidation or deceit (s 295 (Qld) and s 272 (WA)).

Under s 291 of the *Criminal Code* (Qld) and s 268 of the *Criminal Code* (WA) 'it is unlawful to kill any person unless such killing is authorised or justified or excused by law'. Thus, for example, a person will be excused from criminal responsibility for killing another person if the elements of defences such as extraordinary emergency or self-defence are satisfied (or, more accurately, the Crown cannot negative these defences beyond reasonable doubt). Another example can be found in s 23 of the *Criminal Code* (Qld), which absolves a person from criminal responsibility if (a) an act or omission occurs independently of the person's will, or (b) an event that was not foreseen as a possible consequence and would not have been reasonably foreseen by an ordinary person. Section 23A(2) and s 23B(2) are the equivalent sections in the *Criminal Code* (WA).

PUTTING THE FACTS INTO THE LAW

Here, on the facts, Lucien tells Hannah: 'You are no longer fit to be my wife. I'll show you butchering. There will be nothing left of you for your lover Richard!' The examiner is clearly signalling that

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intention is a 'given'. Neither is the difference between an intention to kill, an intention to cause grievous bodily harm, or an intention to cause a bodily injury of such a nature as to endanger life relevant here, as it is in some questions.

When the victim in a hypothetical legal problem question does not die immediately, the issue of causation is generally raised. In addition, given the manner of Hannah's death, concomitance also needs to be considered. On causation and concomitance, the key portion of the factual matrix is as follows:

> Hannah is terrified and in her panic to escape falls over a table and smashes her head on the tiled floor. Hannah does not move and Lucien believes that he has killed her. Lucien decides to dispose of Hannah's body in one of the large rubbish skips on a local building site. Lucien covers Hannah's body with material already in the skip.
>
> It subsequently emerges from the forensic evidence that Hannah was not dead when Lucien dumped her in the skip and she actually suffocated some time later.

On reading this passage, two cases should have come to the fore: *Royall v The Queen* (1991) 172 CLR 378, and *Thabo Meli v The Queen* [1954] 1 All ER 373. Hannah's panic to escape and smashing her head on the tiled floor is on point with the facts in *Royall* (victim jumped out of 6th floor bathroom to avoid violence).

In *Royall*, The High Court was unable to settle on a single test, with Mason CJ, Deane and Dawson JJ preferring the natural consequences test, Toohey and Gaudron JJ favouring the substantial cause test, and Brennan and McHugh JJ the reasonable foreseeability test. Thus, Mason CJ was able to dismiss the appeal based on the victim having 'a well-founded apprehension of physical harm such as to make it a natural consequence (or reasonable) that the victim would seek to escape' [at 389]. Toohey and Gaudron JJ held to the view that causation is a question of objective fact, and does not depend on an appreciation of the consequences of any act in approving *R v Hallett* (1969) SASR 141.

Cases in the Griffith Codes would appear to favour the use of the substantial or significant contribution test: see *Krakouer v The State of Western Australia* [2006] WASCA 81 [39] per Steytler P.

> In the end, it seems to me that, on the present state of authority, it is enough to satisfy the requirement of causation for the purpose of attributing criminal responsibility if the act of the accused makes a significant contribution to the death of the victim, whether by accelerating the victim's death or otherwise, and that it is for the jury to decide whether or not the connection is sufficiently substantial.

Applying the substantial or significant contribution test, Lucien's intention to 'butcher' Hannah satisfies the test in so far as it caused Hannah to be rendered unconscious with an unspecified injury. The same causation outcome would also result under either the natural consequences test or

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the reasonable foreseeability test. In any event, s 293 and s 295 (Qld) and s 270 and s 272 (WA) have in combination a broad reach, making it difficult to break the chain of causation.

> 293 Definition of killing
>
> Except as hereinafter set forth, any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person.
>
> 295 Causing death by threats
>
> A person who, by threats or intimidation of any kind, or by deceit, causes another person to do an act or make an omission which results in the death of that other person, is deemed to have killed the other person.

Thus, if Hannah had died as a result of her fall, Lucien would be held to have caused her death. However, Hannah was not dead at this point in time, but actually died from suffocation after Lucien dumped her in a skip. Does the fact that Lucien was mistaken make any difference? On the authority of *Thabo Meli v The Queen* [1954] 1 All ER 373, *R v Church* [1966] 1 QB 59, and *R v Taber* (2002) 56 NSWLR 443, the answer is 'no'. In *Thabo Meli v The Queen* [1954] 1 All ER 373 at 374, Lord Reid stated:

> It appears to their Lordships impossible to divide up what was really one series of acts in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan, and as part of their plan; and it is much too refined a ground of judgment to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before, in fact, it was achieved, therefore they are to escape the penalties of the law.

Applying the Privy Council's reasoning in *Thabo Meli v The Queen* to the facts here, Lucien intended to kill Hannah and thought he had done so when she fell. The fact that Lucien was under a misapprehension that Hannah was dead when he dumped her in the skip 'is much too refined a ground of judgment … to escape the penalties of the law'.

So as intention, causation and concomitance are all satisfied, only the question of whether Lucien's actions were 'unlawful' can prevent him from being convicted of murder. The only excuse open to Lucien is a partial one and only applies in Queensland: the partial defence to murder of provocation.

Provocation is available as a partial defence to a charge of murder in Queensland pursuant to s 304 of the *Criminal Code* (Qld). The defence is partial because, if successful, it cannot result in a complete acquittal of a murder charge, only reduce a conviction of murder to manslaughter.

Whilst no specific definition exists under the *Criminal Code* (Qld) for provocation as regards a defence to murder, s 304(1) below contains all the elements of the partial defence to murder on the grounds of provocation.

> 304 Killing on provocation

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> (1) When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.
>
> (2) Subsection (1) does not apply if the sudden provocation is based on words alone, other than in circumstances of a most extreme and exceptional character.
>
> (3) Also, subsection (1) does not apply, other than in circumstances of a most extreme and exceptional character, if (a) a domestic relationship exists between 2 persons; and (b) one person unlawfully kills the other person (the deceased); and (c) the sudden provocation is based on anything done by the deceased or anything the person believes the deceased has done (i) to end the relationship; or (ii) to change the nature of the relationship; or (iii) to indicate in any way that the relationship may, should or will end, or that there may, should or will be a change to the nature of the relationship.
>
> (4) For subsection (3)(a), despite the *Domestic and Family Violence Protection Act 2012*, section 18(6), a domestic relationship includes a relationship in which 2 persons date or dated each other on a number of occasions.
>
> (5) Subsection (3)(c)(i) applies even if the relationship has ended before the sudden provocation and killing happens.
>
> (6) For proof of circumstances of a most extreme and exceptional character mentioned in subsection (2) or (3) regard may be had to any history of violence that is relevant in all the circumstances.
>
> (7) On a charge of murder, it is for the defence to prove that the person charged is, under this section, liable to be convicted of manslaughter only.
>
> (8) When 2 or more persons unlawfully kill another, the fact that 1 of the persons is, under this section, guilty of manslaughter only does not affect the question whether the unlawful killing amounted to murder in the case of the other person or persons.

In applying and interpreting s 304(1) of the *Criminal Code* (Qld), the Courts have consistently adopted the common law position in dealing with each element of the partial defence of provocation. Under s 304(7) the onus of proof is reversed, placing the legal onus on the defence on the balance of probabilities. By reversing the onus of proof and placing a legal onus on the defendant on the balance of probabilities, provocation in Queensland will likely only be successful under exceptional circumstances. Given the physical differences between men and women and that approximately 90% of homicides are committed by men, in practice it will likely mean showing the deceased had attacked Lucien with a knife or sharp instrument.

The preliminary question of law for the judge will be 'whether there is sufficient evidence that a jury could be satisfied on the balance of probabilities that the defence applied'. As a result of the insertion of ss 304(2) and (3), this may involve deciding whether there is sufficient evidence of circumstances of a most extreme and exceptional character where the alleged provocation is either

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based on words alone (s 304(2)), or something alleged to have been done (or believed to have been done) by the deceased affecting the domestic relationship between the deceased and the defendant (s 304(3)).

Hannah's provocation is based on words alone.

> Hannah snaps and yells at Lucien: 'You stupid wog, you just don't get it do you. I can't stand having to listen any more to you butchering the English language or st-st-st-stuttering every time you lose control of yourself. I can do better than you and Richard is twice the man you are in every way.'

Furthermore, as Lucien and Hannah are in a domestic relationship, s 304(3) applies. Thus, Lucien faces a double hurdle in the form of s 304(2) and s 304(3) that on the balance of probabilities there is sufficient evidence of circumstances of a most extreme and exceptional character to allow the partial defence of provocation to go to the jury. This is most unlikely, but for present purposes it will be assumed the trial judge allows the partial defence to go to the jury.

The legal meaning of provocation consists of conduct which (a) causes the defendant to lose control (subjective); and (b) could cause an ordinary person to lose self-control and react in the manner in which the defendant reacted (objective): *Stingel v The Queen* (1990) 171 CLR 312.

The subjective test of causing the defendant to lose control ('in the heat of passion caused by sudden provocation, and before there is time for the person's passion to cool') is clearly inconsistent with premeditation: *Chhay v The Queen* (1994) 72 A Crim R 1, 10 (Gleeson CJ); *Parker v The Queen* (1964) 111 CLR 610, 630 (Dixon CJ).

Here, on the facts, Lucien appears to be acting in a premeditated manner.

> Enraged at seeing his wife with another man, Lucien returns home to wait for Hannah. Over the next few hours Lucien sharpens a large kitchen knife and cuts in half their wedding photographs.

Additionally, the provocation defence is not available where the defendant induced the provocation through his or her conduct or words: *Edwards v The Queen* (1973) AC 648. If this were permissible, then the requirement that the provocation must be 'sudden', would not be met. Again, on the facts, Lucien has confronted Hannah and flung the cut wedding photographs in Hannah's face.

> When Hannah finally returns home, Lucien confronts her with his seeing Hannah with Richard at lunchtime. Hannah does not deny Lucien's accusation and instead is relieved hoping that Lucien will begin to understand their marriage is over. But this simply fuels Lucien's jealousy and he flings the cut wedding photographs in Hannah's face.

Does the fact that Lucien broods for twenty minutes mean that because there is an interval between the provocative conduct and Lucien's emotional response to it, that there has been time for the Lucien's passion to cool?

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> Lucien is stunned into silence. He broods darkly on Hannah's outburst for some twenty minutes before seizing the large kitchen knife he has been sharpening and then advances on his wife.

Courts have recognised that responses to provocative conduct may not be immediate, in particular, where the victim suffered long term abuse and the provocation may be cumulative: *Stingel v The Queen* (1990) 171 CLR 312, 326; *R v R* (1981) 28 SASR 321. Provocation is not necessarily excluded because there is an interval between the provocative conduct and the defendant's emotional response to it: *Pollock v The Queen* [2010] HCA 35 at [54]. Thus, Lucien's brooding for twenty minutes does not preclude the partial defence of provocation as he might be on a 'slow boil'. The subjective test goes to the gravity of the provocation from the perspective of allowance for the defendant's characteristics and sensitivities: *Stingel v The Queen* (1990) 171 CLR 312, 326.

Even allowing for Lucien's sensitivities concerning his poor command of the English language and a stammer when he becomes nervous or excited, which Hannah singled out when she snapped, it is unlikely that Lucien would satisfy the subjective part of the test as in Queensland the defence faces a legal onus under s 304(7).

However, for present purposes it will be assumed Lucien does meet the subjective component, which necessitates examination of the second objective part of the test. The objective test requires consideration of whether it is possible that the ordinary person placed in similar circumstances as the defendant could have reacted to the provocation in the same way: *Stingel v The Queen* (1990) 171 CLR 312, 326; *Masciantonio v The Queen* (1995) 183 CLR 58, 69 (Brennan, Dean, Dawson and Gaudron JJ). The question then becomes whether the ordinary person faced by that degree of provocation could (not would) have killed the deceased. On the facts, this would appear to be most unlikely, especially given the legal onus on the defence.

Summing up on provocation it would appear that (1) Lucien acted in a premeditated manner, and (2) induced the provocation. In any event, given he was 'provoked' by words alone and was in a domestic relationship, he has to satisfy the test of circumstances of a most extreme and exceptional character on the balance of probabilities. Furthermore, it is unlikely that Lucien would satisfy either the subjective or objective parts of the test for provocation. Lucien's prospects of succeeding on provocation are therefore extremely slim.

CONCLUSION

The advice to Lucien as to his criminal responsibility is that he is likely to be convicted of the murder of Hannah. All the elements of murder are satisfied (intention, killing and unlawful). There is little prospect of the partial defence of provocation succeeding, which would have reduced his criminal responsibility to manslaughter.

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PROBLEM QUESTION 2

ASSUME THE FOLLOWING FACTS

Alex and Mark were partners in a failing business. During a stormy meeting between the two men at Mark's house to discuss the future of the business, Alex became agitated. Mark, when interviewed by the police, claimed he thought Alex might become violent and so picked up his shotgun which he knew to be loaded with the safety catch off.

Mark's version of events was that he only pointed the shotgun at Alex to quieten him down and that it discharged by accident. Forensic tests showed that normal pressure was required to fire the shotgun.

The police have charged Mark with murder.

Advise Mark as to his criminal responsibility.

THE ISSUES

This question raises three issues: (1) the elements of murder; (2) whether the act was voluntary; and (3) the defence of accident.

THE RELEVANT LAW

For murder, the three elements are: (1) intention; (2) kills; and (3) unlawfully (without authorisation, justification or excuse). There is no doubt that Mark has killed Alex. Hence, the focus of the question for the elements of murder is upon Mark's *mens rea* or fault element at the time Alex died, and whether Mark has an excuse, namely, the shotgun discharged by accident. However, for criminal responsibility to attach to Mark his act must be voluntary. On the facts, both limbs of s 23 are engaged: s 23(1)(a) and (b) (Qld), and s 23A(2) and s 23B(2) (WA).

> 23 Intention and motive (Qld)
>
> (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for
>
> > (a) an act or omission that occurs independently of the exercise of the person's will; or
> >
> > (b) an event that
> >
> > > (i) the person does not intend or foresee as a possible consequence; and
> > >
> > > (ii) an ordinary person would not reasonably foresee as a possible consequence.

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As Mark has been charged with murder, the Crown case will be that Mark quarrelled with his business partner over the future of their failing business, and in a fit of anger during their stormy meeting deliberately shot Alex at close range with a shotgun he knew to be cocked and loaded, and which required normal pressure to discharge. The defence will argue that Mark was scared of what Alex might do, only pointed the gun at Alex in an attempt to quieten him down with no intention of killing or causing grievous bodily harm to Alex, and that the gun discharged either (a) involuntarily or (b) by accident.

The Griffith Codes do not define intention. Such an absence has required judges to interpret the meaning of intention in the Codes. The leading case is *R v Willmot (No 2)* (1985) 2 Qd R 413. Connolly J took the opportunity to warn of the dangers of trying to define the word 'intention' to the jury. After consulting the *Shorter Oxford English Dictionary* to establish the definition of 'intends' is 'to mean, to have in mind', which excludes the notion of desire, Connolly J stated there is 'no ambiguity about the expression as used in s 302(1) and it is not only unnecessary but undesirable, in charging a jury, to set about explaining an ordinary and well understood word in the English language', citing *R v Moloney* [1985] 2 WLR 648, 664 in support.

The nature of the overlap between the subjective test of intention and inference from the evidence was considered in *R v Glebow* [2002] QCA 442. Jerrard JA noted that the trial judge had directed the jury that 'where, (as was commonly the case), there was no direct evidence of the existence of the necessary intention, it may be inferred from facts which had been proved beyond reasonable doubt' (at [12]). Furthermore, Jerrard JA took no objection to the prosecution reminding the jury that 'intention was something which could be inferred from the degree of violence that was used', and other matters relevant to the question of intention included whether any remorse was shown, whether any assistance was given to the victim, and the continued aggressive conduct of the accused (at [15]).

Cases on point with the factual matrix include *Murray v The Queen* (2002) 211 CLR 193 and *Stevens v The Queen* (2005) 227 CLR 319. In *Murray*, the evidence of the appellant was that he had pointed a loaded and cocked gun at the deceased with his finger on the trigger having the sole intention of frightening him, but that he had been hit on the head and the gun discharged. He denied he had deliberately pulled the trigger. The trial judge had directed the jury on accident under s 23(1)(b) of the *Criminal Code* (Qld) but had not directed the jury on s 23(1)(a), which deals with an unwilled act, and this lack of direction was the subject of the appeal. The focus of the High Court was upon the meaning of the word 'act'.

Gummow and Hayne JJ at 211 [53]

> [53] [O]nce it is recognised that the relevant act in this case is the act of discharging the loaded shotgun, it can be seen that whether or not particular elements of that composite set of movements (load, cock, present, fire) were the subject of conscious consideration by the appellant, there is no basis for concluding that the set of movements, *taken as a whole*, was

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> not willed. There was no suggestion of disease or natural mental infirmity; there was no suggestion of sleep walking, epilepsy, concussion, hypoglycaemia or dissociative state. (Original emphasis.)

The significance of the reference to the set of movements taken collectively is that the narrower the definition of the relevant act, the greater the difficulty faced by the Crown in proving the act was willed. In *Murray*, while some of the steps might have been automatic (no conscious thought), other steps were willed acts to which the appellant had turned his mind.

In *Stevens*, the fact scenario concerned the appropriate instructions to a jury when the accused is claiming he feared the victim was about to commit suicide and in lunging for the rifle it discharged killing the victim. The appeal turned on the trial judge's decision not to direct the jury on accident under the then s 23(1)(b) of the *Criminal Code 1899* (Qld) because his Honour considered it was subsumed in his directions on intent for murder and neither party wanted to raise manslaughter. In addition, a direction under s 23(1)(b) would have opened up the alternative verdict of manslaughter by virtue of the qualification in sub-section (1) relating to negligent acts.

Gleeson CJ and Heydon J, who were in the minority, cited *Murray v The Queen* as framing the question for decision whether s 23 was engaged as whether 'there [was] an issue for the jury about whether there was an unwilled act, or an event occurring by accident, that was an issue separate from the issue about the intention with which the appellant acted' at [18]. Gleeson CJ and Heydon J answered that question in the negative, because the threshold issue was causation and the trial judge's directions were clear that an acquittal should be returned if the Crown failed to negative the appellant's account.

The majority gave three separate judgments. McHugh J, while recognising the case was fought on murder being the sole possible guilty verdict, considered that manslaughter should have been left to the jury at [29]. Kirby J held that because the application of s 23(1)(b) was not expressly excluded in a murder trial, in considering whether the Crown has established the necessary specific intention 'the jury's attention must be directed (where accident is an available classification of the facts) to that category of exemption from criminal responsibility' at [81]. Callinan J could not 'be satisfied that the appellant has not missed a chance of an acquittal by reason of the absence of a direction of the kind that I have suggested' at [162]. The relevant portion of Callinan J's 'model' direction is as follows at [160]:

> The accused is under no obligation to prove any of these matters. Before you can convict, you must be satisfied by the prosecution on whom the onus lies, beyond reasonable doubt, that the death was not an accident, that is, not an event which occurred as a result of an unintended and unforeseen act or acts on the part of the accused; and that it would not have been reasonably foreseen by an ordinary person in his position.

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The Crown has to negative beyond reasonable doubt Mark's account of what happened. The Crown will invite the jury to infer the necessary intention to kill Alex on Mark's part from the facts which had been proved beyond reasonable doubt. The fact that Mark and Alex had a stormy meeting over their failing business will be pressed as providing the motive. The fact that the meeting took place in Mark's house, and Mark just happened to have to hand a cocked and loaded shotgun will be presented as evidence of premeditation. The fact that Mark pointed the cocked and loaded shotgun at Alex made it a virtual certainty that Alex would be killed if the shotgun did discharge when Mark knew the normal pressure required to fire the shotgun, meant that the act was neither involuntary nor an accident.

The Crown will rely on *Murray v The Queen* (2002) 211 CLR 193 at 211 [53] per Gummow and Hayne JJ that Mark's composite set of movements (load, cock, present, fire) were the subject of conscious consideration by Mark, and therefore there is no basis for concluding that the set of movements, *taken as a whole*, was not willed. The Crown will say that there is no evidence of disease or natural mental infirmity and no suggestion of sleep walking, epilepsy, concussion, hypoglycaemia or dissociative state to support the proposition that Mark's actions were involuntary (occurred independently of the exercise of Mark's will).

In addition, the Crown will seek to negative the test for accident by arguing that the possible consequence of Alex's death would have been reasonably foreseen by an ordinary person in Mark's position (pointing a cocked and loaded shotgun at Alex with knowledge of the trigger pressure). Irrespective of foresight, the Crown's position is that Mark's intention to kill Alex, inferred from proven facts, is entirely incompatible with the second limb of s 23, namely, accident.

The defence does not have to prove anything. However, given that murder and manslaughter are alternative verdicts, it would be open to the defence to argue that Mark has been criminally negligent under the duty provisions of the Griffith Codes: here, s 289 Duty of person in charge of dangerous things (Qld) or the equivalent s 266 (WA). Mark could plead guilty to manslaughter in the hope that the Crown would accept a plea of manslaughter rather than charge him with murder. Mark would have to weigh the manslaughter plea as against the prospect of a complete acquittal if the Crown cannot negative beyond reasonable doubt the defence of accident, or that Mark's act of pulling the trigger was involuntary.

CONCLUSION

The advice to Mark is that he is facing the reality of being convicted of the murder of Alex if the Crown succeeds in negativing beyond reasonable doubt Mark's account of what happened. There is strong circumstantial evidence against him, and his main hope lies in the Crown failing to negative the defence of accident. The advice includes the option of Mark pleading guilty to manslaughter on the basis of criminal negligence, which would still likely result in a custodial sentence.

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