Is the law on murder and voluntary of reform?manslaughter in England and Wales in need

Introduction

The law on murder and voluntary manslaughter in England and Wales has been developed over a period of around five hundred years and is the product of a variety of statutory provisions along with a complex and far-reaching series of judicial decisions. These decisions have dealt with specific points of law and never addressed the offences in a holistic fashion. Law Commission proposals have suggested a three tier approach to homicide offences which would include first degree and second degree murder and manslaughter. The advantage would be a clear structure for such offences that properly reflects degrees of fault.[1] The question will be considered under three headings: murder, voluntary manslaughter and proposals for reform.

Murder

Murder is defined as unlawful homicide with 'malice aforethought'.[2] The *actus reus* (guilty act)of murder is the unlawful causing of death of a human being, under the Queens Peace.[3] The prosecution must prove that the defendant caused the victim's death, although difficulties arise when there are more than one cause of death.[4] The prosecution must establish both factual and legal causation. First that *but for* the conduct of the accused the victim would not have died and that the injury imposed by the defendant was *more than a minimal cause* of the victim's death. Legal causation requires that this original injury was an operative and significant cause of death.[5] Proving causation of death therefore can be problematic, where there are intervening acts or multiple injuries which contributed to the victim's death. In certain cases, there may be a number of perpetrators and evidence must be found to determine the specific role played by each one.

The *mens rea* (mental element) is 'with malice aforethought' (or the intention to kill or cause grievous bodily harm).[6] Malice aforethought does not; however, require malicious intent and in *Inglis,*[7] the Court of Appeal reiterated the position that even 'mercy killings' or acts of compassion could be murder. This is one problematic aspect of murder, as it means that it fails to distinguish between a malevolent and benevolent intention.

The Homicide Act 1957 requires that malice aforethought be either express or implied.[8] Implied malice was defined in *Vickers*[9]as intention to cause grievous bodily harm and affirmed in *Cunningham*.[10] Grievous bodily harm is understood to mean,

really serious harm (*DPP v Smith*).[11] A person can therefore be convicted of murder even without intending to kill the victim nor even having foreseen the possibility that death might occur as a result of their act.[12] This situation leads to the problem that very different ranges of intention and awareness are incorporated to make one offence of murder; this is further complicated by the fact that the penalty for murder is currently mandatory life imprisonment.[13]

Voluntary Manslaughter

The offence of manslaughter generally covers all unlawful homicides that are not murder.[14] Voluntary manslaughter includes situations where the *mens rea* for murder is present, but the defendant is able to rely upon a special defence, which enables the defendant to reduce their liability to one of voluntary manslaughter. These special defences include: loss of control, diminished responsibility or suicide pact. [15] The defence of 'loss of control' replaced the earlier common law offence of 'provocation'[16] which was criticised as a barrier to female victims of domestic violence claiming a partial defence to murder (e.g. *Thornton*),[17] even after many years of serious abuse at the hands of their abusers.[18]

The 'loss of control' defence can be pleaded as a partial defence to murder when the defendant claims they lost their self-control as a result of a qualifying trigger, and a person of the defendant's sex and age, with a normal degree of tolerance and self-restraint and in the same circumstances as the defendant could have acted in the same or similar way to the defendant.[19] In *Jewell*, the loss of control was defined as "a loss of the ability to act in accordance with considered judgement or a loss of normal powers of reasoning".[20] In this case the Court of Appeal found a 'cooling off period' and that 'loss of control' had not occurred in this case. In *Ahluwalia*;[21] however, it was confirmed that a cooling off period did not always prohibit a defence of provocation. In *Humphreys*,[22] the age and sex of the defendant was found to contribute to the sudden loss of control triggered by a minor incident, as it was the 'last straw' in a series of abusive incidents. These amendments to the law are therefore said to take account of more gender and age specific reactions to triggering acts.

The two further partial defences to murder are diminished responsibility and suicide pact, both of which are provided for within the Homicide Act 1957. The defence of diminished responsibility was introduced in response to criticisms of the defence of insanity. It must prove the elements of the defence on the balance of probabilities (*Dunbar*).[23] These include abnormality of mental functioning which arises from a recognised medical condition, leading to a substantial impairment of the defendant's ability to understand, form a rational judgement or exercise self-control.[24] These

conditions must provide an explanation for the defendant's act or omission in killing.[25] The term abnormality of mind to abnormality of mental function was amended in 2009.[26] The defence of 'suicide pact' is also a partial defence to murder where the defendant has a 'settled intention of dying'.[27]

What is clear about the current law on murder and voluntary manslaughter is that they are largely the product of common law, with various statutory provisions.[28] The main difficulty with this position is that reforms have been carried out in a piecemeal fashion over a period of more than five hundred years.[29] While changes to the provocation and diminished responsibility offences have been made by virtue of the Coroners and Justice Act 2009, these changes have addressed specific deficiencies in the law, but not addressed the entire framework and to an extent, merely added to the law's piecemeal nature. This state of affairs has other implications, for example, sentencing guidelines which were issued for murder cases presupposed that murder has a rationale structure which correctly reflects degrees of fault and provides appropriate defences. The law has never had such a structure.[30]

Proposals for Reform

There are a number of potential areas for reform within the area of the criminal law on unlawful homicide, while certain changes have already been made in recent years, certain proposals for reform made during the mid-2000s have yet to be enacted into primary legislation. Amongst these proposals include the recommendation to create a three tier, rather than two tier system of homicide offences; the abolition of the mandatory life sentence for murder and the creation of a statutory definition of intention.[31] What the Law Commission found with the existing rules is that the current offences are largely a product of judicial law making in individual cases over hundreds of years.[32] They lack the holistic approach that can be achieved through legislation enacted after wide consultation and research into alternative possibilities.[33] When Parliament had passed the Homicide Act 1957, they had intended a killing not to amount to murder, unless the defendant realised that their conduct might cause death. The widening of murder in subsequent case law can therefore be considered to be beyond the will or Parliament.[34]

The Law Commission recommended replacing the existing system comprised of two main offences (murder and manslaughter) with a three-tier system of general homicide offences. The aim was to achieve "order, fairness and clarity to the law of homicide, the scope of and distinction between individual homicide offences must be made clearer and more intelligible, as well as being morally more defensible".[35] The proposal suggested dividing the offence of murder into two distinct offences: first degree murder

and second degree, while maintaining a third offence of manslaughter.[36] The ability to distinguish between first degree and second degree murder would enable prosecutors to distinguish between cases where killing or serious injury was intentional with an awareness of a serious risk of causing death and cases where the awareness of the risk of serious injury or the intent to cause serious injury were absent. Manslaughter would remain to exist in situations where the *mens rea* for murder is absent.[37]

Various other proposals have been made in relation to an overhaul of the current system, these include the abolition of the mandatory life sentence for murder which is said to artificially stretch out the defences to murder when a life sentence is considered too harsh a penalty based upon the specific facts of the case.[38] Elsewhere, the Law Commission has also suggested a statutory definition of intention,[39] finally concluding after consultation that this should codify existing common law principles. The difficulty will always be cases that appear to provide a harsh result for a specific set of circumstances in the application of the existing law. The advantage of a framework approach therefore appears to offer prosecutors more flexibility in finding an appropriate charge that appropriately addresses the level of fault within the given circumstances of the case.

Conclusion

The law on murder and voluntary manslaughter in England and Wales developed through the process of mainly judge-made rules over a period of around five hundred years. The outcome has been a complex mix of rules, often which exhibit particular biases of the law-makers over the year, as exemplified by the defence of provocation to murder. While statutory changes have been introduced to amend various parts of the law, they have been introduced in a piecemeal fashion, some in 1957 and others in 2009 with over fifty years between them. There remains, therefore, a pressing need for a more holistic approach that is backed by public consultation to adopt a new statutory framework to adequately addresses the varying degrees of fault that exist within the act of killing another human being.

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[2] Michael J Allen, *Criminal Law* (14th edition, Oxford University Press 2017) 343.

[3] ibid 342.

[4] Catherine Elliott and Frances Quinn, *Criminal Law* (11th edition, Pearson 2016) 57.

[5] ibid 79.

[6] Allen (n 2) 343.

[7] *R v Inglis* [2010] EWCA Crim 2637.

[8] Homicide Act 1957 section 1(1).

[9] *R v Vickers* [1957] 2 QB 664.

[10] *R v Cunningham* [1982] AC 566.

[11] *DPP v Smith* [1961] AC 290.

[12] Allen (n 2) 345.

[13] Criminal Justice Act 2003 section 269.

[14] Allen (n 2) 347.

[15] Nicola Monaghan, *Criminal Law* (Oxford University Press 2016) 107.

[16] Homicide Act (n 8) section 3.

[17] *R v Thornton* (1993) 96 Cr App R 112.

[18] Richard Card and Jill Molloy, *Card, Cross and Jones Criminal Law* (Oxford University Press 2016) 241.

[19] Coroners and Justice Act 2009 sections 54-56.

[20] *R v Jewell* EWCA Crim 414 [24].

[21] *R v Ahluwalia* (1993) 96 Cr App R 133.

[22] *R v Humphreys* [1995] 4 All ER 1008.

[23] *R v Dunbar* [1958] 1 QB 1.

[24] Homicide Act (n 8) section 2(1).

[25] ibid section 2(1).

[26] Coroners and Justice Act (n 20) section 52.

[27] Homicide Act (n 8) section 4(1).

[28] Law Commission (n 1) para 1.9.

[29] ibid.

[30] Criminal Justice Act (n 13) section 269 and sch 21.

[31] Elliott and Quinn (n 4) 74–76.

[32] Law Commission (n 1) para 1.15.

[33] ibid.

[34] *R v. Vickers* (n 9).

[35] Law Commission (n 1) para 2.4.

[36] ibid 1.9.

[37] ibid 1.38.

[38] Elliott and Quinn (n 4) 74.

[39] Law Commission, A New Homicide Act for England and Wales? An Overview (2005) Consultation Paper No. 177