right to regulate their bargains by restraining their employees from varying the contract by making terms to which the company has not agreed.

It is suggested that Lord Diplock's view that the terms of the contract in these situations are gathered from what each party led the other to believe is preferable, especially as this view is of course by no means an innovation: compare with *Bruce v. Hunter*,[57] *Re Marquis of Anglesea*.[58] It is still to be hoped that the forthcoming report of the Law Commission on exemption clauses in contracts for services will place this area on a more acceptable footing.

PAUL BINGHAM

R. v. HAYWOOD[1]

Criminal law—Murder—Intent—Effect of taking drugs—Defence of automatism—Voluntary and conscious act—Whether verdict of acquital open—Manslaughter—Mens rea—Death caused by unlawful act.

The accused in this case, a youth aged fifteen years, had swallowed a quantity of valium tablets shortly prior to breaking into a nearby house for the purpose of stealing. Whilst in the house he found and consumed some whisky. The accused also found a rifle and ammunition and he tested his marksmanship by shooting at various items inside the house. Following this he fired a number of shots from inside which went beyond the house and one shot struck and mortally wounded a woman. He was charged with murder. The accused gave evidence that, prior to shooting from within the house out into the street, he looked, perceived a tree, and shot at it. He then saw a woman come out of a nearby house and fired two more shots at another tree. He further said that at the time of firing these shots he was aiming accurately and holding the gun by resting it on a windowsill. A plan submitted in evidence showed that the trees did not exist as Haywood perceived them.[2] Psychiatric evidence was presented by the defence to the effect that the acts, including the firing of the homicidal shot (which may have been one of the aimed shots mentioned above), performed by the accused after approximately one half hour from the taking of the valium tablets were acts that were, or might have been, performed involuntarily. Defence Counsel contended that as the act which caused death (the firing of the rifle) was not a voluntary act, because of the combined effect of the drug and alcohol, the accused should not stand culpable. In response the Crown contended that even were the jury to accept the proposition that at the material time the defendant was unable to perform a voluntary act, or if the jury had not been satisfied beyond reasonable doubt that the accused was able to perform a voluntary act, nevertheless, since the condition was due to self-induction, it would not be open to the jury to do other than consider the alternatives of murder or manslaughter.[3] This submission was based on the authority of *R.* v. *Lipman*.[4]

[57] (1813) 3 Camp. 467; 170 E.R. 1448. [58] [1901] 2 Ch. 548.

[1] [1971] V.R. 755, Supreme Court of Victoria, Crockett J.

[2] See Transcript of Crockett J.'s charge to the jury in *Haywood*, pp. 36a-38a. Cf. *R. v. Joyce* [1970] S.A.S.R. 184.

[3] To deny a jury its right to acquit is open to suspicion. See Devlin, *Trial By Jury* (1956) 160-1.

[4] [1970] 1 Q.B. 152; [1969] 3 All E.R. 410.

Lipman, in an hallucinatory state after taking the drug L.S.D., imagined that he was decending to the centre of the earth and that he was being attacked by snakes. In his efforts to repel the snakes he struck his female companion two blows on the head and crammed some eight inches of sheet into her mouth. As a result she died of asphyxia. Lipman was convicted of manslaughter. He appealed contending that it was necessary for the Crown to prove that he had intended to do the acts likely to result in harm, or foresaw that harm would result from what he was doing. Automatism or involuntary action was not pleaded. The Court of Appeal, Criminal Division, dismissed the appeal holding no specific intent was necessary to support a conviction for manslaughter based on a killing in the course of an unlawful act; accordingly self induced drunkeness was no defence to such a charge.[5] Further for the purpose of criminal responsibility there was no reason to distinguish between the effects of drugs taken voluntarily and drunkeness voluntarily induced;[6] and accordingly since the acts complained of were likely to cause harm to Lipman's companion no acquittal was possible.

In the Supreme Court of Victoria, Crockett J., the trial judge in Haywood, gave a ruling on the Crown's submission. In effect the problem before him was —to what extent is an involuntary act a defence to a charge of murder or manslaughter by unlawful and dangerous act (the unlawful act being an assault and/or the firing of a rifle in breach of the provisions of the Firearms Act 1958 of Victoria)[7] when the actor's involuntary state is self-induced by the consumption of drugs and alcohol? In the circumstances Crockett J. had only to consider the legal problems created by the hitherto confusing authorities. He was not required to grapple with the obvious social problems which are related to this area of the law. In giving his ruling, Crockett J. relied on the basic elements of the crimes of murder and manslaughter by unlawful and dangerous act.

As regards murder he stated that the act done must be with the intent to kill or cause grievous bodily harm. If this intent is not established by the Crown beyond reasonable doubt then a jury is unable to find the person charged guilty of murder. This is so even if the inability to establish the existence of the requisite intent flows from an impairment of the accused's state of mind that is attributable to a voluntary intake of drug or alcohol.[8] This law is indisputable and is in accord with Lipman and the authorities relied on therein.[9] But more fundamentally Crockett J., deriving support from the tacit principle in criminal law of voluntariness, stressed that the act causing death must be a conscious, voluntary and deliberate act. The elements of intent to act and the voluntariness or otherwise of the act require that 'the state of mind of the accused must be looked at. And it is in this particular connexion that the cases to which reference has already been made do not appear to give specific attention'.[10]

[5] This finding was based primarily on the obiter dictum of Lord Birkenhead L.C. in *Director of Public Prosecutions v. Beard* [1920] A.C. 479, 499, and the obiter dicta of Lord Denning in *Attorney General for Northern Ireland v. Gallagher* [1963] A.C. 349, 381 and *Bratty v. Attorney General for Northern Ireland* [1963] A.C. 386, 410.

[6] In principle this seems correct and has gained support. See Greenwood and Hooker, 'Case and Comment' [1969] *Criminal Law Review* 546, 547; *Barker v. Burke* [1970] V.R. 884.

[7] It may be questionable whether a breach of ss. 29(a) and 29(d) of the Firearms Act 1958 is a sufficiently criminal act for the offence of manslaughter by unlawful and dangerous act.

[8] [1971] V.R. 755, 757.

[9] [1970] 1 Q.B. 152, 156-7.

[10] [1971] V.R. 755, 758 *per* Crockett J. referring to *Beard, Bratty, Gallagher* and *Lipman, supra* n. 4 and 5.

When examining manslaughter by unlawful and dangerous act, a crime based on constructive malice where the jury must be satisfied by the application of an objective test that a reasonable person in the accused's situation would realize that the act he was performing would expose the deceased to an appreciable danger of some really serious injury,[11] Crockett J. said that the difficulty was not removed 'of considering the state of mind of the accused person *in limine* as it were, so as to determine whether the initial act which is that which causes the death of the deceased could be characterized as a conscious, deliberate and voluntary act'.[12] Further, the voluntary act of the accused, in the present case the pulling of the trigger, must have been done with intent for an unlawful assault to be committed.[13] Commenting on *R. v. Lamb*,[14] where a gun thought to be unloaded and pointed in jest caused death and an appeal against a conviction for manslaughter was upheld, Crockett J. said 'I find it difficult to distinguish that case from any case where there can be no harmful act in the form of an assault and battery inasmuch as what is said to constitute the assault and battery is not intentional because the act is an involuntary act. I think *Lamb's Case* is authority for the proposition that even in a case of manslaughter by unlawful and dangerous act there must be a degree of *mens rea,* and the requirement of *mens rea* is met by possession of an intention to commit the assault and battery'.[15]

In essence Crockett J. was saying that for the crimes of murder and manslaughter by unlawful and dangerous act the accused, at the time of doing the act which caused death, must be acting voluntarily and with *mens rea. Mens rea* is present in murder if there is an intent to kill or cause grievous bodily harm and in manslaughter by unlawful and dangerous act if there is an intent to commit the unlawful act, for example, an assault, which caused death. If the intent is not present and established by the Crown beyond reasonable doubt when the act is performed because of drink or drug induced automatism then there should be an acquittal.[16] This ruling is contrary to the holding in *Lipman's* case where an important reason for not allowing a self-induced drugged or drunken state as a defence to a charge of manslaughter by unlawful and dangerous act was that manslaughter does not require a 'specific intent'[17] as does murder.[18] This, of course, is true. One does not intend to commit manslaughter but intent must be present to perform the unlawful act which causes death.[19] It is in relation to this aspect of the offence that the Court of Appeal's reasoning in *Lipman's* case is open to criticism as it seems that the Court accepted the unlawful act to be the striking of the blows and cramming of the sheet down the victim's throat. At this time Lipman thought he was fighting snakes which is surely not an unlawful act. The reliance on manslaughter by unlawful and dangerous act in *Lipman's* case appears to be incorrect. Perhaps if the Court of Appeal had based the offence on the taking of the drug (an act which Lipman intended) the judgment would be more acceptable.[20] But this does not seem

[11] *R. v. Holzer* [1968] V.R. 481. [12] [1971] V.R. 755, 758.

[13] [1971] V.R. 755, 758 relying on *R. v. Lamb;* [1967] 2 All E.R. 1282.

[14] [1967] 2 All E.R. 1282. [15] [1971] V.R. 755, 758.

[16] Crockett J. found support for his reasoning in *R. v. Ryan* [1967] A.L.R. 577, 582-3 *per* Barwick C.J.; 594 *per* Taylor and Owen JJ.; 605 *per* Windeyer J.; and in *R. v. Keogh* [1964] V.R. 400.

[17] [1970] 1 Q.B. 152, 157 *per* Widgery L.J. The term 'specific intent' is ambiguous and has inspired comment, see *e.g.,* 'Drunkeness, Drugs and Manslaughter' [1970] *Criminal Law Review* 132, 134-7.

[18] *R. v. Lipman* [1969] 3 All E.R. 410. [19] See [1971] V.R. 755, 758.

[20] This was suggested in a comment in [1969] *Criminal Law Review* 546.

entirely satisfactory. Alternatively manslaughter by criminal negligence could have been relied on as sufficient grounds to substantiate the conviction.[21]

The ruling in *Haywood's* case provides a guide in an area of existing confusion and is thus welcome. It indicates that a self-induced state of automatism will operate as a general defence in our system.[22] The reasoning is sound and in accord with basic legal principle and because of this it is an authority of some importance despite the fact that it did not emanate from an appellate tribunal. However, one may well ponder the social consequences of allowing the defence of alcohol or drug induced automatism. Drug taking is an increasing socal problem and to allow self-induced automatism as a complete defence 'might open the flood-gates to unpunishable, anti-social conduct involving destruction of the life or health or property of other members of the community. You may think that it is a defence which is easy to assert and may be hard to disprove'.[23] The defence did not succeed in *Haywood's* case. He was found to be guilty of manslaughter as there was sufficient evidence before the jury for it not to accept the plea of automatism. It is possible however that cases may arise where an accused is acquitted and acquittal in the circumstances is socially undesirable. Of course the offence of manslaughter by criminal negligence may be useful in this area as an alternative (and one would think a favourable alternative on legal principle) to that of manslaughter by unlawful and dangerous act. But are the existing common law offences adequate in an area which is of relative recent origin and may gain more significance in society in the near future? Perhaps legislative intervention is necessary for the creation of new offences with appropriate and socially acceptable remedial sentences.

NEAL B. CHAMINGS

COMINOS v. COMINOS[1]

Federal Jurisdiction of State Courts—Matrimonial Causes.

The power afforded by section 77(iii)

> . . . the Parliament may make laws—
>
> (i) . . .
>
> (ii) . . .
>
> (iii) Investing any court of a State with federal jurisdiction

of the Australian Constitution to Federal Parliament, has been subject to judicial scrutiny in several recent cases.[2] The most recently reported decision is that of *Cominos v. Cominos*[3] which arose in the Supreme Court of South Australia as a suit for divorce and ancillary relief. The respondent contended that a judge of the Supreme Court, sitting in its matrimonial jurisdiction under

[21] *Ibid.*
[22] A point unsettled since *D.P.P. v. Beard* [1920] A.C. 479.
[23] Taken from the transcript of Crockett J.'s charge to the jury in *Haywood*, p. 24a.

[1] (1972) 46 A.L.J.R. 593. High Court of Australia; McTiernan, Menzies, Walsh, Gibbs, Stephen and Mason JJ.
[2] *Kotsis v. Kotsis* (1971) 45 A.L.J.R. 62 and *Knight v. Knight* (1971) 45 A.L.J.R. 315, in both of which the meaning of 'court' was litigated; *Capital T.V. and Appliances Pty Ltd v. Falconer* (1971) 45 A.L.J.R. 186, in which the problem was posed (*inter alia*) whether 'court' encompassed a territorial court.
[3] (1972) 46 A.L.J.R. 593.