HOMICIDE 'BY ANY UNLAWFUL ACT'

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There has been for some years a failure fully to appreciate the existence and content of the Tasmanian Criminal Code. Events of recent months have gone some way to remedy this situation, and it is perhaps almost trite at this time to urge that the Code should be studied as the source of criminal law for the State. It is true that in 1934 Crisp J. said:[1] 'We have to construe the Code: if its language is plain and clear, there is no more to be said, despite the consequences'; but his words do not seem to have found many echoes in the Tasmanian Reports in the ensuing twenty-five years or so.

The subject of homicide frequently arouses the interest of lawyers as well as of those whose altruism may be less pronounced, and the relevant provisions of the Code have received fairly careful scrutiny from time to time. Those provisions are contained in chapter XVII, and section 156 is one of several sections in which the crimes of murder and manslaughter (*inter alia*) are constituted. Certain categories of homicide are designated 'culpable', of which some are further classified as murder. Cases of culpable homicide falling outside the sphere of murder are designated manslaughter.

It is convenient to set out section 156 in full:

(2) Homicide is culpable when it is caused—

(a) By an act intended to cause death or bodily harm, or which is commonly known to be likely to cause death or bodily harm, and which is not justified under the provisions of the Code.

(b) By an omission amounting to culpable negligence to perform a duty tending to the preservation of human life, although there may be no intention to cause death or bodily harm, or

(c) By any unlawful act.

(3) The question what amounts to culpable negligence is a question of fact, to be determined on the circumstances of each particular case.

(4) For the purposes of this chapter it is unlawful—

(a) To cause death in the manner described in paragraph III of section one hundred and fifty-four:

(b) To wilfully frighten a child of tender years: or

(c) To wilfully frighten a sick person knowing such person to be sick.

(5) Homicide that is not culpable is not punishable.

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1 *Woodruff* v. *Nolan* [1934] Tas. L.R. 127, 130.

The purpose of this article is to consider the nature of the 'unlawful act' prescribed in section 156 (2) (c) and, in so doing, to direct attention to some related problems of interpretation of the Code which still remain to be solved. The adverb 'unlawfully' and also the noun 'act' have both been the subject of recent judicial interpretation, but for purposes and in contexts different from the present.[2] Consequently, the definitions previously formulated in connection (*inter alia*) with section 13 (1) and section 172 may have little or no relevance to section 156; the concept involved here seems to be the composite one of 'an-unlawful-act', but in so far as the usual meaning of 'unlawful', namely, 'without legal excuse or justification' is relevant, it supports and, indeed, with the reservations to be indicated later, states the view contended for in this article. Apart from this, several other possibilities arise. It may be that section 156 (4) provides the key; or that any act which is unlawful in the sense of 'illicit' will suffice; or a tort, or a quasi-criminal act (a 'simple offence'); or a crime.

It is proposed to deal with each of these possibilities in turn.

Sub-section (4) attracts attention because of its opening words: 'For the purposes of this chapter'. But closer inspection seems to indicate that this sub-section is not exhaustive, and merely makes provision for cases which were doubtful at common law. For instance, the conduct mentioned in sub-section 4 (a) *i.e.* as indicated in paragraph (c) of section 154, has been a matter of controversy for some time.[3] Russell found it necessary in this connection to rely on colonial authority for the proposition that death so caused was culpable, and quotes *R.* v. *Grimes*[4]; and the question seems to have been still arguable in 1909[5] and in 1912.[6] Paragraphs (a) and (b) of section 156 (4) contradict Lord Hale's proposition that death caused without any definite bodily injury is outside the sphere of homicide 'because secret things belong to God; and hence it was that before 1 Ja. 1, c. 12 witchcraft or fascination was not felony because it wanted a trial'.[7]

However, in *R.* v. *Towers*[8] a charge of manslaughter was brought against a man who was alleged to have frightened a child to death. The matter seems not to be beyond doubt even now, for Russell says:[9] 'It has often been considered that there must be some actual corporal damage to the victim; and that if a person, either by working upon the fancy of another, or by harsh and unkind usage, puts him into such an excess of grief or fear that he dies suddenly, or contracts some disease which causes his death, such killing is not homicide. But on principle there seems no reason why one who frightened another to death should

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2 *Cf. R.* v. *Vallance* (1961) 35 A.L.J.R. 183.
3 Russell on *Crime* (10th Edn.), 469.
4 (1894) 15 N.S.W.L.R. 209.
5 *R.* v. *Curley* (1909) 2 Cr. App. R. 109.
6 *R.* v. *Beech* (1912) 76 J.P. 287.
7 1 Hale 429.
8 (1874) 12 Cox C.C. 530.
9 *Op. cit.*, 468.

not be held legally to have caused that death'. And Garrow[10] quotes the report of the Criminal Code Commission, referring to the corresponding provisions of the Draft Code: 'This obviates a possible doubt'. So although it does not seem that section 156 (4) exhaustively defines 'unlawful act' for this purpose, some kinds of conduct therein described would seem to be merely tortious (*e.g.* paragraph II), and not falling within paragraphs (a) or (b) of sub-section (2). This too supports the present argument.

Illicit acts fall into two categories. On the one hand are cases of what may be called 'private immorality'. Stephen gives as an example the case of seduction of B by A, resulting in B's death in her confinement. This, it seems, though an immoral is not an unlawful act for the present purpose, though of course other considerations may arise if the girl is under eighteen. As examples of public immorality, Stephen suggests such things as prize fights and tight-rope exhibitions; some of these would now be crimes under the Code, and it may be doubted whether the remainder should any more be 'unlawful acts' in this context than should acts of private immorality.

It is in connexion with torts that the most interesting questions arise. Taking first torts other than negligence, it seems clear that these will constitute 'unlawful acts' under section 156. This was certainly the old common law position. And, as was said by Windeyer J. in *R.* v. *Vallance*, 'So far as homicide is concerned . . . the common law doctrine is very largely retained by sections 156-159 of the Code.' In *R.* v. *Sullivan*,[11] for example, a lad in a spirit of fun withdrew the trapstick from a cart so that it upset and ejected the driver, with fatal results. Sullivan intended no harm, but was convicted of manslaughter. Similarly, in *R.* v. *Fenton*,[12] Tindal C. J. said: 'If death ensues as the consequence of a wrongful act, an act which the party who commits it can neither justify nor excuse, it is not accidental death . . . if (death) followed from such wrongful act, as an effect from a cause, the offence is manslaughter. . . .'

It is true that it has been claimed that by 1883 this strict rule had been somewhat relaxed, for in that year *R.* v. *Franklin*[13] indicated that at least in the opinion of Field J. 'the civil wrong is immaterial to this charge of manslaughter.' But this was (possibly erroneously) expressed to be in respect of a negligent act and not immediately relevant to the present discussion. The submission is that *R.* v. *Franklin* is not a convincing decision, because at any rate at the end of the 19th century it was impossible to say that the concept of 'criminal negligence' as finally

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10 *Criminal Law of New Zealand* (3rd Edn.), 112.

11 (1836) 7 C. & P. 641.

12 (1830) 1 Lew. 179.

13 (1883) 15 Cox C.C. 163.

propounded in *Andrews* v. *D.P.P.*[14] was settled. Stephen, for example, wrote:[15]

> 'The words "unlawful act" include
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> (i) Acts punishable as crimes (or involving penalties);
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> (ii) Acts constituting actionable wrongs;
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> (iii) Acts contrary to public policy or morality or injurious to the public'.

He added a footnote: 'Hale, East and Foster make a distinction between *mala in se*, and *mala prohibita*, which I think can no longer be regarded as law'. This distinction is closely similar to the question raised by Lord Atkin's remarks in *Andrews* v. *D.P.P.*[16] that 'there is an obvious difference between doing an unlawful act and doing a lawful act with a degree of carelessness which the legislature makes criminal'. Such subtleties are avoided by the view that death caused by a tortious act is manslaughter. And when one recalls that the crime is no longer a felony and can be met by a wide range of penalties the reason for these refinements disappears. Further criticisms of *R.* v. *Franklin* are that it conflicts with *R.* v. *Fenton*, and that no mention was made in the case of the question whether or not the accused was engaged in stealing at the time of the fatality.

It is submitted then that any tortious act (apart from negligence) is more or less clearly within section 156, although Crisp J. in *R.* v. *Davis* expressed some doubt as to this[17]. An example may be interesting. Suppose that A removes a miser's hoard of gold in circumstances which amount to a tort (say trespass) but not to a stealing; the miser B goes to the hiding place, finds the hoard missing and dies of the resultant shock. Why should A's conduct not be an 'unlawful act'? Incidentally, Snelling, in a valuable recent article,[18] has listed a number of cases which support the present contention, culminating in *R.* v. *Woods*,[19] a decision of Avory J.

What of negligently tortious conduct? The scheme of the homicide provisions is, apparently, to provide for negligence in section 156 (2) II[20]. The term used is 'culpable negligence' and the criterion of culpability is established in sub-section (3). Paragraph (b) refers to omissions to perform the duties set out in chapter XVI of the Code; there are few if any other cases under the Code in which criminal responsibility attaches to an omission (see section 13 (2)), and section 156 provides that in order to involve such a result an omission must amount to 'culpable negligence'. But where conduct can fairly be described as an 'act' then the scheme of the Code seems to require that it should be so

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14 [1937] A.C. 576.

15 Digest 5th Edn. art. 231.

16 [1937] A.C. 576, 585.

17 [1955] Tas. S.R. 52, 55.

18 30 (1956) A.L.J. 382, 438.

19 (1921) 85 J.P. 272.

20 *R.* v. *Davis* [1955] Tas. S.R. 52, 53.

regarded and not be notionally transformed into an 'omission' even though this may (as it often will) be logically possible. This it is respectfully suggested is demonstrated by *R.* v. *Davis*. In that case the Crown maintained that Davis had committed unlawful acts (driving under the influence and speeding) and that these acts had caused the death of the deceased and that, therefore, Davis could properly be charged with manslaughter under section 156 (2) (c). This contention failed because the trial judge converted these positive acts into negative 'omissions' to perform one of the duties already mentioned, and naturally then felt himself constrained to hold that in order to involve criminal responsibility such an omission had to amount to 'culpable negligence'. This he equated with 'criminal negligence' as discussed in *R.* v. *Andrews* and he concluded that conduct capable of being described as 'mere negligence' did not constitute an 'unlawful act' for that purpose.

It may be pointed out that there is no reason to assume that the Code necessarily coincides with the present English law; in New Zealand it has been held that in the light of provisions not unlike the Tasmanian sections 150, 152 and 156, the bi-partite view of negligence has no application[21]. Having this in mind, may it not be that the Code envisages that any act which is a breach of a rule of 'positive law' (in the Austinian sense) should involve criminal responsibility if it causes death? On the other hand, *omissions* resulting in death generally only produce criminal responsibility under the Code when they 'amount to culpable negligence' and are omissions to perform one of the duties tending to the preservation of human life. This would be more or less consonant with the view 'thou shalt not kill but needst not strive officiously to keep alive'. Moreover, as the Code provisions so closely follow the wording of Stephen's Digest (*e.g.* compare section 156 with article 243) it seems fair to assume that the draftsman had in mind Stephen's proposition (article 233) that it is not criminal to cause death by an omission other than an omission to perform one of the prescribed duties. On this reading, section 156 (2) (a) would provide for acts done with intent (express or implied); paragraph (b) would deal with omissions; and paragraph (c) would qualify paragraph (b) by saying, in effect, that if the accused acted in breach of the positive law (statute, regulation or rule of case law) it matters not that his conduct might possibly be regarded as some sort of omission, *even* an omission to perform one of the duties tending to the preservation of human life—if death results, he is criminally responsible.

This view would conflict with *Andrews* v. *D.P.P.* and possibly with *R.* v. *Bateman*,[22] but both of those decisions are later in time than the Code and are not necessarily applicable. *Andrews* v. *D.P.P.* has been criticised[23] and the unsatisfactory nature of the distinction there made has already been adverted to. *R.* v. *Bateman* was not followed in *R.* v. *Storey*.

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21 *R.* v. *Storey* [1931] N.Z.L.R. 417; *cf. R.* v. *Callaghan* (1952) 87 C.L.R. 115.

22 (1925) 19 Cr. App. R. 8.

23 *L.Q.R.* 43 (1927) 380; L. Radzinowicz, *The Modern Approach to Criminal Law* (1948), 237-240; Kenny, *Outline of Criminal Law* (15th Edn.), 134; Russell, *op. cit.*, 646.

Thus, it is submitted that *any* tortious *act* will be sufficient to bring the offender within section 156 (2) (c) if in fact it causes death, and that if his conduct is neither excusable nor justified it is not relevant to ask whether it can be regarded as an 'omission'.

As to simple offences, it is suggested that death caused by one of these will be culpable, and the reasoning is much the same as that in respect of torts. A breach of a quasi-criminal rule was clearly within Stephen's idea of an unlawful act, and far from this being a novel proposition[24] was mentioned as long ago as 1858[25]. In that case the accused kept fireworks in his house in breach of a statutory prohibition. The negligence of his servants caused a fire in the house which due to the presence of the fireworks resulted in a fatality. It seems to have been accepted that if the death had occurred without the supervening negligence of the servants and as a result of the misdemeanour *per se* the accused would have been guilty of manslaughter, although on the facts of the case the decision was against a conviction.

Acts which are crimes are *prima facie* within section 156, though there is at least one exception even to this proposition, *i.e.* perjury other than perjury which falls within section 153 (6). This exception is established by section 153 (7). In *R.* v. *Leighton*,[26] Crawford J. expressed the view that an assault would be 'an unlawful act' and indeed it seems difficult to argue to the contrary.

In conclusion, it is suggested that paragraph (c) of section 156 (2) requires a very wide interpretation and should not artificially be restricted. If it is argued that such a wide scope for the law of manslaughter is undesirable, the following considerations should be borne in mind—

1. Homicide involves the death of a human being. Social changes have not reduced the value which the law places upon human life, but have increased it. Perhaps in this enlightened age it should be regarded as *more* serious, not *less* to kill another. Some such reasoning surely underlies the contemporary unpopularity of capital punishment.
2. In the last resort, juries will not convict unless the current social code makes a conviction desirable.
3. The punishment for manslaughter already varies tremendously according to the facts of the case.
4. The common law had no precise doctrine of *mens rea* in respect of manslaughter (and still has none) and the Code provisions, if interpreted as has been suggested in this article, may be regarded as an attempt at precision in this regard, if perhaps a little severe. If some modification of these strict but intelligible notions is

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24 *Cf.* Crawford J. in *R.* v. *Vallance* (1961) Tas. C.C.A. (as yet unreported).

25 *R.* v. *Bennett* (1858) Bell 1.

26 (1960) Tas. C.C.A. (unreported).

desired, it is suggested that some attempt should be made to formulate a clear concept of the mental ingredient in manslaughter, rather than haphazard indulgence in piecemeal qualifications of the rules which the Code provides.

5. If some such modification of section 156 (c) is to be made there is something to be said for the view that it should take the form of a requirement that to be an 'unlawful act' for this purpose the conduct of the accused which caused the death must have been either accompanied by foresight of its consequences or else have been such that foresight could reasonably be imputed to the accused. This line of reasoning is consistent with that adopted by the High Court of Australia in *R.* v. *Vallance* and with the objective nature of the other provisions about homicide. (It would be odd, it is suggested, to adopt a subjective test in respect of manslaughter while an objective one prevails in the case of murder). Finally such a view would have at least some merit in point of policy.
6. The section under discussion is applicable *only* when death is *caused by* the 'unlawful act', so that cases of death occurring merely in the course of an unlawful act are excluded. Causation is essential.