LEGISLATING THE CRIMINAL CODE: THE YEAR AND A DAY RULE IN HOMICIDE

LAW COMMISSION

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LAW COM No 230

The Law Commission

(LAW COM.No.230)

Legislating the Criminal Code THE YEAR AND A DAY RULE IN HOMICIDE

Item 5 of the Fourth Programme of Law Reform: Criminal Law

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The terms of this report were agreed on 13 December 1994.

LAW COMMISSION

LEGISLATING THE CRIMINAL CODE: THE YEAR AND A DAY RULE IN HOMICIDE

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GLOSSARY

In this report the following terms and expressions are used for the sake of brevity:

"ACPO"	the Association of Chief Police Officers
"the BMA"	the British Medical Association
"the Cambridge case"	the case in which Miss Pamela Banyard died on 14 August 1988, having been the victim 18 months earlier of an attack
"the CLRC"	the Criminal Law Revision Committee
"the CLRC's Fourteenth Report"	the Fourteenth Report of the Criminal Law Revision Committee: Offences against the Person (1980) Cmnd 7844
"the CPS"	the Crown Prosecution Service
"the Darlington case"	the case in which Michael Gibson died 16 months after an attack on him
"LCCP No 135"	Criminal Law: Involuntary Manslaughter, Law Commission Consultation Paper No 135 (April 1994)
"LCCP No 136"	Criminal Law: The Year and a Day Rule in Homicide, Law Commission Consultation Paper No 136 (July 1994)
"Law Com No 177"	Criminal Law: A Criminal Code for England and Wales, Law Commission Report No 177 (2 vols, 1989) HC 299
"Law Com No 218"	Criminal Law: Legislating the Criminal Code: Offences against the Person and General Principles, Law Commission Report No 218 (1993) Cm 2370
"the Nathan Committee"	the House of Lords Select Committee on Murder and Life Imprisonment, which reported in 1989
"the Oxford case"	the case in which a victim in Oxford died in 1988 as a result of a stabbing which had occurred nearly two and a half years earlier, referred to by Professor Andrew Ashworth in *Principles of Criminal Law* (1st ed, 1991) p 229
"pvs"	persistent vegetative state
"the rule"	the long-established common law rule which creates an irrebuttable presumption that a person has not caused a death if it occurs more than a year and a day after the act or omission from which it resulted
"the *Sambasivam* rule"	the rule that the prosecution may not challenge the validity of a previous acquittal of the same defendant by adducing evidence in a subsequent trial which would be inconsistent with it, expressed in the leading case *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458

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To the Right Honourable the Lord Mackay of Clashfern, Lord High Chancellor of Great Britain

PART I
INTRODUCTION AND SUMMARY OF RECOMMENDATIONS

Introduction

1.1 In this report we make recommendations for the reform of the long-established common law rule that a person cannot be convicted of murder where death does not occur within a year and a day of the injury that caused it.[1] The rule also applies to manslaughter,[2] infanticide,[3] aiding and abetting suicide,[4] verdicts of suicide returned by coroners' juries[5] and possibly also to the motoring offences of causing death by dangerous driving, causing death by careless driving when under the influence of drink or drugs, and aggravated vehicle taking causing death.[6]

1.2 In the consultation paper upon which the proposals in this report are based,[7] we set out the history of the rule[8] and the way it has now become an irrebuttable presumption which curtails the right of the prosecution to prove that the defendant caused death if more than a year and a day has elapsed after the injury that caused the death.

1.3 We believed that a review of the rule was desirable for four main reasons.[9] In the first place it was unlikely that the appeal courts would ever have an opportunity to review the rule because the Crown Prosecution Service ("the CPS") would be

1 This will hereafter be called "the rule".

2 *Dyson* [1908] 2 KB 454: see paras 2.5-2.7 below.

3 *Inner West London Coroner ex parte De Luca* [1989] QB 249, 252E and 254H *per* Bingham LJ and Hutchison J respectively: see para 2.8 and Appendix B below.

4 See para 2.9 below.

5 See para 2.9 below.

6 See paras 2.12-2.15 and Appendix B below.

7 Consultation Paper No 136, Criminal Law: The Year and a Day Rule in Homicide (1994); hereafter, "LCCP No 136".

8 LCCP No 136, paras 2.1-2.7.

9 LCCP No 136, paras 1.10-1.12.

unlikely to prosecute for a homicide offence in any case where the rule would mean that the accused would automatically be acquitted. Even if the question were to come before the appeal courts, it is arguable that they would be prevented from holding that the rule should be abolished because of the principle against retrospective legislation enshrined in Article 7 of the European Convention on Human Rights.[10]

1.4 In the second place, when the rule was considered five years ago by the House of Lords Select Committee on Murder and Life Imprisonment ("the Nathan Committee")[11] and by the Divisional Court,[12] both took the view that they were not prepared to contemplate the rule being abolished for one offence only, but left in force for others. We were very conscious of the same consideration when we were preparing our recent consultation paper on involuntary manslaughter.[13] The only way in which the rule can be given comprehensive consideration is if it is subjected to critical scrutiny as a discrete subject in its own right, as we are now doing.

1.5 The third reason why we believed that this review should be carried out was that the problems to which the rule gives rise were becoming more evident because of the increasing use of life support machines to keep people alive for more than a year and a day after a life-threatening event.[14] This has led to increasing public concern about the rule, in particular because it has led to what some consider to be very strange and unacceptable results.

1.6 Three recent cases illustrate this point. Pamela Banyard died on 14 August 1988.[15] Eighteen months earlier she had been the victim of a serious assault. A pathologist gave evidence to the effect that she had suffered irreversible brain damage in the attack, and for the rest of her life she had remained in a coma under medical care. Her assailant could not be convicted of murder because of the rule. He was

[10] See paras 4.22-4.26 below. The appellant in *R v R* [1992] 1 AC 599 has a complaint pending before the European Court of Human Rights on the basis that his conviction for the attempted rape of his wife arose out of conduct which did not at the material time constitute a criminal offence under UK law. Although the European Commission on Human Rights declared the complaint admissible on 14 January 1994, the Commission decided on 27 June 1994 that there had in fact been no breach of the Convention.

[11] (1989) HL 78-I: see paras 2.18-2.20 below.

[12] *Inner West London Coroner ex parte De Luca* [1989] QB 249, 253H-254C: see paras 2.8-2.11 below.

[13] Criminal Law: Involuntary Manslaughter, Consultation Paper No 135 (April 1994); hereafter "LCCP No 135".

[14] In *Airedale NHS Trust v Bland* [1993] AC 789, Lord Browne-Wilkinson said (at p 879) that "we were told [that the number of pvs cases in this country was] between 1,000 and 1,500".

[15] Hereafter this case will be referred to as "the Cambridge case".

convicted of attempted murder and robbery instead and sentenced to ten years' imprisonment.[16]

1.7 In the same year a man died as a result of a stabbing nearly two and a half years earlier. The assailant was convicted of unlawful wounding with intent to cause grievous bodily harm,[17] and was also sentenced to ten years' imprisonment.[18] The assailant would therefore have had sufficient mens rea for murder,[19] but he could not be charged with this offence because of the rule.

1.8 A more recent case involved Michael Gibson[20] who suffered brain damage as a result of an attack on him in the street. He was revived after his heart had stopped and went on living in a persistent vegetative state for 16 months until he died of pneumonia. His assailant was convicted of causing grievous bodily harm and sentenced to two years' imprisonment; he could not be charged with murder or manslaughter following his victim's death because of the rule. This led to widespread public criticism, particularly in the Darlington area,[21] and to proposed amendments to the Criminal Justice and Public Order Bill 1994 aimed at abolishing the rule without replacement insofar as it applied to murder and manslaughter.[22]

1.9 The fourth reason why we considered that a review of the rule was desirable is that in many cases of gross negligence manslaughter there is no alternative offence for which the wrongdoer can be prosecuted if his victim survives for more than a year and a day.[23] Even if an alternative offence is available, the defendant is likely to receive a much lower sentence if his victim dies more than a year and a day after the commission of the wrongful act than if the death occurred within that period.[24] Although it is arguable that, in the contexts of the offence of manslaughter and

[16] *Cambridge Evening News* 15, 16 and 20 August 1988. This case is also referred to by D E C Yale in "A Year and a Day in Homicide" [1989] CLJ 202.

[17] Under s 18 of the Offences against the Person Act 1861: see Appendix B.

[18] *Oxford Times* 11 November 1988. This case was referred to by Professor Andrew Ashworth in *Principles of Criminal Law* (1991) p 229 and will hereafter be called "the Oxford case".

[19] Ie the mental state required by the law. Since *Moloney* [1985] AC 905, it has been clearly established that the mens rea for murder is intention to kill or to cause serious bodily harm.

[20] *The Times* 1 September 1993. Hereafter this case will be referred to as "the Darlington case".

[21] *The Northern Echo* has published a number of articles since the attack took place covering the coroner's inquest, Mr Gibson's eventual death and the attempts to bring about a change in the law: see, eg, 7 May, 31 August and 1 September 1993 and 16 March and 20 April 1994. On 5 May 1994 we received a petition from people in the Darlington area expressing their dissatisfaction over this case and calling for abolition of the rule.

[22] These amendments were narrowly rejected: see paras 2.22-2.24 below.

[23] See paras 3.17-3.18 below.

[24] Such as statutory road traffic offences: see paras 3.21-3.22 below.

current sentencing policy, too great an emphasis is placed on the *consequences* of an accused's conduct, particularly the fact that death was caused, there is still no reason why cases should be treated differently depending on the length of time between the infliction of injury and death.

1.10 Our provisional view in LCCP No 136 was that the rule should be abolished[25] with prospective effect.[26] We asked our readers for their views on this proposal and on the way in which the defendant could be adequately protected from unfair prosecution in the event of the rule being abolished.

1.11 There was a large response to the consultation paper[27] and we are grateful for the time and effort spent by our consultees both in compiling their thoughtful responses and, in the case of some, by meeting us for further discussions.

1.12 The great majority of consultees welcomed our approach and endorsed our proposal that the rule should be abolished. We also received many ideas about ways of giving adequate protection to the defendant if the rule should be abolished.

Summary of recommendations

1.13 Our main proposals for reform are:-

(1) that the rule should be abolished with prospective effect in relation to murder, manslaughter, infanticide, aiding and abetting suicide and any other offence to which it presently applies, and to suicide for the purpose of coroners' verdicts;[28] but

(2) that the consent of the Attorney General should be required in order to bring a prosecution for any offence of which one of the elements is causing the death of another person, or the offence of aiding, abetting, counselling or procuring a person's suicide, where (i) a period of three years has elapsed between the act or omission alleged to have caused the death in question and the institution of proceedings; or where (ii) it is proposed to allege that the death in question was caused by an act or omission which constituted the whole or part of the facts alleged in any previous proceedings against the accused for an offence for which a custodial sentence for a term of two years or more has been imposed on him.[29]

[25] LCCP No 136 para 6.19.

[26] LCCP No 136 paras 6.25-6.26.

[27] See Appendix C below.

[28] See para 4.26 below.

[29] See para 5.38 below.

1.14 This project, which we decided to undertake in the course of preparing our consultation paper on involuntary manslaughter,[30] forms part of our long-term objective to codify the criminal law. When we have published our final recommendations on involuntary manslaughter, we intend to incorporate both those recommendations and the ones which we make in this report into the growing Criminal Code.

1.15 The rest of this report is arranged as follows:-

Part II deals with the history and present status of the rule.

Part III deals with the issues which must be considered in any review of the rule.

Part IV deals with the options for reform of the rule.

Part V is concerned with questions of protection for the defendant in the event of the rule being abolished.

In Part VI we discuss whether a previous conviction for a related non-fatal offence should be admissible as evidence in a subsequent prosecution for a homicide offence.

In Part VII we set out our three recommendations for reform.

Appendix A contains a draft Bill which would give effect to our recommendations.

Appendix B sets out the relevant parts of the statutory offences to which we refer in this project, for example, the offences under sections 18 and 20 of the Offences against the Person Act 1861 with which a defendant might be charged before the death of the victim or as an alternative to murder or manslaughter because of the operation of the rule.

Appendix C is a list of those who responded to LCCP No 136.

[30] See LCCP No 135, para 1.26. We decided to give the completion of this report priority over our project on manslaughter at the request of the Home Office and because of the concerns expressed in Parliament about the rule: see paras 2.22-2.24 below.

PART II
THE HISTORY AND PRESENT STATUS OF THE RULE

Introduction

2.1 In this part, we summarise the historical background to the rule[1] and describe its present status.[2]

2.2 Two eminent committees have considered the rule in the last 20 years; neither advocated its abolition but their approaches were different. We discuss these previous reviews[3] and we then mention some recent attempts to change the rule both in this country[4] and overseas.[5]

The historical background to the rule

2.3 As we described the development of the rule in some detail in LCCP No 136,[6] we will content ourselves here with only a brief summary of its history. In the early Middle Ages, when a homicide occurred, two different actions could be brought: proceedings at the king's suit (a public prosecution), and an appeal for felony of death (which was the equivalent of a private prosecution by interested parties, usually the relatives of the victim). This latter was instituted first.

2.4 In an attempt to simplify the procedure which had previously existed, a statute[7] was passed in 1278 which provided that the appeal for felony of death would stand if the relative sued within a year and a day of the act which allegedly caused the death. This was subsequently interpreted as imposing a rule that if proceedings were not brought within the specified period, the right to bring appeal proceedings would be lost.[8] The appeals of death procedure was eventually abolished, but by this time the year and a day limit had become fixed as a substantive rule of law in the offence of murder.[9]

1 See paras 2.3-2.4 below.

2 See paras 2.5-2.15 below.

3 See paras 2.16-2.20 below.

4 See paras 2.21-2.24 below.

5 See paras 2.21-2.29 below.

6 LCCP No 136 paras 2.1-2.7; and see also D E C Yale "A Year and a Day in Homicide" [1989] CLJ 202.

7 Statute of Gloucester, 6 Edw 1, c 9 (1278).

8 See D E C Yale "A Year and a Day in Homicide" [1989] CLJ 202 and Fitz Ab Corone (1330) 303.

9 Eg Coke wrote that an essential ingredient of the crime of murder was that "the party wounded, or hurt, etc die of the wound, or hurt, etc within a year and a day after the same": *Coke's Institutes* (1809) Part III p 47.

The present status of the rule

2.5 The rule now applies not only to murder but also to other offences, for example, manslaughter. In *Dyson*,[10] the accused inflicted injuries on a child in November 1906 and again in December 1907. The child died in March 1908. The trial judge directed the jury that the accused could be found guilty of manslaughter even if the death was caused by the injuries inflicted in November 1906.

2.6 Lord Alverstone, giving the judgment of the newly created Court of Criminal Appeal, held that this was a misdirection because:

> "... it is still undoubtedly the law of the land that no person can be convicted of manslaughter where the death does not occur within a year and a day after the injury was inflicted, for in that event it must be attributed to some other cause".[11]

2.7 This decision is interesting for two reasons. First, the court expressed the rule in terms of *causation*: if the death occurred more than 366 days after the injury was inflicted it was presumed not to have been *caused* by the injury. Secondly, the court was expressing an *unequivocal* proposition. It thereby turned what was probably formerly a question of fact for a jury to decide (that is, the question of causation) into the irrebuttable presumption of law which it now is in cases where there has been a lapse of time of more than 366 days between the injury and the death.

2.8 The rule has also been held to apply to the statutory offence of infanticide.[12] Section 1(1) of the Infanticide Act 1938[13] empowers a court to convict a defendant of infanticide "notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder". Accordingly, when more than a year and a day has elapsed between the initiating act and the death, a defendant cannot be convicted of infanticide because she could not have been convicted of murder.

2.9 In *Ex parte De Luca*[14] the Divisional Court said that the rule applied to killings pursuant to a suicide pact, reduced to manslaughter by section 4(1) of the Homicide Act 1957, and to aiding and abetting suicide contrary to section 2(1) of the Suicide Act 1961.[15] It decided at the same time that a verdict of suicide could not be

[10] [1908] 2 KB 454.

[11] [1908] 2 KB 454, 456.

[12] *Inner West London Coroner ex parte De Luca* [1989] QB 249 at pp 252E and 254H *per* Bingham LJ and Hutchison J respectively.

[13] See Appendix B.

[14] [1989] 2 QB 249.

[15] For the relevant statutory provisions, see Appendix B.

returned at an inquest if the death occurred more than a year and a day after the relevant injury had been inflicted by the deceased.

2.10 The *De Luca* case[16] is also significant for the approach of Bingham LJ, who pointed out that the court could take one or other of two views, namely:

> "one is that taken by this coroner ... . The year and a day rule is an anomalous relic of a (no doubt fully justified) distrust of medical science in medieval times. It may have provided, and provides, a useful if arbitrary rule of thumb where crime is concerned. It should not be extended into a field where no criminal liability is involved so as to preclude an objective scientific inquiry by a coroner into how, when and where a deceased person came by his death and the giving of a verdict of suicide where this is established on the facts.
>
> "The alternative argument is that ... [s]uicide may, as such, have ceased to be a crime but it has not lost all its criminal implications. ... A stigma remains, particularly to those of certain faiths. A verdict of suicide (however the language is softened) should not be recorded now that suicide is no longer criminal when it could not have been recorded when it was. The rule that after passage of a year and a day death must be attributed to some other cause should be applied now as it would have been then."[17]

2.11 Bingham LJ concluded that "while good social arguments could be advanced for abrogating the rule for purposes of [offences under sections 4(1) of the Homicide Act 1957 and 2(1) of the Suicide Act 1961] and murder and manslaughter, I see very little social advantage in abrogating it for the purposes of a coroner's verdict alone".[18]

2.12 Significantly, the rule may also apply to motoring offences involving the causing of death. In *Government of the USA v Jennings*,[19] Lord Roskill said that the legal ingredients of motor manslaughter and the now repealed statutory offence of causing death by reckless driving were identical.[20] If this dictum was literally true, the year

[16] [1989] 2 QB 249.

[17] *Ex parte De Luca* [1989] QB 249, 253H-254C.

[18] *Ibid* at p 254E. A similar approach was adopted by the Nathan Committee, see paras 2.18-2.20 below.

[19] [1983] 1 AC 624.

[20] *Ibid*, 644H-645A. Lords Fraser, Scarman, Bridge and Brightman agreed with his speech.

and a day rule would have applied to the statutory offence in the same way as it applied to manslaughter at common law.[21]

2.13 On 1 July 1992, the statutory offence of causing death by reckless driving was replaced by a new statutory offence of causing death by dangerous driving.[22] The main difference between the new offence and the old is that the new offence is directed at the *manner* of the defendant's driving,[23] whereas the old offence required an assessment of the defendant's *state of mind.* Smith and Hogan believe that the rule applies to the new offence, and to all other forms of criminal homicide.[24] There is, however, no judicial authority on this point.

2.14 If the rule applies to the offence of causing death by dangerous driving, it probably applies also to other driving offences which have as an element "causing the death of another", such as the new offence of causing death by careless driving while under the influence of drink or drugs[25] and also that of causing death by aggravated vehicle taking.[26]

2.15 We expressed these views about the applicability of the rule to motoring offences in LCCP No 136[27] and none of our consultees disagreed with us. For the purposes of the rest of this report, we will assume that the rule applies to all these offences. If it does not, this only goes to show the anomalous and unprincipled nature of the rule.

[21] D E C Yale in "A Year and a Day in Homicide" [1989] CLJ 202, 210 states that "it seems likely that the rule also applies to the causing of death by reckless driving".

[22] This was inserted into the Road Traffic Act 1988 by s 1 of the Road Traffic Act 1991: see Appendix B.

[23] The new offence covers those whose driving falls far below what would be expected of a competent and careful driver, Road Traffic Act 1988 ss 1 and 2 A (as amended): see Appendix B.

[24] J C Smith and B Hogan, *Criminal Law* (7th ed, 1992) p 331.

[25] Section 3A of the Road Traffic Act 1988, introduced by s 3 of the Road Traffic Act 1991: see Appendix B.

[26] Section 12A of the Theft Act 1968, introduced by s 2(1) of the Aggravated Vehicle Taking Act 1992: see Appendix B. While the offence of aggravated vehicle taking in itself under s 12A(2)(b) is committed irrespective of whether death is caused, s 12A(4) provides for a maximum sentence of five years' imprisonment if death is caused. This sentencing provision, therefore, creates a separate offence: *Courtie* [1984] AC 463, and see *Button, The Times* 21 October 1994, and Professor Sir John Smith's commentary on *DPP v Butterworth* [1995] Crim LR 71.

[27] LCCP No 136 para 2.15.

Previous reviews of the rule

The views of the Criminal Law Revision Committee

2.16 In March 1980 the Criminal Law Revision Committee ("the CLRC") published its Fourteenth Report on offences against the person,[28] in which it recommended that the rule should be retained for three reasons, namely, (1) the difficulty of proving causation where there is a gap between injury and death, (2) the fact that it would be wrong for a person to remain almost indefinitely at risk of prosecution for murder, and (3) the consideration that where the rule applies to prevent a prosecution for a fatal offence, there are frequently alternative offences, carrying maximum penalties of life imprisonment, with which the defendant can be charged.[29] We will consider the force of each of these arguments in Part III below.[30]

The Draft Criminal Code

2.17 When we prepared a draft Criminal Code for England and Wales in 1989,[31] we followed a general policy of including in it, without any further consideration, recent unimplemented recommendations of expert bodies such as the CLRC.[32] Thus, in the light of the recommendations contained in the CLRC's Fourteenth Report,[33] the rule was preserved in the draft Code,[34] and no fresh thought was given to it at that time.

The Nathan Committee

2.18 In the late 1980s, the rule was considered by the Nathan Committee,[35] which received evidence on the rule from the CPS, the Law Commission, the Association of Chief Police Officers of England and Wales (Crime Committee),[36] the Howard League for Penal Reform, and the Scottish Crown Office, together with oral evidence from the Home Advocate Depute.[37]

[28] CLRC Fourteenth Report: Offences against the Person (1980) Cmnd 7844.

[29] The CLRC went on to recommend that in cases where there is a lapse of time between the act which causes injury and the infliction of injury itself (eg when a bomb is set to go off at some later time), the year and a day period should start to run from the infliction of injury; and, where pre-natal injury is inflicted, from birth: Fourteenth Report, para 40.

[30] In paras 3.3-3.10, 3.11-3.14 and 3.15-3.25 respectively.

[31] A Criminal Code for England and Wales, Law Commission Report No 177 (1989), hereafter "Law Com No 177".

[32] Law Com No 177, para 3.34.

[33] See para 2.16 above.

[34] Clause 53(b).

[35] See para 1.4 above.

[36] Hereafter, "ACPO".

[37] See LCCP No 136 paras 3.6-3.14 for details of the submissions.

2.19 In the event, the Nathan Committee, whose terms of reference limited it to the consideration of the offence of murder, concluded that:

> "[T]he 'year and a day rule' is not particular to the law of murder. It applies also to manslaughter and to the offence of aiding, abetting, counselling or procuring suicide, contrary to the Suicide Act 1961.[38] Whatever the merits or demerits of the rule, it would not be appropriate to abolish it for the law of murder while leaving it in force with respect to these other offences of homicide which are outside the Committee's terms of reference. The Committee recommend that no change should be made in this aspect of the law."[39]

2.20 Thus, the committee took the same course as was subsequently adopted by Bingham LJ[40] in concluding that the rule could not be abolished in respect of only one offence but that it had to be examined in the context of all the offences to which it applies. As we have said,[41] we were conscious of the same consideration when we were preparing our consultation paper on involuntary manslaughter.[42] This was one of the factors which led to our decision to review the rule in the context of this separate law reform project.

Recent developments in England

2.21 In recent years, there has been increasing public concern about the rule and in particular about the fact that it has led to some very unexpected and strange results, for example in the Cambridge,[43] Oxford[44] and Darlington[45] cases.

2.22 As a result of this last case, the rule was attacked by Mr Alan Milburn,[46] the member of Parliament for Darlington. He later proposed an amendment[47] to the Criminal Justice and Public Order Bill 1994 in the following terms:

[38] See Appendix B (footnote added).

[39] Report of the Select Committee on Murder and Life Imprisonment (1989) HL 78-I, para 34.

[40] In *Ex parte De Luca* [1989] QB 249, 254D-E: see para 2.11 above.

[41] See para 1.4 above.

[42] LCCP No 135.

[43] See para 1.6 above.

[44] See para 1.7 above.

[45] See para 1.8 above.

[46] Written Answer, *Hansard* (HC) 5 November 1993, vol 231, col 527; *Hansard* (HC) 2 December 1993, vol 233, col 1163 (oral question to Prime Minister).

[47] *Hansard* Criminal Justice Public Order Bill: Standing Committee B, 26th Sitting, 3 March 1994 (Morning), Cols 1159-1167.

"[t]he presumption in criminal law that the offence of murder shall occur only if the party wounded or hurt dies of the wound or hurt within a year and a day shall be abolished".

Significantly the proposed amendment only applied to murder and not to the other offences[48] to which the rule applies.

2.23 Mr David MacLean MP, the Minister of State for the Home Office, answering on the Government's behalf, accepted that medical science had moved on and that this had left the rule in an unsatisfactory position. However, he was not prepared to accept the new clause immediately for two reasons: it did not provide a mechanism to control potentially unlimited liability for murder, and it dealt only with murder and not with the other offences to which the rule applies, particularly manslaughter. On this basis he was satisfied that it was appropriate to institute a thorough and urgent examination of the rule, and he told the Standing Committee that the Law Commission had agreed to consider this matter. With some reluctance the clause was withdrawn before it was voted upon.

2.24 The issue was raised again at the report stage of the same Bill.[49] Mr Milburn again sought to introduce a clause to remove the rule, but this time the proposed clause covered not only murder but also manslaughter. He was supported by Mr Alex Carlile QC MP, who stressed that the law in England and Wales was out of step with that in Scotland and indeed the rest of Europe. Mr MacLean agreed that he was personally inclined to the view that abolition would turn out to be the only sensible course, but he resisted the introduction of the clause on the grounds that the issue was not as simple as was being suggested[50] and that the Law Commission had already independently arrived at a decision to review the rule.[51] The new clause was defeated by 17 votes.

Recent developments in other jurisdictions[52]

2.25 In Canada, section 210 of the Canadian Criminal Code preserves the rule in respect of "culpable homicide or the offence of causing death of a person by criminal negligence or by means of the commission of [the offences of causing death by dangerous driving or causing death by driving while under the influence of alcohol or a drug]". It has been heavily criticised as being an anomaly which should be

[48] See paras 2.5-2.15 above.

[49] *Weekly Hansard* (1994), Issue No 1651, vol 241, cols 86-90.

[50] *Ibid*, col 89. He referred to the decisions of the CLRC and the Nathan Committee not to recommend abolition of the rule: see paras 2.16 and 2.19 above.

[51] In the course of our review of involuntary manslaughter: see para 1.14 above.

[52] For further details see LCCP No 136 Appendix B.

removed.[53] In *Recodifying the Criminal Law*[54] the Law Reform Commission of Canada recommended that the specific causation provisions for homicide, including the year and a day rule, should be subsumed under a general causation provision.[55]

2.26 Following the publication of that report, the federal and provincial governments embarked upon a project to consider possible reforms of Canadian homicide law. The Final Report of a Federal-Provincial Working Group on Homicide, published in June 1990, recommended an amendment of the rules of causation which, inter alia, removed the rule from Canadian law.

2.27 In Australia the year and a day rule has been abolished in Victoria,[56] New South Wales,[57] South Australia,[58] Western Australia[59] and Tasmania.[60] Queensland remains the only state to retain the rule; and there, too, change is now contemplated as the Final Report of the Queensland Criminal Code Review Committee[61] has recommended the repeal of the rule on the ground that it is anomalous.

2.28 In New Zealand the Crimes Consultative Committee in its 1991 Report on the Crimes Bill 1989[62] recommended the abolition of the rule. This recommendation has not yet been implemented.

2.29 In the United States of America, the rule has survived either by judicial decision or statute in most states, but the modern trend appears to be towards the abolition of the rule.[63]

[53] D Stuart, *Canadian Criminal Law* (2nd ed, 1987) p 105.

[54] Law Reform Commission of Canada, Report 31 p 56.

[55] In clause 2(6) of the proposed new code which states that anyone causes a result when his conduct substantially contributes to its occurrence and no other unforeseen and unforeseeable cause supersedes his conduct.

[56] Crimes (Year and a Day Rule) Act 1991 (Victoria): see Appendix C to LCCP No 136.

[57] Crimes (Injuries) Amendment Act 1990 (NSW), Act No 101 of 1990: see Appendix C to LCCP No 136.

[58] Criminal Law Consolidation (Abolition of the Year and a Day rule) Amendment Act 1991 (SA): see Appendix C to LCCP No 136.

[59] Criminal Law Amendment Act 1991 (Western Australia): see Appendix C to LCCP No 136.

[60] Criminal Code Amendment (Year and a Day Rule Repeal) Act 1993.

[61] Final Report of the Criminal Code Review Committee to the Attorney General (June 1992) Sched 2.

[62] Report of Crimes Consultative Committee 1991, pp 51-52.

[63] La Fave and Scott *Criminal Law* (2nd ed, 1986) p 299; and see LCCP No 136 Appendix B paras 13-16 for details of the present application of the rule in the United States.

PART III
THE ISSUES

Introduction

3.1 In this part we consider the matters which we identified in our consultation paper as being of relevance in any discussion of the changes, if any, which should be made to the rule. We start by considering the reasons which have been regarded as justifying its continuation.

3.2 In short, three arguments have commended themselves to those who have favoured retaining the rule,[1] namely (1) the difficulty of proving causation when there is a long gap between injury and death ("the causation problem"); (2) the fact that it would be wrong for a person to remain almost indefinitely at risk of prosecution for murder or another fatal offence ("the finality argument"); and (3) the consideration that even where the rule applies, the defendant can usually still be convicted of a serious offence. In paragraphs 3.3-3.19 below we consider the validity of these three arguments.

(1) The causation problem

3.3 We will first consider what we have called "the causation problem". Our provisional view in LCCP No 136 was that there was no need to retain the rule on this ground because progress in medical science has enabled doctors to identify a cause of death even though it occurred more than a year and a day before.[2] The CLRC in its Fourteenth Report recognised that this was arguably the case, though it recommended retention of the rule on other grounds,[3] including the finality argument.

3.4 Our provisional view was influenced by the fact that in Scotland the absence of the rule has not apparently caused any problem on this or any other ground. We asked our consultees for their comments on this: the Lord President[4] confirmed our opinion, and no-one dissented from it.

3.5 When we considered the causation problem, we provisionally indicated that we were unaware of any other area of the law in which it has been decided that technical evidence is too difficult for a jury to comprehend.[5] In our experience, it is quite common for jurors to have to deal with technical matters: for example, fingerprint or DNA evidence, evidence about the effect that drugs may have had on the

[1] Eg the CLRC: see para 2.16 above.

[2] See LCCP No 136 para 6.4(a).

[3] See para 2.16 above.

[4] The senior judge in the Court of Session.

[5] See LCCP No 136 para 4.22.

defendant, or evidence of City practice or of complex and difficult financial transactions which might form the basis of a fraud prosecution.

3.6 Furthermore, and more relevantly, coroners' juries frequently have to consider complex evidence as to the means by which the deceased died.[6] This entails analysis of medical evidence in order to determine what, in medical terms, was the cause of death. In this context, then, the jury is expected to be able to deal with complicated factual problems of causation.

3.7 Significantly, on consultation nobody disagreed with our suggestion that problems about causation did not justify the continuance of the rule; on the contrary many supported our approach.

3.8 The British Medical Association stressed that "with the advance of medical science, the understanding of the progression of ill health and disease means that what may have been a substantial evidential problem is now less so". An experienced criminal barrister, Mr Alex Carlile QC MP, agreed that

> "progress in modern medical science and forensic science should mitigate [the] problem [of causation]. As Counsel I have been involved in court cases brought long after the crime and on one occasion I was junior Counsel for the prosecution in relation to a murder which had taken place 22 years before the trial. Delay was an issue, but with regard to recollection rather than causation".

3.9 Another consultee[7] felt some concern as to the ability of pathologists to testify as to what caused a death. But he agreed "that that worry does not suddenly become prohibitive 366 days after the event. It ought ... to be reflected ... in a consciousness on the part of trial judges of the potential difficulties in the way of prosecution in such cases and a willingness to find 'no case' or to make these difficulties clear in directing the jury".

3.10 All these points are cogent; and it should also be borne in mind that the burden of proof is upon the prosecution, and if they cannot show beyond reasonable doubt that the defendant's acts caused the death, the prosecution will fail.[8] Thus, we reject the idea that the rule should be retained because of difficulties in ascertaining the exact cause of death after more than a year's lapse of time.

[6] See *HM Coroner for North Humberside and Scunthorpe, ex parte Jamieson* [1994] 3 WLR 82 (CA) for details of the coroners' jury's role.

[7] Mr Simon Gardner, Fellow and Tutor in Law of Lincoln College Oxford.

[8] *Woolmington v DPP* [1935] AC 462.

(2) The finality argument

3.11 The second argument relied upon by the supporters of the rule is "the finality argument", namely that it would be wrong for a person to remain almost indefinitely at risk of prosecution for murder.

3.12 There are two separate aspects to this objection. First, there is a concern that a defendant who has not hitherto been prosecuted for *any* offence relating to the conduct which caused the death may, after the death, be liable to be prosecuted for murder or manslaughter at any time. However, there is no limitation period for other serious offences, and it is hard to see why prosecutions for fatal offences should be subject to different rules.[9] For example, charges for sexual offences are often brought years after the incidents in question,[10] and many people accused of murder who are not detected or apprehended at the time of the offence are tried years later.[11]

3.13 The second aspect to the finality argument relates to double jeopardy: a person may have been sentenced to a long period of imprisonment for an assault charge or attempted murder and then find himself prosecuted for murder, which carries a mandatory life sentence, in relation to the same incident. This can happen under the present law if the death occurred within a year and a day,[12] but the problem will be more serious if the rule is abolished.

3.14 We do not believe that there has to be a stark choice between the continuation of the rule, on the one hand, and a situation in which people are inevitably disadvantaged by prosecutions brought after a lapse of time or put in jeopardy of twice being severely punished for the same criminal act, on the other. As we demonstrate in Part V below, we consider that the most appropriate way to protect defendants in these situations is through an effective screening process which will help to prevent unfair or oppressive prosecutions.[13]

[9] See para 4.8 below for an argument in favour of different treatment.

[10] On consultation, the Council of HM Circuit Judges stressed that they frequently deal with "late reported sexual abuse cases of ten years and more". They added, on the need for a limitation period, "no reason is seen to have different rules for late deaths than for any very old allegations".

[11] Eg David Main was prosecuted in June 1994 for a murder said to have been committed by him in 1973: *The Guardian* 28 June, 1994.

[12] Harold Golding was sentenced to eight years imprisonment for causing grievous bodily harm with intent and was later charged and convicted of murder when the victim of his attack died 11 months after the assault: *The Times* 28 April 1994.

[13] See para 5.38 below.

(3) The contention that the rule does not work an injustice because the perpetrator might be convicted of an alternative serious offence

3.15 It will be recalled[14] that the CLRC in its Fourteenth Report justified the existence and continuation of the rule on the ground that, inter alia:

> "when death follows over a year after the infliction of injury the killer does not necessarily escape justice. He may be charged with attempted murder or causing grievous bodily harm with intent, both of which are punishable, and, if our recommendations are accepted, will continue to be punishable, with life imprisonment".[15]

3.16 We now turn to examine the alternative offences which are available at present if the rule prevents prosecution for a fatal offence.

3.17 In some cases the rule gives immunity to people who could have been prosecuted for gross negligence manslaughter if the victim had died within a year and a day of the causing of the harm. Examples of wrongful acts which might fall into this category are the giving of grossly negligent medical treatment[16] or the defective rewiring of a house by an electrician.[17]

3.18 The basic requirement for gross negligence manslaughter is that death was caused by the serious or "gross" negligence of another: there is no need to prove intention or foresight of harm on the part of the accused.[18] For this reason, there is frequently no alternative offence with which a defendant can be charged; for example, the least serious assault offence under the Offences against the Person Act 1861 requires that the accused foresaw either that his actions would cause another to fear violence or that they would lead to some physical contact with another person.[19] Therefore, in some cases where death is caused by gross negligence, there is no alternative offence with which the person responsible can be charged because of the rule.

[14] See para 2.16 above.

[15] Fourteenth Report, para 39.

[16] *Adomako* [1994] 3 WLR 288; and see LCCP No 135 paras 3.121-3.150.

[17] *Holloway (sub nom Prentice)* [1994] QB 302; see LCCP No 135 paras 3.151-3.153.

[18] See LCCP No 135 Part III and in particular the analysis at paras 3.145-3.155; see also *Adomako* [1994] 3 WLR 288, 292-295.

[19] See Legislating the Criminal Code: Offences against the Person and General Principles (1993) Law Com No 218 para 12.26; or J C Smith and B Hogan, *Criminal Law* (7th ed, 1992) pp 404-406 and 426-428; and Appendix B below for the relevant statutory provisions.

3.19 In other cases,[20] the rule leads to convictions for lesser offences such as attempted murder or assault offences under the Offences against the Person Act 1861.[21] We think it is wrong that a defendant should be charged with an offence which does not properly reflect the consequences of his conduct merely because his victim happens to survive for more than 366 days. This consequence of the rule has a knock-on effect on sentencing, which we now turn to consider.

(4) The effect of the rule on sentencing

3.20 It is a general rule, as we demonstrated in the consultation paper,[22] that offenders receive higher sentences for fatal offences than for non-fatal offences. We concluded, therefore, that the rule leads to lower sentences being imposed, and this analysis was not criticized by any of our consultees.

3.21 One of the most startling examples is that if the victim dies more than 366 days after an incident of dangerous driving, it is likely[23] that the driver can be prosecuted only for dangerous driving,[24] an offence with a maximum sentence of two years' imprisonment, and cannot be charged with the more serious offence of causing death by dangerous driving,[25] which carries a maximum sentence of ten years.[26]

3.22 The Court of Appeal has held[27] that in bad cases of causing death by dangerous driving, or of causing death by careless driving when under the influence of drink or drugs,[28] the defendant should be imprisoned for upwards of five years, and in the very worst cases, if contested, the sentence should be the maximum permitted. It stressed that only exceptionally would a non-custodial sentence be appropriate. By contrast, if the driver does not cause death, or if he cannot be charged with causing death because of the rule, he can be sentenced to a *maximum* of two years' imprisonment and a fine: since it is a relatively new offence, no clear sentencing guidelines have yet been laid down.

[20] See paras 1.6-1.8 above.

[21] See Appendix B.

[22] LCCP No 136 paras 4.27-4.46.

[23] See paras 2.12-2.15 above.

[24] Road Traffic Act 1988 s 2 (as amended by the Road Traffic Act 1991 s 1): see Appendix B.

[25] Road Traffic Act 1988 s 1 (as amended by the Road Traffic Act 1991 s 1): see Appendix B.

[26] Criminal Justice Act 1993, s 67.

[27] *Shepherd* [1994] 1 WLR 530, 536; and in *Attorney-General's Reference (No 24 of 1994), The Times* 31 October 1994, the Court of Appeal increased to four years' imprisonment the sentence of a man convicted of this offence even when taking into account the double jeopardy factor, ie that he had already been dealt with by the Crown Court.

[28] Road Traffic Act 1988 s 3A (as amended by the Road Traffic Act 1991 s 3).

3.23 There are numerous other cases in which a defendant can expect a much lighter sentence if the death of his victim does not occur within the year and a day period. In LCCP No 136[29] we looked at the sentences that a defendant could expect to serve for murder, manslaughter and other fatal offences and contrasted these with the sentences imposed for the corresponding non-fatal offences.

3.24 The table below shows the average length of time actually served by a person convicted of murder and given the mandatory life sentence.[30]

Year of release	Average time served (years)
1988	10.1
1989	11.6
1990	12.2
1991	12.2
1992	12.5 (provisional figure)

By contrast, the average length of time actually spent in prison by someone convicted of attempted murder in 1991 was between three years nine months and five years.[31] This is the case even though the intention required for attempted murder—intention to kill—is more blameworthy than that required for murder, namely, intention to kill *or* to cause serious injury. In this context also, then, it is apparent that if an offence based on the causing of death can be charged, the accused is likely (if convicted) to serve a markedly higher sentence.

3.25 The average sentence imposed for manslaughter in 1991 was four years ten months,[32] while the average sentence for causing grievous bodily harm with intent was three years, and one year three months for unlawfully inflicting grievous bodily harm. Obviously, there are substantial variations within each category,[33] but what

[29] LCCP No 136 paras 4.27-4.45.

[30] Murder (Abolition of Death Penalty) Act 1965 s 1(1). It should be remembered that a person convicted of murder remains on licence for the rest of his life, even once he has been released from prison.

[31] See LCCP No 136 para 4.31.

[32] Although 29% of defendants convicted of manslaughter receive a non-custodial sentence: see LCCP No 136 para 4.34.

[33] We are grateful to Dr David Thomas who drew our attention to a case where the Court of Appeal upheld a sentence of 15 years on a man aged 22 with no previous record of serious violence for a particularly brutal offence of causing grievous bodily harm with intent which left the victim permanently crippled and ultimately caused his death: *Slater and Knowles* (15 July 1994, CACD) unreported.

these statistics indicate is that murder and manslaughter attract on average substantially longer sentences than the substitute offences with which the defendant may have to be charged because of the rule.

Conclusion

3.26 We do not believe that the continuation of the rule can be justified. The three arguments that have been relied upon in the past in support of its continued existence[34] no longer retain any validity. There is no reason why a jury is any less able to deal with questions of causation where there is a long gap between injury and death.[35] If the rule were to be abolished, it would be possible to create appropriate procedural safeguards which would make an unfair homicide prosecution less likely to be brought.[36] Finally, the rule works an injustice because the perpetrator sometimes cannot be convicted of an alternative serious offence, as in some instances of killing by gross negligence.[37] In other cases the defendant is prosecuted for a less serious offence and spends less time in prison than he would have done if the rule had not applied.[38]

3.27 We will now consider the options for reform which we set out in LCCP No 136.[39]

[34] See para 3.2 above.

[35] See paras 3.3-3.10 above.

[36] See paras 3.11-3.14 above, and Part V below.

[37] See paras 3.17-3.18 above.

[38] See paras 3.19-3.24 above.

[39] See para VI thereof.

PART IV
OPTIONS FOR REFORM

Introduction

4.1 In LCCP No 136 we put forward for consideration various options as to how the law might be clarified, reformed and put on a statutory basis to form part, in the long term, of a complete criminal code.[1] We invited the comments and criticisms of our readers on these options. We have now had the benefit of the responses on consultation, for which we are very grateful. In this part of our report we consider the various options in the light of these responses.

Option 1: Retain the rule

4.2 We included this option because it was the conclusion of the CLRC in its Fourteenth Report,[2] as well as reflecting the views expressed to the Nathan Committee[3] by ACPO[4] and the Howard League for Penal Reform. In 1994 not one of our consultees supported it.

4.3 There do not appear to be any reasons justifying the continued existence of the rule; as we showed in Part III, it is anomalous and creates injustice. In LCCP No 136, our provisional view was that it should be abolished;[5] consultation has only confirmed us in this belief.

4.4 Of the 52 who responded to our consultation paper, 43 favoured the view that the rule should be abolished. They included judges,[6] academics,[7] legal practitioners' bodies,[8] parliamentarians,[9] the police and prosecuting authorities,[10] those with experience of medical matters[11] and others with knowledge and experience of the

1 LCCP No 136 Part VI.

2 See para 2.16 above.

3 See para 2.18 above.

4 See LCCP No 136 para 3.9; ACPO has changed its view and stated in its response that it now recommends abolition.

5 LCCP No 136 para 6.19.

6 The Lord Chief Justice; Rougier, Alliott, Tuckey, Waterhouse and Philips JJ; the Judge Advocate General; and the Council of HM Circuit Judges.

7 Professor Sir John Smith QC, Professor Glanville Williams QC, Professor Andrew Ashworth, Mr Simon Gardner, Mr David Yale, Mr John Spencer and Dr Jeremy Horder.

8 The Bar Council Law Reform Committee, the Criminal Bar Association, the Criminal Law Committee of The Law Society.

9 Alex Carlile MP, Lord Morton of Shuna, Lord Nathan and Mr Alan Milburn MP.

10 The Police Superintendents' Association, the Association of Chief Police Officers, the Police Federation and the Crown Prosecution Service.

11 The British Medical Association and the Solicitor for the Department of Health.

criminal law. The rule has been condemned as "completely outdated and publicly indefensible";[12] a proposition which "cannot be defended in its present form";[13] a "nonsense";[14] and "an arbitrary rule now overtaken by advances in medical and forensic science".[15]

4.5 For all these reasons, we reject this option.

Option 2: Make the rule a rebuttable presumption

4.6 This option would mean that in cases where death occurred more than a year and a day after the injury there would be a presumption, which could be challenged in court, that the injury did not cause the death. Our provisional view was that such an amendment to the rule would have the same effect as outright abolition of the rule because it is always for the prosecution to prove the cause of death beyond reasonable doubt.[16] None of our consultees supported this proposal and we reject it.

Option 3: Amend the rule by extending the time limit

4.7 This option was adopted in the Californian Penal Code.[17] This Code originally incorporated the year and a day rule but it was amended in 1969 so that it now reads:

> "to make the killing either murder or manslaughter it is requisite that the party die within three years and a day after the stroke received or the cause of death administered. In the computation of such time, the whole of the day on which the act was done shall be reckoned the first".[18]

4.8 This option was favoured by a few respondents.[19] Among them was Hutchison J,[20] who pointed out that homicide offences can be distinguished from other crimes which are not subject to a limitation period on prosecution because there may be a long lapse of time between the criminal conduct and the occurrence of the

[12] By Mr Justice Tuckey.

[13] By Professor Andrew Ashworth, the editor of the Criminal Law Review.

[14] By Mr John Spencer of Selwyn College, Cambridge.

[15] By the Judge Advocate General.

[16] *Woolmington v DPP* [1935] AC 462; and see LCCP No 136 para 6.8.

[17] The Californian Penal Code § 194: see LCCP No 136 Appendix B paras 14-15.

[18] *West's Annotated California Codes, Penal Code* (St Paul, Minn, 1988) p 409.

[19] In addition to the respondents cited in this and the following paragraph, the Coroners' Society thought that there were "very cogent arguments for having some limit" to protect defendants from stale prosecutions.

[20] One of the two serving judges who have had to consider the rule, in *Ex parte De Luca* [1989] QB 249: see paras 2.8-2.11 above.

consequence—death—which completes the crime. He was concerned about leaving offenders who may not be morally much to blame indefinitely at risk of prosecution for a homicide offence; and he believed that three years and a day would strike a proper balance between the need to extend the time limit to reflect changed social and medical conditions, and the need to achieve finality for the protection of defendants. He believed that the time should run from the date when the defendant was arrested in connection with the events said to have caused the death.

4.9 Liberty and JUSTICE also supported amending the rule to allow homicide prosecutions only where death occurs within three years of the day on which injury was caused. The reasons given for this proposal were, broadly, the same as those given for the retention of the rule by the CLRC in its Fourteenth Report:[21] the causation problem and the finality argument. We have considered these arguments in paragraphs 3.3-3.14 above. Liberty and JUSTICE were particularly concerned with the position of the defendant who has already served a long sentence for a non-fatal offence prior to the death of the victim, and also with defendants in cases where there has been a substantial lapse of time between the causing of injury and the prosecution for homicide.

4.10 Although a three year rule would obviously have a more limited effect than the year and a day rule, all the objections that can be made to the present rule[22] would apply to this amendment. There have been a number of cases[23] in which victims have been kept alive for more than three years. As medical science develops, patients can expect to be kept alive for increasingly long periods. As the British Medical Association pointed out in their response to LCCP No 136, "it would seem regrettable if the availability of ultimately unavailing treatment should prevent the appropriate criminal charge from being brought forward", and it would be "highly inappropriate that there should be any interaction between medical care and criminal law in such circumstances".

4.11 We agree with the BMA that doctors should not be called upon to make decisions about care which will affect the criminal liability of the person who injured their patient. Furthermore, we consider that the existence of any fixed limitation period for homicide prosecutions—be it one or three years and a day—would place

[21] See para 2.16 above.

[22] See Part III above and LCCP No 136 para 6.19.

[23] The House of Lords Select Committee on Medical Ethics was told of cases of people surviving in a persistent vegetative state ("pvs") for 30 and 16 years (1993-94, HL Paper 21-III, written evidence of Dr Keith Andrews, para 3.1.3), and that the BMA's Draft Guidelines stated that "the diagnosis of pvs should not be considered confirmed until the patient has been insentient for 12 months" (HL Paper 21-II, evidence of the BMA, p 56). In *Airedale NHS Trust v Bland* [1993] AC 789, Lord Browne-Wilkinson said (at p 879) "we were told [that the number of pvs cases in this country was] between 1,000 and 1,500".

intolerable pressures on the courts if they are invited to decide on the lawfulness of the withdrawal of medical treatment in pvs cases close to the date when the fixed limitation period is due to expire.[24]

4.12 The fears expressed by those who favoured this option are cogent. However, we do not consider that the protection of the defendant from unfair prosecution justifies the replacement of the rule with another fixed and arbitrary absolute bar. In some cases, prosecution of the defendant for a homicide offence when death occurs more than three years after the wrongful act or omission may be in the interests of justice, including the interests of the relatives of the victim in seeing justice done.

4.13 We agree that it would not be adequate protection for the defendant if his only remedy lay in his ability to bring an application for a stay of a prosecution on the grounds of abuse of process:[25] by that time he would already have been subjected to very substantial worry and possibly expense. We believe that there should be an earlier filtering process, to prevent unjust or oppressive prosecutions from being brought in the first place. This filtering process would be much more flexible than an absolute bar after the expiry of a fixed time period, and would permit prosecutions to be brought if this was in the interests of justice, but would operate fairly and consistently to prevent prosecution in other cases. In Part V below we consider how such a filtering process might be introduced.[26]

Option 4: Abolish the rule for certain offences but retain it for others

4.14 We have described how, when the House of Commons recently debated the proposed repeal of the rule at the committee stage of the Criminal Justice and Public Order Bill, it was proposed that the rule should be repealed insofar as it related to murder.[27] At the report stage, the scope of the proposed repeal extended to manslaughter as well as murder, but not to the other offences to which the rule applies.[28] Neither proposal was accepted. In our consultation paper we provisionally rejected the option that the rule should be abolished for some offences but retained for others.[29]

[24] See *Frenchay Healthcare NHS Trust v S* [1994] 1 WLR 601. In Mentally Incapacitated Adults and Decision-Making: Medical Treatment and Research, Law Commission Consultation Paper No 129 (1993) para 4.4 we recommended the creation of a new judicial forum with jurisdiction to make orders to disapprove the medical treatment of incapacitated patients. This proposal was welcomed by the House of Lords Select Committee on Medical Ethics in its Report (1993-94, HL Paper 21-I) para 246, and we will be reverting to this issue in our report on Mental Incapacity (1995) Law Com No 230, which is due to be published very soon after the publication of the present report.

[25] See paras 5.39-5.40 below.

[26] See in particular para 5.38.

[27] See para 2.22 above.

[28] See para 2.24 above.

[29] LCCP No 136 para 6.12.

4.15 This option, however, was favoured by one of our consultees.[30] He thought that the rule should be abolished with regard to murder, manslaughter, aiding and abetting suicide and infanticide.[31] He believed that in relation to other offences, some time limit should be retained because it would be unjustifiably harsh to leave a defendant at risk of prosecution indefinitely. In practice, this would preserve the rule for motoring offences.[32]

4.16 It seems strange that a dangerous driver who causes death should be treated differently from, say, a grossly negligent anaesthetist. All the criticisms of the rule apply equally in the context of motoring offences. Furthermore, it appears to be the clear intention of Parliament that there should be a marked difference in sentencing between motoring offences causing death and those which do not cause death.[33] We believe that it would be inconsistent for the rule to continue to exist in relation to motoring offences alone. The rule should not be permitted to frustrate the intention of Parliament with regard to the sentencing of drivers who kill. Accordingly we do not accept this option.

Option 5: Abolish the rule and replace it with a time limit for the prosecution of homicide offences

4.17 This option would entail the introduction of a limitation period on the commencement of prosecution for homicide offences along the lines of those which apply to some statutory offences.[34]

4.18 We cannot think of any compelling reason why there should be a time limit for the prosecution of homicide offences but not for other serious offences. In addition, the introduction of such a limitation period would affect a much wider group of cases than those presently covered by the rule. It would apply to limit the prosecution of cases where death followed immediately after injury, but where the identity or whereabouts of the person responsible could not be established for a long period after the offence.

[30] Mr Justice Jowitt.

[31] Provided that the age limit stipulated in s 1 of the Infanticide Act 1938 (for which, see Appendix B) applies to the age of the child when the act or omission which caused the death occurs, as opposed to the age of a child at death.

[32] See paras 2.5-2.15 above.

[33] *Staddon* (1991) 13 Cr App R (S) 171, 173 *per* Cresswell J; see paras 3.21-3.22 above.

[34] For example, the Trade Descriptions Act 1968 s 19(1) sets a time limit of three years from the commission of the offence or one year from its first discovery by the prosecutor, whichever is the earlier; and under the Customs and Excise Management Act 1979 (as amended) s 146(A) sets a period of 20 years if the offence was indictable and three years if it was a summary offence.

4.19 None of our consultees favoured this approach. Nor do we.[35]

Option 6: Abolish the rule without replacement

4.20 This is the option which we support, as did 43 of our consultees.[36] Our reasons for supporting the abolition of the rule are:

(a) The rule appears to have become rooted in substantive law by way of historical accident rather than through any deliberate policy.[37]

(b) With the advance of modern medical science it is normally possible to ascertain the cause of a death, and in particular to point to a specific cause which may have arisen some years earlier.[38]

(c) In consequence, the rule operates to prevent convictions when the cause of death could otherwise be shown, to the required standard of proof, to be a wrongful act which occurred more than a year and a day before the death. In cases where the prosecution cannot satisfy the burden of proving causation, the abolition of the rule would not lead to injustice because a verdict of not guilty would have to be entered.

(d) The rule gives an immunity to some people who would have been guilty of gross negligence manslaughter if the victim had died within a year and a day of the wrongful act or omission.[39]

(e) In many cases the rule leads to convictions for lesser crimes than are appropriate: typically, attempted murder or offences under sections 18 or 20

[35] Although Sir Wilfrid Bourne "would ... like to see [the abolition of the rule] made in conjunction with a more radical reform, beyond the scope of the CP ... whereby an absolute limitation period applied to all criminal proceedings. ..."

[36] ACPO; Mr Trevor Aldridge QC; Mr Justice Alliott; Professor Andrew Ashworth; the Bar Council Law Reform Committee; Sir Wilfrid Bourne KCB QC; Mrs Diana Brahams; Lord Campbell of Alloway QC; the Cardiff Crime Study Group; Mr Alex Carlile QC MP; Lord Justice Carswell; the Council of HM Circuit Judges; the Criminal Bar Association; the CPS; Mr Simon Gardner; Mrs Pat Gibson; Dr J A Harvey; Lord Hope, Lord President of the Court of Session; Dr Jeremy Horder; the Justices' Clerks' Society; the Chief Metropolitan Stipendiary Magistrate; Mr Alan Milburn MP; Lord Morton of Shuna; Lord Nathan; the National Society for the Prevention of Cruelty to Children; the Office of the Judge Advocate General; Ms Nicola Padfield; Mr Justice Phillips; the Police Federation; the Police Superintendents' Association; Mr Justice Rougier; Mr Gary Slapper; Professor Sir John Smith CBE QC FBA; the Solicitor, Department of Health and Department of Social Security; Mr John Spencer; Lord Taylor of Gosforth, the Lord Chief Justice; Mr Justice Tuckey; Judge Lawrence Verney TD, the Recorder of London; Mr Justice Waterhouse; Professor Glanville Williams QC; Mr Justice Wright; Mr David Yale.

[37] See paras 2.3-2.4 above.

[38] See paras 3.3-3.10 above.

[39] See paras 3.17-3.18 above.

of the Offences against the Person Act 1861 have to be relied upon if the victim lives for more than a year and a day after the injury.[40]

(f) Following on from the previous point, it is likely that the rule leads to lower sentences being imposed in cases where death occurred more than 366 days after the infliction of injury.[41]

(g) The experience in Scotland has shown that criminal justice systems can and do operate fairly and effectively without the rule. The rule has been abolished in all states in Australia except Queensland, where the Criminal Code Review Committee has advised that it should be abolished. The American Law Institute's Model Penal Code does not contain the rule. Law reform bodies in both Canada and New Zealand have recommended its abolition.[42]

4.21 In coming to our conclusion we have taken into account the problems that the abolition of the rule might create for the defendant. As we shall show,[43] we believe that it is possible to protect his interests satisfactorily without retaining either the rule or any modified version of it.

Should the reform be prospective or retrospective?

4.22 We asked on consultation whether, if we decided to abolish the rule, this should take effect *prospectively*—in other words, should the rule continue to apply in relation to deaths caused by acts or omissions committed *before* the legislation which abolishes the rule comes into force, but be abolished in relation to deaths caused by acts or omissions committed *after* the commencement of the legislation? Our provisional view was that the abolition of the rule should take effect prospectively, rather than retrospectively.[44] On consultation 16 of our consultees dealt with this point, and 15 of them agreed with us.

[40] See para 3.19 above.

[41] See paras 3.20-3.24 above.

[42] See paras 2.25-2.29 above.

[43] See Part V below, particularly para 5.38.

[44] LCCP No 136 paras 6.25-6.26.

4.23 To adopt this approach would ensure compliance with the European Convention on Human Rights to which the United Kingdom is a party. Article 7(1) of the Convention protects against retroactivity in criminal law in these terms:[45]

> "No one shall be held guilty of any criminal offence on account of an act or omission which did not constitute a criminal offence under national or international law at the time when it was committed."

The remainder of Article 7(1) provides that no heavier penalty can be imposed than that applicable at the time the offence was committed.

4.24 It is not completely certain whether the retrospective abolition of the rule would constitute a breach of Article 7(1) because, with the important exception of some acts or omissions of gross negligence, the act or omission in question would have constituted a criminal offence (albeit not an offence of homicide) before the rule was abolished. However, the abolition of the rule would lead to higher penalties being imposed in some cases. In any event, if the rule were to be abolished retrospectively this would be inconsistent with the accepted principle of English law that changes should not be retrospective.[46]

4.25 **We therefore recommend that the year and a day rule should be abolished with prospective effect (Recommendation 1).**

[45] The most relevant case brought under Article 7 was *Ireland v United Kingdom* (Application No 5451/72 of 6 March 1972: Yearbook XV, 1972). Legislation provided that persons would be deemed to be guilty of criminal offences if they failed to comply with the orders of a member of the security forces. The case was withdrawn on the strength of an undertaking by the United Kingdom that no one would be held guilty of a criminal offence by reason of this legislation on account of an act or omission which was not a criminal offence when it occurred.

[46] See, eg, the general concern about retrospective changes in jurisdiction when the War Crimes Act 1991 was being considered in Parliament (LCCP No 136 para 6.26). Sir Edward Heath MP was concerned that if retrospective legislation was allowed in this sphere, Parliament would be prepared to act retrospectively in other areas (*Hansard* HC 19 March 1990, vol 169 col 925). Lord Campbell of Alloway QC considered retrospective legislation an "anathema" (*Hansard* HL 4 December 1989 vol 513 col 618).

PART V
CONSEQUENCES OF ABOLITION OF THE RULE: SAFEGUARDS FOR THE DEFENDANT AGAINST LATE OR REPEATED PROSECUTIONS

Introduction

5.1 In this part we consider the difficulties which might arise for defendants in terms of late or repeated prosecutions if, as we recommend, the year and a day rule is abolished. It is obvious that the repeal of the rule would lead to more cases in which a considerable period of time will have passed between the incident which led to the death and the prosecution. This might cause difficulties for the defendant, for example, if he or his witnesses can no longer clearly remember what took place.

5.2 Problems might also arise where the defendant has already been prosecuted for a non-fatal offence such as assault or attempted murder before the death occurs.[1] If convicted, he may already have served or be serving a substantial sentence. It is clearly desirable that there should be safeguards for defendants against unduly late or unnecessary second prosecutions. These safeguards should take the form of both a screening process to prevent unfair prosecutions being brought in the first place, and a system by which the defendant can apply to have an unjust prosecution stopped if it is in fact brought.

5.3 We consider first whether the principles now being applied by prosecutors when they decide whether to bring a prosecution would provide an adequate safeguard for a proposed defendant in situations like these, and we recommend that the Attorney-General's consent should be required for a prosecution in certain circumstances.[2] Secondly, we examine the special considerations which apply when the defendant has been acquitted of a non-fatal offence and the complainant subsequently dies.[3]

Protection against the institution of proceedings: the Code for Crown Prosecutors

5.4 The exercise of the discretion whether or not to prosecute is governed by the principles set out in the Code for Crown Prosecutors.[4] The significance of the Code

[1] The pleas in bar of autrefois convict and acquit will not prevent a prosecution for a homicide offence following a previous conviction for a non-fatal offence based on the same facts: *Thomas* [1950] 1 KB 26; *De Salvi* (1857) 10 Cox CC 481; and see LCCP No 136 paras 5.2-5.11.

[2] See para 5.38 below.

[3] See paras 5.44-5.56 below.

[4] The Code is issued pursuant to s 10 of the Prosecution of Offences Act 1985 and is included in the Director's Annual Report to the Attorney General, which is laid before Parliament and published (s 9). The Code, therefore, is a public declaration of the general principles which the CPS applies in the exercise of its functions.

in the present context is that it sets out some of the public interest criteria which have to be considered before a prosecution can be commenced or continued.

5.5 At the time when LCCP No 136 was completed for publication,[5] the edition of the Code then current stated that the factors affecting the decision whether to prosecute varied from case to case "but broadly speaking, the graver the offence, the less likelihood there will be that the public interest will allow of a disposal less than prosecution, for example caution".[6]

5.6 This earlier version of the Code said in relation to "staleness":

> "Regard must be had ... to ... the length of time which is likely to elapse before the matter can be brought to trial. The Crown Prosecutor should be slow to prosecute if the last offence was committed three or more years before the probable date of trial, unless, despite its staleness, an immediate custodial sentence of some length is likely to be imposed ... . Generally the graver the allegation the less significance will be attached to the element of staleness."[7]

5.7 A new edition of the Code was published in June 1994. The relevant passage now reads:

> "a prosecution is less likely to be needed if ... there has been a long delay between the offence taking place and the date of the trial unless:
> •the offence is serious;
> •the delay has been caused in part by the defendant;
> •the offence has only recently come to light; or
> •the complexity of the offence has meant there has been a long investigation".[8]

5.8 There does not appear to be any great difference between the earlier edition of the Code and its successor, except that the earlier Code was more specific about the relevance of the staleness of the offence. It specifically dealt with a case where the offence was committed three or more years before the probable date of the trial and then stated that the Crown Prosecutor "should be slow to prosecute" unless "despite its staleness an immediate custodial sentence of some length is likely to be imposed". However, the CPS[9] has told us that the relevant principles remain the

[5] On 23 May 1994.

[6] Code for Crown Prosecutors (1992) para 8.

[7] *Ibid*, para 8(ii).

[8] Code for Crown Prosecutors (June 1994) para 6.5.

[9] And in the Tom Sargeant Memorial Lecture (1994) Mrs Barbara Mills QC, the Director of Public Prosecutions, referred to the staleness of the offence as being a public interest factor against prosecution: (1994) 144 NLJ 1670-1671.

same,[10] and we will therefore assume that the comments made in the earlier edition will still apply, notwithstanding that they are no longer expressly stated.

5.9 Neither version of the Code makes any explicit reference to the case where the accused has previously been acquitted or convicted of a non-fatal offence and the victim later dies.

5.10 In the case of a defendant who has previously been *convicted* of a non-fatal offence, the new Code is unlikely to prevent a second prosecution for a homicide offence, particularly if that offence is murder. This is because it provides that "the more serious the offence, the more likely it is that a prosecution will be needed in the public interest", and that a prosecution is likely to be needed if "a conviction is likely to result in a significant sentence".[11]

5.11 Since the only possible sentence for murder is life imprisonment, and the maximum sentences for manslaughter, causing death by dangerous driving and other homicide offences are also high,[12] the Code suggests that a prosecution for one of these offences will almost always be justified, even if the accused has already been sentenced to a long period of imprisonment for the non-fatal offence.

5.12 Where the proposed defendant has previously been *acquitted* of a non-fatal offence, the first stage in the decision whether to prosecute, the application of the "evidential test", would be relevant: "prosecutors must be satisfied that there is enough evidence to provide a 'realistic prospect of conviction'".[13]

5.13 If, in the type of case contemplated here, the prosecutor considered that evidence was likely to be excluded by the court because it would be inconsistent with a previous acquittal,[14] and that as a result there would not be sufficient evidence for a realistic prospect of conviction, the prosecution should not be brought. This rule would not, however, necessarily protect a defendant in a case where it was uncertain whether evidence would be excluded or not.[15]

[10] Professor Andrew Ashworth and Ms Julia Fionda comment in an article in the Criminal Law Review on "The New Code for Crown Prosecutors: (1) Prosecution, Accountability and the Public Interest" [1994] Crim LR 894, 901 "[t]he Commission asks whether the 'safeguards' in the 'principles which guide prosecutors when exercising their discretion not to bring a prosecution' would be sufficient. The answer is that any detailed guidance would probably not now be allowed into the Code for Crown Prosecutors ... . Perhaps 'members of the public' do not require such detail, but proper principles of accountability certainly do".

[11] Code for Crown Prosecutors (June 1994) para 6.4.

[12] See paras 3.21-3.24 above.

[13] Code for Crown Prosecutors (June 1994) para 5.1.

[14] See paras 5.49-5.51 below.

[15] See para 5.56 below.

5.14 We asked our readers to comment on whether the provisions of the Code then in force, together with other safeguards such as the power of a court to stay a prosecution for abuse of process, amounted to an adequate protection for a defendant.[16]

5.15 Eighteen respondents stated that they considered the discretion of prosecutors, either alone or in combination with the discretion of the court to stay a case for abuse of process,[17] to provide adequate or sufficient protection for the defendant. Nevertheless we were struck by the fact that some of those who have great practical day to day experience of criminal courts were unhappy about reliance on the Code as a safeguard for defendants.

5.16 The Criminal Bar Association ("the CBA"), for example, was concerned that the weight given in the Code to the seriousness of the offence would mean that a prosecution would *almost always* be brought after the death of the victim. It pointed out that there is a mandatory life sentence for murder and that, with rare exceptions, longer terms of imprisonment are served by persons convicted of homicide offences than by those convicted of lesser offences. The CBA was very conscious of the pressure to prosecute which is sometimes exerted by the relatives of the deceased and the general public. It believed that there should be a two-pronged solution. This should consist of express guidelines for these particular situations in addition to the standard guidance, and also a requirement that the consent of the Attorney General should be given before a prosecution could be brought. The CBA suggested six guidelines which should be borne in mind by both the CPS and the Attorney General.[18]

5.17 Support for a solution along these lines was also forthcoming from the Law Reform Committee of the Bar Council, which was not satisfied that the Code provided a sufficient safeguard. It, also, wished to have a system by which the consent of the Attorney General would be required for renewed or late prosecutions. Others such as Liberty (who did not favour the complete abolition of the rule) feared that the

[16] LCCP No 136 para 6.23.

[17] See paras 5.39-5.43 below.

[18] The suggested guidelines are as follows. In deciding whether to prosecute, the prosecutor should take into account (1) the particular nature of the offence and the circumstances under which it was committed, (2) the length of time which has elapsed since the offence was committed including the effect which the lapse of time might have had on the defendant and his conduct since the offence, (3) the defendant's personal circumstances, including his character and any previous convictions, (4) if he has already been convicted, the defendant's previous sentence including whether he has completed that sentence or how long he has served and how much of the sentence remains to be served, (5) the views of the prison governor and the probation service on the defendant, together with any medical or psychiatric reports and (6) any views which might have been expressed at any time by the deceased and/or by his relatives.

existence of the mandatory life sentence for murder would lead to prosecution in cases where murder became a possible charge after the death of the victim.

5.18 We accept that the factors that will have to be considered in deciding whether to bring either a second prosecution or a prosecution after a lapse of time for a homicide offence are very different from, and more complex than, the considerations normally taken into account by prosecutors.

5.19 In cases where the defendant *has previously been convicted*, it will have to be decided whether it would be right that he should be put in jeopardy of another sentence; this will entail consideration of, inter alia, whether the previous sentence was adequate for a homicide offence. In cases where the defendant *has not previously been prosecuted*, the prosecutor will have to bear in mind, amongst other matters, the effect of the lapse of time on the defendant and the gravity of the offence. As we shall show,[19] quite different considerations apply where the defendant *has previously been acquitted* of a related non-fatal offence.

5.20 We are convinced that it will be very difficult to balance the conflicting considerations dispassionately, especially bearing in mind that there may well be substantial public pressure for a prosecution from relatives of the dead person and the media.

5.21 Traditionally, the Attorney General has been required to give his consent in cases where difficult and unusual public interest considerations have to be balanced. Examples of this are offences of bribery and corruption,[20] offences under the Official Secrets Acts 1911 and 1989, offences of stirring up racial hatred,[21] certain offences of terrorism[22] and prosecutions for war crimes.[23] There are some similarities between the factors which would influence the decision to prosecute for a war crime and for a homicide offence where more than 366 days have passed between the infliction of injury and the death: for example, the gravity of the offence and the lapse of time before the prosecution would be commenced.

Our recommendations

5.22 We have come to the conclusion that, in certain tightly defined cases where the balancing act would be particularly difficult, it should be a condition of prosecution that the Attorney General's consent should first be obtained. The Attorney General

[19] See paras 5.44-5.56 below.

[20] Under the Public Bodies Corrupt Practices Act 1889 s 4, and the Prevention of Corruption Act 1906 s 2.

[21] Public Order Act 1986 s 27.

[22] Prevention of Terrorism (Temporary Provisions) Act 1989 s 19.

[23] War Crimes Act 1991 s 1(3).

is uniquely placed as the Government's senior law officer to carry out the important exercise of using "his best informed judgment before authorising proceedings to commence".[24] Under our proposed scheme, he would be called upon to balance all the relevant factors. We do not think that it is necessary to list these factors. No guidelines are set out in other cases where the Attorney General's consent is required. Instead, the matter is left to his experience.

5.23 In making this recommendation we have taken two important matters into consideration. In the first place, we accept the evidence of the CPS that it does and will give very careful consideration before deciding whether to prosecute for a homicide offence a person who has previously been convicted of a non-fatal offence, or who has had to endure a long passage of time between the wrongful act and the decision to prosecute. As we have previously mentioned,[25] the CPS has from time to time brought a prosecution for a non-fatal offence and then, after the death of the victim, brought a homicide prosecution. Nobody has suggested to us that the CPS has exercised its discretion to prosecute in those cases in an unsatisfactory manner. There are, of course, very few of these cases at present, but there will be more if the rule is abolished. Our concern is that some of these cases could present exceptionally difficult problems for prosecutors. We are also concerned that unfair or oppressive private prosecutions could be instituted by members of the public, for example, relatives of the victim of an assault. We thought of recommending that the consent of the Director of Public Prosecutions ("the DPP"), rather than the Attorney General, should be obtained in these difficult cases, but we rejected this idea because wherever a statute requires the consent of the DPP, the consent of any Crown Prosecutor is sufficient.[26] We do not consider that in these circumstances a requirement for the DPP's consent would be an adequate safeguard for the defendant.

5.24 The second point is that the consent of the Attorney General should not be regarded as the only protection for the defendant. The first form of protection, in many cases,[27] will lie in the discretion of the CPS itself, and other safeguards will include the ability of the defendant to apply for a stay of a prosecution on grounds of abuse of process. He will also, of course, have the right of appeal if a non-mandatory sentence given for the homicide offence is regarded as excessive in all the circumstances, including any sentence already imposed for the same conduct.

5.25 It is next necessary to identify the categories of cases in which the Attorney General's consent ought to be required. This entails trying to pinpoint the types of

[24] J Ll J Edwards *The Attorney-General, Politics and the Public Interest* (1984) p 19.

[25] See para 3.13 n 12 above.

[26] Prosecution of Offences Act 1985 s 1(7).

[27] This protection will not, of course, apply in relation to private prosecutions.

case in which a particularly difficult balancing operation will be called for in order to decide whether a prosecution should be instituted, and then drawing up criteria to identify those cases.

5.26 We have decided that the consent of the Attorney General should be required for a prosecution for murder, manslaughter, infanticide, aiding and abetting suicide, or any other homicide offence, in two categories of case: cases where there has been a lapse of time of three years or more between the act or omission alleged to have caused the death and the proposed institution of proceedings,[28] and cases where the proposed defendant has already been sentenced to two or more years' imprisonment for a non-fatal offence based on the same facts.[29] Our recommendation might, therefore, change the law, because it is not absolutely clear to which homicide offences the rule currently applies,[30] and our scheme would apply to *all* homicide offences. However, we can think of no reason why the procedure which we recommend should distinguish between different homicide offences on the ground that the rule may or may not have applied to them.

5.27 We recommend that the Attorney General's consent should be required for a homicide prosecution in either of these two categories of case whether or not the death occurred within 366 days of the act or omission which is alleged to have caused it. We have come to this decision because we consider that the principled and sensible procedure which we recommend to prevent oppressive homicide prosecutions would be equally beneficial in *all* cases of these two types. Our purpose behind recommendation 1 (abolishing the rule)[31] was to do away with arbitrary distinctions between cases based on the interval of time between the infliction of injury and death.

Lapse of time

5.28 We consider that the Attorney General's consent should be required for a homicide prosecution to be brought three years or more after the act or omission which allegedly caused the death. The purpose of this recommendation is to protect the proposed defendant from prosecutions being brought after a substantial interval of time, when his memory of the events in question might not be reliable, and when other evidence might have disappeared. For this reason, we recommend that the three year period should run from the date of the wrongful act or omission which allegedly caused the death (or, where there was a series of such acts or omissions, from the last in the series), to the date proposed for the institution of proceedings.

[28] See paras 5.28-5.29 below.

[29] See paras 5.30-5.35 below.

[30] See paras 2.12-2.15 above.

[31] See para 4.26 above.

5.29 Although, as with all fixed time limits, this rule may appear somewhat arbitrary, we consider that after three years[32] the balance between the interests of justice in prosecuting for a criminal offence and in protecting the defendant from oppressive and stale prosecutions will be harder to strike, and that the final decision in such cases should therefore be made by the Attorney General.

Cases where there has been a previous conviction

5.30 The second category of cases in which we believe the Attorney General's consent should be required for a homicide prosecution, is where the act or omission on which it is proposed to rely in these proceedings has already been alleged against the accused in a previous prosecution for a non-fatal offence, for which he received a custodial sentence of two or more years.

5.31 The rationale of this recommendation is that in some cases the sentence imposed for a non-fatal offence will be an adequate punishment for a homicide offence arising out of the same incident, allowing for the lapse of time, the element of double jeopardy, and the fact that the sentencer may well have taken into account the consideration that the victim was brought close to death by the offence.[33]

5.32 In many cases the sentence imposed for the non-fatal offence will *not* be adequate punishment for the homicide offence because the incidence of death (even if caused by a freak medical condition, such as "an eggshell skull") normally leads to an increase in sentence. As a general approach, in cases where the victim has died, the courts assess the sentence which would have been appropriate if the death had not occurred and then add on something to reflect the fact that a person was killed.[34] By the same token, in cases of manslaughter arising from fighting, the judicial approach is that "English law has always regarded *causing the death of a man* as an offence of great gravity, although the *circumstances* in which death is caused are manifestly relevant to assessing the degree of criminal responsibility and wickedness."[35]

5.33 To require the Attorney General's consent in all cases where the accused had previously been convicted of a relevant non-fatal offence would, in our view, be disproportionate: it would scarcely be objectionable to prosecute for murder or

[32] It is noteworthy that within the three year period it would be open to the victim, if still alive, to claim damages against the accused in tort in respect of his injuries: Limitation Act 1980 s 11.

[33] See *Slater and Knowles* (15 July 1994, CACD) unreported: para 3.25 n 33 above.

[34] *Paget* (1982) 4 Cr App R (S) 399.

[35] *Stuart* (1979) 1 Cr App R (S) 228, 230 *per* Cumming-Bruce LJ (emphasis added). "However unintended [the] killing may be, the sentence should reflect the gravity of the fact that death has been caused": *Paget* (1982) 4 Cr App R (S) 399, 401 *per* Robert Goff LJ. See also Lord Lane CJ in *Ruby* (1987) 9 Cr App R (S) 305, 308.

manslaughter in a case where the defendant had, for example, been *fined* in respect of the original assault. The question then is, how severe must a sentence for a non-fatal offence be for it to be genuinely doubtful whether, after the appropriate discounts for delay and double jeopardy, conviction of a homicide offence would be likely to justify a substantially greater sentence than that already imposed? We have come to the conclusion that two years is the appropriate figure.

5.34 There are four types of offence with which we are principally concerned in this context. These are when death eventually occurs following (1) an act of gross negligence, (2) a motoring offence, (3) an act of violence—or some other act which causes death and may be characterised as unlawful act manslaughter[36]—or (4) an act in which death or serious injury was intended, but on a murder charge a defence of provocation or diminished responsibility might be available to reduce the conviction to manslaughter. The first two of these cases raise no real difficulty because (1) an act of gross negligence which did not cause death, even if it amounted to an offence at all, would rarely result in a sentence approaching that which might be expected on a conviction for manslaughter, and (2) Parliament has recently signalled that it regards motoring offences which cause death as far more serious than those which do not.[37] We therefore directed our attention to the third and fourth types of case we have described above.

5.35 We were interested to identify the type of case where the court would have known at the time of the first conviction that the defendant's act had had catastrophic consequences, and would have reflected these consequences in the sentence, so that the sentence for any subsequent homicide offence would probably not be substantially greater.

5.36 Wherever a line is drawn it is bound to appear somewhat arbitrary, but we eventually came to the conclusion that the class of case requiring the Attorney General's consent should be those cases where the defendant received a sentence of two years or more at the first trial. Such a rule would, therefore, embrace many cases where a blow has inadvertently led to a fractured skull[38] and the victim is known to be on a life support machine at the first trial; or where there is so much mitigation surrounding a conviction for causing grievous bodily harm with intent (for which the defences of provocation and diminished responsibility are not available) that the judge at the first trial imposes a sentence of as little as two years'

[36] See LCCP No 135 Part II.

[37] See para 3.21 above.

[38] In *Coleman* (1992) 13 Cr App R (S) 508, 512 Lord Lane CJ said that when death occurs, the starting point for the sentencer in this type of case is 12 months' imprisonment on a plea of guilty. He made it clear that if there are aggravating, and no mitigating, features, the sentence will be longer, eg if the defendant was susceptible to outbreaks of violence, if the assault was gratuitous and unprovoked or if more than one blow was struck.

imprisonment.[39] We can also envisage cases involving severe unintended harm to small children which might fall into this category.[40]

5.37 We believe that in any case in which a defendant has received *less* than two years' imprisonment, the task of deciding whether to prosecute for a homicide offence is made substantially easier by the much longer sentences that are usually imposed for homicide offences. And we do not consider that the class of case in which the judge at the first trial imposes a hospital order would give rise to the sort of cases which require the intervention of the Attorney General, because in that type of case the length of the hospital order is unlimited and the eventual outcome will depend on the defendant's mental health rather than on questions of retribution and deterrence. In both of these types of case we believe that the decision whether to prosecute (or whether to take over and discontinue a private prosecution) should be left to the CPS on its own.

5.38 It is often difficult to determine after the event what factors the judge took into account when passing sentence, but if there is any doubt whether the act or omission was taken into account when the defendant was sentenced for the non-fatal offence, we believe that he should be given the benefit of that doubt. Therefore, we recommend that the Attorney General's consent should be required in all cases[41] where the act or omission in question was alleged against the defendant during a trial on indictment (unless the allegation was subsequently expressly withdrawn from the jury) or during a hearing for sentence following a plea of guilty in the Crown Court or a committal for sentence from a magistrates' court. Where there was a *Newton* hearing,[42] the allegations found by the judge to have been proved will be relevant; but in cases where there was no need for such a hearing because the facts, although in dispute, would not have affected the severity of the sentence, *any* allegation made by the prosecution will be relevant for the purposes of our recommendation.

[39] Examples of cases in which sentences of as little as two or three years' imprisonment were imposed following a conviction for manslaughter by reason of diminished responsibility are to be seen in *Jewsbury* (1981) 3 Cr App R (S) 1; *Davis* (1983) 5 Cr App R (S) 425; and *Smith* (1988) 10 Cr App R (S) 120.

[40] In *Bashford* (1988) 10 Cr App R (S) 359 the Court of Appeal upheld a sentence of two years' imprisonment of a defendant who pleaded guilty to the manslaughter of his son aged four and a half months. He had shaken the child, who was crying persistently, and the shaking caused a subdural haemorrhage. There was no evidence of the use of violence on any other occasion, and there was medical evidence that the shaking would not have had to be particularly severe. The court said that the sentence appeared to be, if anything, at the lower limit of sentences for this type of offence.

[41] Subject to the requirement that the defendant received a custodial sentence of at least two years.

[42] Ie proceedings heard after a verdict or plea of guilty for the purpose of determining any issue of fact left unresolved and in dispute between the prosecution and defence and which is relevant to the severity of the sentence which should be imposed: see *Newton* (1983) 77 Cr App R 13.

5.39 In conclusion, **we recommend that the consent of the Attorney General should be required in order to bring a prosecution for murder, manslaughter, infanticide, aiding and abetting suicide, or any other offence of which one of the elements is causing the death of any person, in two specific types of case, namely:-**

(a) where a period of three years has elapsed between the act or omission alleged to have caused the death in question and the institution of proceedings (Recommendation 2); or

(b) where it is proposed to allege that the death in question was caused by an act or omission which constituted the whole or part of the facts alleged in any previous proceedings against the accused for an offence for which a custodial sentence for a term of two years or more has been imposed on him (Recommendation 3).

Abuse of process

5.40 The court has an inherent power to stay prosecutions for abuse of process, but a study of the principles that underlie the existence of this power confirmed our belief that the Attorney General's consent should be required in the two categories of cases we have specified, because the court's discretion will only be exercised in exceptional cases. As we will show, this is a remedy of last resort. In any event, it is preferable that unfair or oppressive prosecutions are not brought in the first place, and that the defendant is spared the anxiety and possible expense of having to apply to have a case stayed.

5.41 The courts can exercise this discretion to stay a prosecution where there has been a very long delay between the commission of the offence and the prosecution, or when the offence charged is based on the same facts as a lesser offence in respect of which the defendant has already been convicted,[43] if to continue with the prosecution would constitute an abuse of process. It is, however, essentially a matter for the prosecution to decide whether, as a matter of policy, it is fair to prosecute in a particular case. In *Humphreys*[44] Lord Salmon said that a judge has not and should not appear to have any responsibility for the institution of prosecutions; nor has he any power to refuse to allow a prosecution to proceed merely because he considers that it ought not to have been brought. He added that it is only if the prosecution amounts to an abuse of the process of the court and is oppressive and vexatious that the judge has the power to intervene.

[43] See *Archbold Criminal Pleading, Evidence and Practice* (1993) para 4-44c; *Moxon Tritsch* [1988] Crim LR 46, considered in *Forest of Dean Justices ex parte Farley* [1990] Crim LR 568; and see also *Griffiths* [1990] Crim LR 181.

[44] [1977] AC 1, 46.

5.42 Where a long period has elapsed between the commission of the offence and the prosecution, the courts will impose a stay only in *exceptional* circumstances, namely where the defendant can establish on the balance of probabilities that, owing to the delay, he would suffer such serious prejudice that no fair trial could be held.[45] In some cases even a *very* long lapse of time has been held not to justify a stay of the proceedings.[46]

5.43 Similarly, in relation to double jeopardy, the cases show that the discretion should only be exercised in *exceptional* circumstances. For example, in *Forest of Dean Justices ex parte Farley*,[47] the Divisional Court confirmed that there is a discretion to stay proceedings if to proceed after conviction or acquittal on a lesser charge would be *oppressive* or *prejudicial*; however, the court stressed that there will be few cases where it is appropriate for the court to intervene in the prosecution process in this way. Furthermore, we suspect that the courts might be reluctant to order a stay where the victim of the attack has died since the first trial.

5.44 We decided that it would be inappropriate for us to recommend any reform of these rules, or even a codification of them, in the context of this project, since we are here concerned with only a very small and discrete category of cases. Many of our respondents expressed themselves to be satisfied with the way in which the courts exercise this discretion. We consider that the existence of the court's inherent power to stay a prosecution as an abuse of process, coupled with our recommendation that the Attorney General's consent should be required for prosecution in certain cases of double jeopardy and lapse of time, will provide an adequate safeguard to the defendant.

The defendant who has previously been acquitted of a non-fatal offence

5.45 Different considerations apply where the defendant has previously been *acquitted* of a non-fatal offence. There are three separate sets of rules which might protect a defendant in this situation from a homicide prosecution based on the same facts: (1) the doctrine of autrefois acquit,[48] (2) the court's discretion to order a stay for abuse of process,[49] and (3) a rule of evidence which prevents the prosecution from adducing evidence which is inconsistent with a previous acquittal.[50]

[45] *Attorney-General's Reference (No 1 of 1990)* [1992] 1 QB 630.

[46] Eg in *Central Criminal Court ex parte Randle and Pottle* (1991) 92 Cr App R 323, a lapse of time of 20 years was held not to amount to an abuse of process.

[47] [1990] Crim LR 568.

[48] See paras 5.45-5.47 below.

[49] See para 5.48 below.

[50] See paras 5.49-5.51 below.

The plea in bar of autrefois acquit

5.46 The plea in bar of autrefois acquit provides a defence to a defendant who can show that he has already been lawfully acquitted of the *same* offence with which he is now charged.

5.47 Unfortunately, whether the plea of autrefois acquit extends beyond this narrow rule is uncertain. In the leading House of Lords case, *Connelly v DPP*,[51] Lord Devlin[52] seems to have been of the opinion that the rule of law against double jeopardy was confined to the situation where the accused had already been convicted or acquitted of the *same* offence, and that cases where he had been convicted or acquitted of *another offence based on substantially the same facts* should be left to the *discretion* of the court. In earlier decisions, however, courts had upheld the plea in bar in circumstances such as these, and these authorities seem to have been approved by Lord Morris of Borth-y-Gest, Lord Hodson and probably Lord Pearce in *Connelly*.[53]

5.48 One rule which does, however, appear to be settled is that in cases where there has been a previous acquittal for a non-fatal offence, and the victim *subsequently* dies, a prosecution for murder or manslaughter is not necessarily barred,[54] although the basis of this rule is not entirely clear. It could be that, for the plea in bar to be effective, the offence charged in the second indictment must have been committed *at the time of* the first charge.[55] Alternatively, the reason for this rule may be that autrefois acquit has a very narrow scope, and that a second prosecution is not barred because the offences of murder or manslaughter are not the *same* as assault or attempted murder.[56]

Abuse of process

5.49 The precise scope of the rule of law is, therefore, unclear. However, a court has a discretion to stay a prosecution for abuse of process if the prosecution would reopen

[51] [1964] AC 1254.

[52] [1964] AC 1254, 1358.

[53] *Ibid*, pp 1315-1318, 1332. Clause 11 of the Draft Criminal Code in Law Com No 177 provides an extended rule against double jeopardy, by providing inter alia that a person should not be tried for an offence which includes an offence of which he has been acquitted or convicted.

[54] *De Salvi* (1857) 10 Cox CC 481; and see *Morris* (1867) LR 1 CCR 90 where it was held that a *conviction* for assault was no bar to an indictment for murder if the victim subsequently died; and *Thomas* [1950] 1 KB 26, where D had been convicted of wounding his wife with intent to murder and was prosecuted for murder after her death.

[55] See *Morris* (1867) LR 1 CCR 90 and *Connelly v DPP* [1964] AC 1254 at p 1305 *per* Lord Morris of Borth-y-Gest, at p 1341 *per* Lord Devlin, and at p 1332 *per* Lord Hodson.

[56] See *De Salvi* (1857) 10 Cox CC 481, where a prosecution for murder was not prevented by a previous acquittal for causing serious injury with intent, because murder (in 1857) did not require proof of intention to cause death or serious injury.

or challenge a verdict of acquittal on an earlier charge, since to proceed in these circumstances would be unjust and oppressive to the accused.[57]

The Sambasivam *rule*

5.50 There is also a related rule of evidence that the prosecution in a subsequent trial against the same defendant may not challenge the validity of an earlier acquittal by adducing evidence which is inconsistent with it. We refer to this rule as "the *Sambasivam* rule" after the case which is the principal authority for it.[58]

5.51 This rule was recognised by Lord Hailsham in the leading case, *Humphreys v DPP*.[59] However, in *Humphreys* the House of Lords declined to apply it: the evidence adduced to prove that the appellant was guilty of perjury also proved that he was in fact guilty of the offence of which he had been acquitted at the trial where he gave his false evidence. This decision can perhaps be explained as an exception to the rule on the basis that evidence of an offence of which the defendant has been acquitted may be admissible at a later trial for another offence if it is relevant to proof of the other offence.[60]

5.52 In *Hay*,[61] however, the Court of Appeal applied the *Sambasivam* rule and held that the appellant was entitled to rely on his previous acquittal of arson as conclusive evidence that he was not guilty of that offence, and that the confession which he had made admitting to that offence was untrue; and that the jury, when considering his confession to burglary made at the same time, should bear in mind that the confession to arson was false.

Our conclusions

5.53 We do not consider that it would be appropriate in this report for us to recommend reforms to this body of law on the protection of the defendant from double jeopardy following a previous *acquittal*, or to attempt to codify it in the context of this project, since we are concerned only with a single distinct category of possible double jeopardy cases.

5.54 In the vast majority of cases where the accused has been acquitted of a non-fatal offence and the victim later dies, the *Sambasivam* rule would mean that there would

[57] *Griffiths* [1990] Crim LR 181; and see para 5.42 above.

[58] *Sambasivam v Public Prosecutor, Federation of Malaya* [1950] AC 458; and see also *G (an Infant) v Coltart* [1967] 1 QB 432; and *Andrews and Hirst on Criminal Evidence* (1992) paras 22.12-22.21; *Cross on Evidence* (7th ed, 1990) pp 87-90; Richard May *Criminal Evidence* (2nd ed, 1990) paras 10-51-10-63.

[59] [1977] AC 1, 40G-41B (Viscount Dilhorne, at p 17H, Lord Salmon, at p 43A-B, and Lord Edmund-Davies, at pp 50F-51A agreed).

[60] Richard May, *op cit*, paras 10-55-10-58, and see *Ollis* [1900] 2 QB 758.

[61] (1983) 77 Cr App R 70.

not be sufficient admissible evidence to afford a realistic prospect of a conviction for a homicide offence, and thus a subsequent prosecution for homicide would not be justified.[62]

5.55 For example, on a charge of murder where the prosecution has to prove that the defendant ("D") unlawfully caused the death of the deceased ("V"), *intending* either to kill him or to cause him serious injury, it would in most cases be impossible to prove murder without putting in some evidence which was inconsistent with a previous acquittal on a charge of attempted murder (where the prosecution has to prove that D *intended* to kill V), or causing grievous bodily harm with intent contrary to section 18 of the Offences against the Person Act 1861 (where it has to prove that D caused V serious injury *intending* to do so).

5.56 In some cases, a previous acquittal will not *necessarily* be inconsistent with a homicide charge. For example, if the accused had been acquitted of attempted murder, having claimed that he intended to cause V serious injury, but that he had not intended to kill him, a murder charge might not be inconsistent. However, such a case is unlikely to arise in practice since, if D caused V an injury which subsequently caused V's death, D would almost certainly have been *convicted* of a lesser alternative offence[63] in these circumstances.[64]

5.57 One case in which the *Sambasivam* rule might not protect an accused who had been acquitted of a non-fatal offence would be where at the first trial he had claimed to have acted under duress, because duress is no defence to murder.[65] It is not certain how the courts would treat such a case in practice; we suspect that the *Sambasivam* rule would not protect this defendant. Similarly, it is not certain whether the court would order a stay for abuse of process in these circumstances. However, this difficulty would be resolved if the defence of duress were made available to a charge of murder, as we recommended in our report on offences against the person.[66]

[62] See para 5.12 above.

[63] Eg under s 18 of the Offences against the Person Act 1861.

[64] Problems might also arise under the present law where the acquittal was for a charge under s 20 of the Offences against the Person Act 1861. This will not always be inconsistent with a prosecution for murder because for this latter offence it must be proved that D *caused* death, and although this can be satisfied by showing that he *wounded* or *inflicted harm* on V, it is possible to *cause* death in other ways: see the discussion in *Mandair* [1994] 2 WLR 700. In Legislating the Criminal Code: Offences against the Person and General Principles (1992) Law Com No 218 (hereafter, "Law Com No 218") we recommended that ss 18, 20 and 47 of the Offences against the Person Act 1861 be replaced by a more rational hierarchy of three offences: intentionally causing serious injury, recklessly causing serious injury and intentionally or recklessly causing injury: Law Com No 218, paras 13.1-13.2. This scheme would avoid the problems caused by the fact that s 20 is limited to wounding or inflicting harm.

[65] *Gotts* [1992] 2 AC 412.

[66] Law Com No 218 paras 30.1-31.8.

PART VI
CONSEQUENCES OF ABOLITION OF THE RULE: THE RELEVANCE AND USE OF A PREVIOUS CONVICTION FOR A NON-FATAL OFFENCE IN A SUBSEQUENT PROSECUTION FOR A HOMICIDE OFFENCE

Introduction

6.1 In this final part of the report we are concerned with the question whether in a prosecution for a homicide offence it should be necessary to prove every element of the charge from scratch, or whether the prosecution should be entitled to rely on a previous conviction of the defendant of a related non-fatal offence to prove some aspect of the homicide case.

6.2 The relevance of this question can be illustrated by the following example. A defendant ("D") was convicted of causing grievous bodily harm with intent contrary to section 18 of the Offences against the Person Act 1861 after a trial at which his defence was that he caused the injury to the complainant ("V") in self-defence. At this first trial, therefore, the jury must have decided that the prosecution had proved beyond reasonable doubt (1) that D caused serious injury to V; (2) that he did so intending to cause serious injury to someone; and (3) that he was not justified in his use of force. After D's trial and conviction, V dies, and the prosecution decide to charge D with murder. This will require them to prove all the elements listed above and, in addition, that the injury caused V's death (and, if evidence points to these issues, that D was not provoked, was not in a state of diminished responsibility and/or was not acting pursuant to a suicide pact).

The law prior to 1984

6.3 These were the facts in the case of *Hogan*,[1] in which Lawson J made a preliminary ruling that the jury at the murder trial was *precluded* from considering any of the issues which had been decided by the jury who had convicted the defendant of causing grievous bodily harm at the first trial. In other words, the first jury's verdict was binding on all subsequent juries; the doctrine of issue estoppel was thus introduced into English criminal law. This decision was overruled in *DPP v Humphreys*[2] when the House of Lords unanimously declared that issue estoppel did not apply in English criminal proceedings.

[1] [1974] QB 398.

[2] [1977] AC 1.

Section 74(3) of the Police and Criminal Evidence Act 1984

6.4 However, the law was changed somewhat by section 74(3) of the Police and Criminal Evidence Act 1984, which creates a presumption of guilt in these circumstances, and places the burden on the defendant to prove that he did not commit the offence of which he was convicted. This subsection, which came into effect on 1 January 1986, provides:

> "In any proceedings where evidence is admissible of the fact that the accused has committed an offence,[3] in so far as that evidence is relevant to any matter in issue in the proceedings for a reason other than a tendency to show in the accused a disposition to commit the kind of offence with which he is charged, if the accused is proved to have been convicted of the offence—
>
> (a) by or before any court in the United Kingdom; or
>
> (b) by a Service Court outside the United Kingdom,
>
> he shall be taken to have committed that offence unless the contrary is proved."

6.5 In one of the few reported cases involving this subsection,[4] the prosecution sought to proceed first with a charge of the summary offence of driving with excess alcohol, because in the magistrates' court the burden of proving that the defendant had drunk alcohol *after* the accident in question was on the defence; and then, if the defendant was convicted, to rely on this conviction to found a further prosecution for causing death by reckless driving—the only recklessness alleged being the consumption of alcohol. The Divisional Court held that it would be oppressive and unfair for the applicant to have to face the serious charge of causing death by reckless driving in circumstances where the burden of proof on the central issue would in effect be placed on him, and granted orders restraining the magistrates from proceeding on the charge of driving with excess alcohol until after the trial of the more serious charge.

6.6 The prosecution had argued that the procedure which they had adopted would not be unfair to the accused because the trial judge could always exclude unfair evidence

[3] This subsection only applies if evidence of previous convictions is *admissible*, presumably under the general rules of evidence. It is at least arguable that, since the House of Lords overruled *Hogan* in *Humphreys*, D's previous conviction for, say, an offence under s 18 of the Offences against the Person Act 1861 should not be admissible in a murder trial based on the same facts. However, the doctrine proposed in *Hogan* which was disapproved in *Humphreys* was *issue estoppel*, whereas s 74(3) creates a *presumption* of guilt. Academic writers who have discussed this issue assume that the prosecution *could* rely on s 74(3) to use the defendant's prior conviction for a non-fatal offence to prove the coinciding elements of a fatal offence with which he has subsequently been charged: see *Andrews and Hirst on Criminal Evidence* (2nd ed, 1992) para 22.30, Peter Murphy *A Practical Approach to Evidence* (4th ed, 1992) para 10.13.2, *Phipson on Evidence* (14th ed, 1990) para 33-110, and Professor Sir John Smith's commentary on *O'Connor* [1987] Crim LR 260; and see *Forest of Dean Justices ex parte Farley* [1990] Crim LR 568.

[4] *Forest of Dean Justices ex parte Farley* [1990] Crim LR 568.

under section 78 of the Police and Criminal Evidence Act 1984.[5] The courts have certainly been prepared to use their discretion under section 78 to exclude evidence of the previous conviction of a *third party* which the prosecution have tried to use to prove an element of the case against the defendant, under subsection 74(1) of the Act.[6] In seven out of a total of 15 reported cases involving section 74(1), the Court of Appeal has said that the evidence of the prior conviction ought to have been excluded.

6.7 In *Robertson and Golder*,[7] two conspiracy cases, the Court of Appeal laid down guidelines for the application of section 74 as a whole. Lord Lane CJ said:[8]

> "Section 74 is a provision which should be sparingly used. There will be occasions where, although the evidence may be technically admissible, its effect is likely to be so slight that it will be wiser not to adduce it. This is particularly so where there is any danger of a contravention of section 78. There is nothing to be gained by adducing evidence of doubtful value at the risk of having the conviction quashed because the admission of that evidence rendered the conviction unsafe or unsatisfactory."

6.8 We suspect that in practice judges might well be reluctant to allow the use of subsection 74(3) in homicide cases where the defendant has previously been convicted of a related non-fatal offence. We considered making a recommendation that evidence of a previous conviction of a non-fatal offence should not be permitted to be used as evidence in a subsequent prosecution for a homicide offence arising out of the same facts. We believe, however, that the discretion given to the court under section 78 of the Police and Criminal Evidence Act 1984 amounts to an

[5] Which provides:

> "(1) In any proceedings the court may refuse to allow evidence on which the prosecution proposes to rely to be given if it appears to the court that, having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it.
>
> (2) Nothing in this section shall prejudice any rule of law requiring a court to exclude evidence."

[6] Which provides:

> "In any proceedings the fact that a person other than the accused has been convicted of an offence by or before any court in the United Kingdom or by a Service court outside the United Kingdom shall be admissible in evidence for the purpose of proving, where to do so is relevant to any issue in those proceedings, that that person committed that offence, whether or not any other evidence of his having committed that offence is given."

[7] [1987] QB 920.

[8] At p 928.

adequate safeguard for defendants. We have not found or been given any evidence which shows that section 74(3) is being operated unfairly. In our opinion it is significant that only one of our respondents, Professor Sir John Smith, commented on this subsection at all.

6.9 It seems unlikely that the use of this section in the sort of case described above would amount to a breach of the European Convention on Human Rights. Article 6 gives a right to a fair trial and a presumption of innocence until proved guilty. Two cases are of interest. In the first,[9] the European Commission of Human Rights decided that the presumption in section 30(2) of the Sexual Offences Act 1956 (that a man who lives with a common prostitute is living on the earnings of prostitution) was acceptable. In the second,[10] the European Court of Human Rights held that Article 392(1) of the French Customs Code, which creates a presumption of law to the effect that a person proved to have been in possession of prohibited goods has smuggled them into France, was not in breach of Article 6 since the "person in possession" was not left entirely without a defence.

6.10 For all these reasons we have decided to make no recommendation in connection with section 74(3) of the Police and Criminal Evidence Act 1984.

[9] *X v UK* Application No 5124/71 (19 July 1972) Collection of Decisions 42 p 135.

[10] *Salabiaku v France* 13 EHRR 379.

PART VII
OUR RECOMMENDATIONS

1. We recommend that the year and a day rule should be abolished for all purposes with prospective effect.[1]

2. We recommend that the consent of the Attorney General should be required in order to bring a prosecution for murder, manslaughter, infanticide, aiding, abetting, counselling or procuring a person's suicide, or any other offence of which one of the elements is causing the death of any person ("a fatal offence"), where a period of three years has elapsed since the act or omission which allegedly caused the death.[2]

3. We recommend that the consent of the Attorney General should be required in order to bring a prosecution for any fatal offence where in the course of the prosecution it is proposed to allege that the death was caused by an act or omission which constituted the whole or part of the facts alleged in any previous proceedings against the accused for an offence for which a custodial sentence for a term of two years or more was imposed on him.[3]

(Signed) HENRY BROOKE, *Chairman*
ANDREW BURROWS
DIANA FABER
CHARLES HARPUM
STEPHEN SILBER

MICHAEL SAYERS, *Secretary*
13 December 1994

[1] See para 4.26 above.

[2] See para 5.38 above.

[3] See para 5.38 above.

APPENDIX A

Draft
Homicide Bill

ARRANGEMENT OF CLAUSES

DRAFT

OF A

B I L L

INTITULED

An Act to abolish the "year and a day" rule in relation to homicide, and to impose certain restrictions on the institution of proceedings for fatal offences. A.D. 1995.

BE IT ENACTED by the Queen's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:—

Abolition of "year and a day" rule in relation to homicide.

1.—(1) The rule commonly known as the "year and a day" rule (by virtue of which an act or omission is conclusively presumed not to have caused a person's death if his death occurs more than a year and a day after it) is abolished for all purposes.

(2) That rule is accordingly abolished by virtue of subsection (1) both—

(a) in relation to every offence in relation to which it applied immediately before the coming into force of this Act, and

(b) to the extent that it then applied for the purpose of determining whether a person had committed suicide.

Restriction on institution of proceedings for fatal offences.

2.—(1) No proceedings to which subsection (2) or (4) applies shall be instituted except by or with the consent of the Attorney General.

(2) This subsection applies to any proceedings against a person for a fatal offence which are instituted at a time when a period of three years or more has elapsed since the act or omission alleged to have caused the death in question.

(3) Where it is alleged that the death in question was caused by a series of acts or omissions, subsection (2) shall be read as referring to the last of them.

(4) This subsection applies to any proceedings against an individual for a fatal offence in which it is proposed to allege that the death in question was caused by an act or omission which constituted the whole or part of the facts alleged in any previous proceedings against him for an

EXPLANATORY NOTES

Clause 1

This clause abolishes the "year and a day" rule for all purposes. The reasoning behind the clause can be found in Part III and paragraphs 4.20-4.21 of the report.

Clause 2

This clause requires the consent of the Attorney General for the institution of proceedings for a "fatal offence" in the circumstances set out in subsections (2) and (4). The policy behind the clause is explained in Part V of the report.

Subsection (2) requires the Attorney General's consent for the institution of such proceedings when a period of three years or more has passed since the act or omission which is alleged to have caused the death in question. Subsection (3) provides in effect that where the death is alleged to have been caused by a *series* of acts or omissions the relevant period runs from the last of the series. The policy behind these subsections is explained in paragraphs 5.28-5.29 of the report.

Subsection (4) requires the Attorney General's consent for the institution of such proceedings if the defendant has previously been given a custodial sentence of two years or more (or, by virtue of subsection (6), an indeterminate sentence) for an offence in respect of which the act or omission now alleged to have caused the death formed the whole or part of the facts alleged against him. Subsection (5) provides that for this purpose an allegation made in previous proceedings is in certain circumstances to be disregarded. The reasoning behind these subsections is explained in paragraphs 5.30-5.38 of the report.

offence for which a custodial sentence for a term of two years or more has been imposed on him.

(5) Any allegation in any such previous proceedings shall be disregarded for the purposes of subsection (4) to the extent that—

(a) it was expressly withdrawn in the course of those proceedings or abandoned on appeal; or

(b) on a sentencing hearing the court found it not to be proved; or

(c) if there was a jury trial, the jury were expressly directed not to consider it (and the court did not on a sentencing hearing subsequently find it to be proved);

and for this purpose "sentencing hearing" means proceedings following a plea or verdict of guilty which are held in order to establish facts relevant for sentencing purposes.

(6) For the purposes of subsection (4) a custodial sentence for life or for any other indeterminate period shall be treated as a custodial sentence for a term of two years or more.

(7) In this section—

"custodial sentence" means any sentence which is a custodial sentence for the purposes of sections 1 to 4 of the Criminal Justice Act 1991 (restrictions etc. as to such sentences), other than a secure training order within the meaning of section 1 of the Criminal Justice and Public Order Act 1994; and

1991 c. 53.

1994 c. 33.

"fatal offence" means—

(a) murder, manslaughter or infanticide;

(b) the offence of aiding, abetting, counselling or procuring a person's suicide; or

(c) any other offence of which one of the elements is causing the death of any person.

Short title, commencement and extent.

3.—(1) This Act may be cited as the Homicide Act 1995.

(2) This Act shall come into force at the end of the period of two months beginning with the day on which it is passed.

(3) Section 1 does not affect the continued application of the rule referred to in that section in relation to any death in the case of which the period of a year and a day relevant for the purposes of that rule began before the date when this Act comes into force.

(4) Section 2 applies in relation to the institution of proceedings on or after that date regardless of when the death in question occurred.

(5) This Act extends to England and Wales only.

Subsection (7) defines "custodial sentence" and "fatal offence" for the purposes of this clause.

Clause 3

Subsections (1) and (2) provide for the Bill's short title and commencement.

Subsection (3) provides that the abolition of the rule is to have no effect where the relevant period of a year and a day has already begun. The reasons for this are explained in paragraphs 4.22-4.24 of the report.

Subsection (4) provides that clause 2 applies to any proceedings to be instituted on or after the commencement date, regardless of the date of the death.

Subsection (5) provides that the Bill will affect the law of England and Wales only.

APPENDIX B

Statutory provisions relating to the rule

Offences against the Person Act 1861, sections 18, 20 and 47

18 Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, with intent to do some grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of an offence, and being convicted thereof shall be liable to imprisonment for life.

20 Whosoever shall unlawfully and maliciously wound or inflict any grievous bodily harm upon any other person, either with or without any weapon or instrument, shall be guilty of a misdemeanour, and being convicted thereof shall be liable to imprisonment for not more than five years.

47 Whosoever shall be convicted on indictment of any assault occasioning actual bodily harm shall be liable to imprisonment for not more than five years.

Infanticide Act 1938, section 1(1)

Where a woman by any wilful act or omission causes the death of her child being a child under the age of twelve months, but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for this Act the offence would have amounted to murder, she shall be guilty of an offence, to wit of infanticide, and may for such offence be dealt with and punished as if she had been guilty of the offence of manslaughter of the child.

Homicide Act 1957, section 4(1)

It shall be manslaughter, and shall not be murder, for a person acting in pursuance of a suicide pact between him and another to kill the other or be a party to the other being killed by a third person.

Suicide Act 1961, section 2(1)

A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding fourteen years.

Theft Act 1968, sections 12(1) and 12A(1)-(4)

12(1) Subject to subsections (5) and (6) below, a person shall be guilty of an offence if, without having the consent of the owner or other lawful authority, he takes any conveyance for his own or another's use or, knowing that any conveyance has been taken without such authority, drives it or allows himself to be carried in or on it.

12A(1) Subject to subsection (3) below, a person is guilty of aggravated taking of a vehicle if—

(a) he commits an offence under section 12(1) above (in this section referred to as a "basic offence") in relation to a mechanically propelled vehicle; and

(b) it is proved that, at any time after the vehicle was unlawfully taken (whether by him or another) and before it was recovered, the vehicle was driven, or injury or damage was caused, in one or more of the circumstances set out in paragraphs (a) to (d) of subsection (2) below.

(2) The circumstances referred to in subsection (1)(b) above are—

(a) ...

(b) that, owing to the driving of the vehicle, an accident occurred by which injury was caused to any person;

(c) ...

(d) ...

(3) A person is not guilty of an offence under this section if he proves that, as regards any such proven driving, injury or damage as is referred to in subsection (1)(b) above, either—

(a) the driving, accident or damage referred to in subsection (2) above occurred before he committed the basic offence; or

(b) he was neither in nor on nor in the immediate vicinity of the vehicle when that driving, accident or damage occurred.

(4) A person guilty of an offence under this section shall be liable on conviction on indictment to imprisonment for a term not exceeding two years or, if it is proved that, in circumstances falling within subsection (2)(b) above, the accident caused the death of the person concerned, five years.

Road Traffic Act 1988, sections 4 and 5

4 (1) A person who, when driving or attempting to drive a mechanically propelled vehicle on a road or other public place, is unfit to drive through drink or drugs is guilty of an offence.

(2) Without prejudice to subsection (1) above, a person who, when in charge of a mechanically propelled vehicle which is on a road or other public place, is unfit to drive through drink or drugs is guilty of an offence.

(3) For the purposes of subsection (2) above, a person shall be deemed not to have been in charge of a mechanically propelled vehicle if he proves that at the material time the circumstances were such that there was no likelihood of his driving it so long as he remained unfit to drive through drink or drugs.

(4) The court may, in determining whether there was such a likelihood as is mentioned in subsection (3) above, disregard any injury to him and any damage to the vehicle.

(5) For the purposes of this section, a person shall be taken to be unfit to drive if his ability to drive properly is for the time being impaired.

(6) A constable may arrest a person without warrant if he has reasonable cause to suspect that that person is or has been committing an offence under this section.

(7) For the purpose of arresting a person under the power conferred by subsection (6) above, a constable may enter (if need be by force) any place where that person is or where the constable, with reasonable cause, suspects him to be.

(8) Subsection (7) above does not extend to Scotland, and nothing in that subsection affects any rule of law in Scotland concerning the right of a constable to enter any premises for any purpose.

5 (1) If a person—

(a) drives or attempts to drive a motor vehicle on a road or other public place, or

(b) is in charge of a motor vehicle on a road or other public place,

after consuming so much alcohol that the proportion of it in his breath, blood or urine exceeds the prescribed limit he is guilty of an offence.

(2) It is a defence for a person charged with an offence under subsection (1)(b) above to prove that at the time he is alleged to have committed the offence the circumstances were such that there was no likelihood of his driving the vehicle whilst the proportion of alcohol in his breath, blood or urine remained likely to exceed the prescribed limit.

(3) The court may, in determining whether there was such a likelihood as is mentioned in subsection (2) above, disregard any injury to him and any damage to the vehicle.

Road Traffic Act 1991, sections 1-3

1 For sections 1 and 2 of the Road Traffic Act 1988 there shall be substituted—

"1 A person who causes the death of another person by driving a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.

2 A person who drives a mechanically propelled vehicle dangerously on a road or other public place is guilty of an offence.

2A (1) For the purposes of sections 1 and 2 above a person is to be regarded as driving dangerously if (and, subject to subsection (2) below, only if)—

(a) the way he drives falls far below what would be expected of a competent and careful driver, and

(b) it would be obvious to a competent and careful driver that driving in that way would be dangerous.

(2) A person is also to be regarded as driving dangerously for the purposes of sections 1 and 2 above if it would be obvious to a competent and careful driver that driving the vehicle in its current state would be dangerous.

(3) In subsections (1) and (2) above "dangerous" refers to danger either of injury to any person or of serious damage to property; and in determining for the purposes of those subsections what would be expected of, or obvious to, a competent and careful driver in a particular case, regard shall be had not only to the circumstances of which he could be expected to be aware but also to any circumstances shown to have been within the knowledge of the accused.

(4) In determining for the purposes of subsection (2) above the state of a vehicle, regard may be had to anything attached to or carried on or in it and to the manner in which it is attached or carried."

2 For section 3 of the Road Traffic Act 1988 there shall be substituted—

"3 If a person drives a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, he is guilty of an offence."

3 Before section 4 of the Road Traffic Act 1988 there shall be inserted—

"3A(1) If a person causes the death of another person by driving a mechanically propelled vehicle on a road or other public place without due care and attention, or without reasonable consideration for other persons using the road or place, and—

(a) he is, at the time when he is driving, unfit to drive through drink or drugs, or

(b) he has consumed so much alcohol that the proportion of it in his breath, blood or urine at that time exceeds the prescribed limit, or

(c) he is, within 18 hours after that time, required to provide a specimen in pursuance of section 7 of this Act, but without reasonable excuse fails to provide it,

he is guilty of an offence.

(2) For the purposes of this section a person shall be taken to be unfit to drive at any time when his ability to drive properly is impaired.

(3) Subsection (1)(b) and (c) above shall not apply in relation to a person driving a mechanically propelled vehicle other than a motor vehicle."

APPENDIX C

List of persons and organisations who commented on Consultation Paper No 136

There follows a list of individuals and organisations who commented on the Law Commission's Consultation Paper No 136, The Year and a Day Rule in Homicide (1994)

Mr Trevor Aldridge QC
Mr Justice Alliott
Association of Chief Police Officers
Professor Andrew Ashworth
Sir Wilfrid Bourne KCB QC
Bar Council Law Reform Committee
Mrs Diana Brahams
British Medical Association
Mr John Burton
Mr Justice Buxton
Lord Campbell of Alloway QC
Cardiff Crime Study Group
Mr Alex Carlile QC MP
Lord Justice Carswell
Chief Metropolitan Stipendiary Magistrate
Coroners' Society of England and Wales
Council of HM Circuit Judges
Criminal Bar Association
Crown Prosecution Service
Mr John Gardner
Mr Simon Gardner
Mrs Pat Gibson
Dr J A Harvey
Lord Hope, Lord President of the Court of Session
Mr Jeremy Horder
Mr Justice Hutchison
Mr Justice Jowitt
JUSTICE
Justices' Clerks' Society
Liberty
Lord Mackay of Clashfern
Mr Alan Milburn MP
Lord Morton of Shuna
Lord Nathan
National Society for the Prevention of Cruelty to Children
Office of the Judge Advocate General

Mrs Nicola Padfield
Mr Justice Phillips
Judge David Pitman
Police Federation of England and Wales
Police Superintendents' Association of England and Wales
Mr Justice Rougier
Mr Gary Slapper
Professor Sir John Smith CBE, QC, FBA
Society of Public Teachers of Law
Solicitor's Office, Department of Health and Department of Social Security
Mr John Spencer
Lord Taylor of Gosforth, the Lord Chief Justice
Mr Justice Tuckey
Judge Lawrence Verney TD, the Recorder of London
Mr Justice Waterhouse
Professor Glanville Williams QC, LLD, FBA
Mr Justice Wright
Mr David Yale

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