COMMENT

A PETITIONER'S ADULTERY AND SECTION 28 (m) OF THE COMMONWEALTH MATRIMONIAL CAUSES ACT 1959

How will the court exercise its discretion under section 37 (3) of the Matrimonial Causes Act 1959 when a petitioner seeking a divorce upon the ground of separation for five years under section 28 (m) has committed adultery? This question had to be decided in *Grosser* v. *Grosser*,[1] a recent unreported decision of the Chief Justice of Tasmania, Sir Stanley Burbury.

Section 28 (m) of the new Federal Act has imparted a non-fault ground among the traditional fault-based grounds for divorce, most of which have graced the statute books of enlightened States during the last half-century. Its forbears in Australia and in the United States have recently been traced.[2] The section constitutes a recognition by the legislature that it is against the public interest to perpetuate indefinitely a broken and unreconcilable marriage.

But public policy has not extended to becoming a rubber stamp for the granting of a divorce to parties who have lived separately and apart for five years or more. In section 37, the courts are required to consider the wider ambit of policy and refuse a decree if it would be harsh and oppressive to the respondent or against public policy to grant it. Divorce has the power to cure; it also has the power to destroy. Public policy demands that the sanctity of marriage be retained and that the responsibilities and obligations of marriage be protected. There must be a balance between competing interests on the judicial scales of public policy.

Section 37 (3)[3], however, injects into the new ground a conventional tinge of fault. For one moment, the complete breakdown of a marriage irrespective of fault is adopted as a ground of divorce, in the next, a traditional discretionary bar based on the fault of the petitioner is made applicable to this ground. The legislature provides for the discretionary bars applicable to other grounds of dissolution of marriage in section 41, but section 28 (m) is expressly excluded. As Burbury C.J. says in *Grosser*

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1 This is now reported in (1961) 2 F.L.R. 152.

2 *University of Western Australia L.R.*, (1960) 51. See also the article by the present writer in *Tasmania University L.R.*, 1 (1960) 496.

3 Section 37 (3) Matrimonial Causes Act 1959 (Commonwealth) provides that 'the Court may in its discretion refuse to make a decree of dissolution of marriage on the ground of separation if the petitioner has, either before or after separation commenced, committed adultery that has not been condoned by the respondent, or, having been so condoned, has been revived'.

v. *Grosser*, logically one might have supposed that none of the discretionary bars based on fault would have been included in section 28 (m).

The legislature has seized, however, upon one particular type of fault (*i.e.* adultery) and made that a discretionary bar under section 37 (3). As the Chief Justice stressed in *Grosser* v. *Grosser*, 'the legislature has left it to the discretion of the courts to refuse a decree upon the ground of separation to an adulterous petitioner but has not indicated upon what principles the discretion is to be exercised.' Burbury C.J. then proceeds to consider the nature of the discretion in the context of the new legislation which accepts as a ground for divorce the complete breakdown of a marriage irrespective of fault.

His Honour stated that it might very well be that if section 37 (3) were not in the Act, the court would still, in the case of an adulterous petitioner, have to consider under section 37 (1) whether, despite the total breakdown of the marriage, the community interest demands the upholding of the sanctity of marriage.[4] But His Honour did not think that the legislature intended a less liberal exercise of the court's discretion to adulterous petitioners in section 37 (3) than is the case with a petition based on some other matrimonial offence. 'The legislature has not made the petitioner's adultery *per se* an absolute bar to a divorce on the ground of separation. There must therefore be factors other than the fact of adultery present to justify the court refusing a decree.'

The learned C.J. then proceeds to cite in full the five classical considerations listed in *Blunt* v. *Blunt*.[5] His Honour says that the prospect of reconcilation must be considered in the ground of separation itself and the fifth consideration, *i.e.* interest of the community at large, is given added weight by the enactment of section 28 (m). The words of Dixon J. (as he then was) in *Viant* v. *Viant*[6] are adopted by His Honour as an apt description of what constitutes the *public interest* within section 37 (1).[7]

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[4] His Honour gave as an example the refusal of a decree to a petitioner who had flagrantly flouted the institution of marriage, as was considered in *Tapp* v. *Tapp* 778 N.S.W.W.N. 122, or where a petitioner left an innocent wife and immediately cohabited with another woman.

[5] [1943] A.C. 517 at 525, *per* Lord Simon. '(a) The position and interest of any children of the marriage; (b) the interest of the party with whom the petitioner has been guilty of misconduct with special regard to the prospect of their future marriage; (c) the question whether, if the marriage is not dissolved, there is a prospect of reconciliation between husband and wife; and (d) the interest of the petitioner, and, in particular, the interest that the petitioner should be able to re-marry and live respectably. To these four considerations I would add a fifth of a moral general character, which must, indeed, be regarded as of primary importance, namely, the interest of the community at large, to be judged by maintaining a true balance between respect for the binding sanctity of marriage and the social considerations which make it contrary to public policy to insist on the maintenance of a union which has utterly broken down'.

[6] (1955) 94 C.L.R. 347.

[7] Dixon J. said the court should exercise its discretion 'now no less than in earlier times with a profound concern for the vital interest which society has in maintaining high respect for the institution of marriage and insisting upon the observance of established standards of conduct on the part of those who approach the courts for divorce'.

The learned C.J. concludes that although the discretion 'may in some cases fail to be exercised in a different way in relation to a ground which does not depend upon fault of the respondent, it would seem to me proper that all the considerations (except the third which is now part of the ground) listed in *Blunt* v. *Blunt* (*supra*) may according to the circumstances of a particular case still be relevant.'

'It may be that in many cases where the court would refuse a decree under section 37 (3) it would in any case be bound to do so under section 37 (1). The sub-sections are not mutually exclusive. *To some extent section 37 (3) may be regarded as a particular application of wide principles stated* in section 37 (1).'

It is the writer's submission that the inclusion of section 37 (3) in the new ground under section 28 (m) is both unfortunate and illogical. As Burbury C.J. admits, the logicality of its addition can be queried. It is a fault provision in what is essentially a non-fault ground. Further, it is respectfully submitted that the considerations in *Blunt* v. *Blunt* are not applicable to this new ground. It has been forcefully argued by Mr. I. McCall[8] that as section 28 (m) is based on a different policy approach to most of the other grounds in the Act it requires a different technique to implement it and different considerations in its application.

Mr. McCall submits that the insertion of section 37 (3) into this new ground demands an interpretation stripped of the fault embellishments which have traditionally surrounded the court's discretion in granting a decree to an adulterous petitioner. He says that section 37 (3) is—

(1) 'to be taken as a direction that adultery *per se* is not to be regarded as conduct which would make the granting of a decree against the public interest and so the bar in section 37 (1) is not automatically raised.'[9]

(2) 'to be interpreted in accordance with the principles indicated in the judgments in *Lodder* v. *Lodder*[10] and *Mason* v. *Mason*,[11] and not those in *Blunt* v. *Blunt*'.

In his judgment in *Grosser* v. *Grosser* the learned Chief Justice accepts the interpretation of section 37 (3) suggested in (1) above, holding that there can be no room for the view that simply because the respondent is guiltless and the petitioner guilty of adultery the court should exercise its discretion against the petitioner. But His Honour clearly considers that the *Blunt* v. *Blunt* principles are imported into section 37 (3). No reference is made in the judgment to the two New Zealand cases mentioned above.

Blunt v. *Blunt*, decided in 1943, has since been the guide of courts in the exercise of their discretion to refuse a decree when the petitioning

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8 See *University of Western Australia L.R.*, (1960) at 81.

9 *Ibid.*

10 (1921) N.Z.L.R. 876.

11 (1921) N.Z.L.R. 955.

party disclosed his or her adultery. The principles stated by Lord Simon were nurtured in a divorce jurisdiction in which the fault of one or other party was a major consideration in the granting or refusing of a decree. Section 28 (m) constitutes a break from this tradition. It demands a new interpretation, freed of the fault concept, to meet the changing demands of society. In submitting that the principles in *Mason* v. *Mason* and *Lodder* v. *Lodder* are preferable to those in *Blunt* v. *Blunt*, it is realised that in essence the same considerations will apply in section 37 (3) as apply in section 37 (1). Sir John Salmond in *Lodder* v. *Lodder* and *Mason* v. *Mason* formulated the concept of the 'public interest' principle which is now statutory in section 37 (1).[12] The principles which govern were concisely summarised by Gresson J. in the New Zealand case of *Crewes* v. *Crewes*.[13] 'It is not conducive to the public interest that men and women should remain bound together in permanence by the bonds of a marriage which has irreconcilably failed and the application to that ground of divorce of the discretion . . . of equal importance that there may be cases where the petitioner has been guilty of such grave matrimonial misconduct that in the public interest a decree should be refused. The court must have regard to both principles.'

It is submitted that it is with those two principles in mind that the court should approach the interpretation of section 37 (3). Frequently there will be a conflict between the two. It is then for the court to decide whether, despite the adultery of the petitioner and the matrimonial history both before and after the separation, the marriage between the parties has irremediably come to an end *de facto* and that its continuance is mischievous, or whether to insist upon the equally important principle that there should be a proper recognition of the duties and obligations of marriage, that it is grave misconduct for a petitioning husband or wife to form an illicit relationship with another while the marriage still subsists, and that such conduct offends against the public interest.

In practice, the consideration by a court of the principles suggested when interpreting section 37 (3) are very similar to the fifth consideration in *Blunt* v. *Blunt*. The facts in *Grosser* v. *Grosser*, as found by His Honour, were that the petitioning husband married the respondent in 1943 while on leave from the army. Immediately after the wedding the parties went to the wife's flat where the husband was told for the first time by the wife that she had two illegitimate children whom she was looking after. The marriage was not consummated on the first night and the next day the husband returned to active service in New Guinea. On his return twelve months later the husband found a boarder at his wife's house. The husband objected to the man's presence and, when his wife

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12 See *University of Western Australia L.R.*, (1960) 51, 73; and *Tasmania University L.R.*, 1 (1960) 496, where the history of the provision is traced. The High Court of Australia has approved Salmond J.'s statements in the two cases mentioned in *Pearlow v. Pearlow* (1953) 90 C.L.R. 70: see in particular 78-79.

13 (1954) N.Z.L.R. 1116 at 1121.

refused to ask the boarder to leave, the husband left. The husband suspected his wife's adultery with the boarder and the parties were separated until 1947. In 1947 the parties met by accident in the street and agreed to cohabit again, the wife telling the husband that the boarder had left. They in fact lived as man and wife for two days when the boarder returned and the wife refused to ask him to leave. The parties then separated again, and had remained separated and apart ever since.

In a discretion statement the petitioner disclosed that he had lived and cohabited with a married woman since 1957, and that the woman had changed her surname to that of the petitioner. The petitioner stated that the woman had since obtained a divorce and that he intended to marry her when he was granted a decree.

In applying the facts in *Grosser* v. *Grosser* to his view of the way in which the discretion should be exercised in section 37 (3), the learned Chief Justice paid lip service to the first four considerations in *Blunt* v. *Blunt*. His Honour concluded that 'it is in the interests of the petitioner and the woman with whom he has cohabited since the year 1957 that they should be able to regularise their union.' But it is submitted that His Honour allowed the public interest to be the prevailing reason for granting a decree, following the fifth consideration in *Blunt* v. *Blunt* and the suggested interpretation of the public interest as expressed in section 37 (1), *i.e.* in accord with the views of Salmond J. in *Lodder* v. *Lodder* and *Mason* v. *Mason*.[14]

D. Chappell

THE QUEEN v. VALLANCE[1]

Since the last publication of this Review two important judgments concerning the criminal law have been delivered. That of the House of Lords in *R.* v. *Smith*[2] adopts (so at least it might be conceded in England) what has been conveniently termed an objective test, *i.e.* the standard of the reasonable man, in order to prove malice aforethought in the common law crime of murder. But those in Tasmania who may be tempted to regard the decision as a startling innovation will doubtless be surprised to learn that in this State of the Commonwealth a similar objective test of guilt for murder has been applicable since the enactment of the Criminal Code in 1924.[3] Moreover, it is of interest to consider that case

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14 *Supra.*

1 The judgment of the High Court of Australia was delivered on July 31, 1961, and is now reported in (1961) 35 A.L.J.R. 183.

2 *Sub nom. Director of Public Prosecutions* v. *Smith* (1960) 3 W.L.R. 546. That decision seems to conflict with the decision of the Australian High Court in *R.* v. *Smyth* (1957) 98 C.L.R. 163. It will be interesting to see which decision the Australian common law jurisdictions choose to follow. In spite of strong views to the contrary, it is submitted that no such choice has been made for Victoria in *R.* v. *Jakac* (1961) V.R. 367.

3 Criminal Code, s. 157 (1) III.

in the light of the recent judgments of the Tasmanian Court of Criminal Appeal in *The Queen* v. *Vallance*,[4] and, on appeal, of the High Court of Australia in *Vallance* v. *The Queen*.[5] Those judgments are immediately concerned with ascertaining the requisite mental elements in the crime of unlawful wounding as constituted by section 172 of the Tasmanian Criminal Code.

The prosecution alleged that Vallance became annoyed with some young children who were playing on a vacant allotment adjacent to his home. Procuring a powerful air rifle he fired a snap shot at a girl of eight years. The pellet would almost certainly have entered the child's heart had it not fortunately been deflected by a rib.

The defence claimed that the pellet was aimed at the ground in the vicinity of the child and must have ricocheted. The shot was fired merely to frighten the children and with no intention whatsoever of wounding or of causing bodily harm.

Vallance was tried on an indictment containing two counts. The first count was laid under section 170 of the Code and charged him with committing an unlawful act *intended* to cause bodily harm. The second count was for wounding under section 172 of the Code.[6] The particulars were that 'Vallance at Hobart in the State of Tasmania on the 14th February 1960 unlawfully wounded' the child.

It will be noticed at once that whereas section 170 clearly requires proof of a specific intent,[7] section 172 *prima facie* requires no proof of any mental element.

The learned trial judge[8] directed the jury that it was essential for the Crown to prove an intent to do grievous bodily harm on the first count, and that it was equally essential for the Crown to prove an intent to wound the child on the second count. His Honour had earlier held that since section 13 (1) exempts a person from criminal responsibility for an act unless it is intentional, the Crown must prove an intentional act of wounding and not merely an intentional preliminary or causative

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4 Unreported, November 9, 1960, *per* Burbury C.J., Crisp and Crawford JJ.

5 *Per* Dixon C.J., Kitto, Taylor, Menzies and Windeyer JJ.

6 The section provides: 'Any person who unlawfully wounds or causes grievous bodily harm to any person by any means whatever is guilty of a crime. Charge: Wounding (or causing grievous bodily harm)'.

7 The words 'specific intent' may be defined to mean, at least, an intent stated expressly (or by neccessary implication, see *e.g.* rape, s. 185 of the Code) in the provision which creates the crime. Specific intent may be contrasted with general intent provided in s. 13 (1) and (2) of the Code. Those definitions may seem obvious, but care is required in avoiding the difficulties which these apparently precise usages can involve. See, for instance, Snelling in *A.L.J.* 30 (1956) at 3, and *cf.* s. 17 (2) of the Code. Is wilfulness a specific intent? See s. 267 (3) of the Code and *cf. R.* v. *Holmes* (1960) W.A.R. 122; Glanville Williams, *Criminal Law* (1953), 43, 378.

8 The late Sir Kenneth Green.

act such as the pulling of the trigger of the rifle which, in the event, resulted in the wounding.[9]

His Honour also directed the jury that the word 'intention' means the state of mind of a person who not only foresees but also desires the possible consequences of his conduct. And further, that the accused would not be criminally responsible if the wound occurred by chance.

Vallance was acquitted on both counts. The Crown appealed against the acquittal on the second count only, its main contention being that the learned trial judge was wrong in law in directing the jury that it was incumbent upon the Crown to prove an intent to wound.

The appeal was allowed and a retrial was ordered. The principal conclusions of the Court of Criminal Appeal[9a] are summarised below.

1. Section 13 (1) imports into section 172 the necessity for proving certain mental elements.[10] An 'act' in section 13 (1) refers not to the act of wounding (or the *actus reus* as it may conveniently be termed) but to some preliminary act which causes the wound. It is not necessary for the Crown to prove an unlawful act, but it is necessary for the Crown to prove an unlawful wounding, *i.e.* a wound not authorised or justified by law.[11]

2. All the judges agreed therefore that the wound is the 'event' referred to in section 13 (1), and that a 'chance event' is an event not in fact intended or foreseen by the actor responsible for the event. The Crown had argued that an 'event' could not be said to occur by chance if a reasonable person in the place of the actor could, in the circumstances, reasonably have been expected to foresee the event. The Court rejected any such objective criterion in relation to the meaning of the word 'chance' and, in effect, concluded that at the retrial the jury should be directed to convict if Vallance either intended to wound the girl or if

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9 Section 13 provides as follows:

'(1) No person shall be criminally responsible for an act, unless it is voluntary and intentional; nor, except as hereinafter expressly provided, for an event which occurs by chance.

(2) Except as otherwise expressly provided, no person shall be criminally responsible for an omission, unless it is intentional.

(3) Any person who with intent to commit an offence does any act or makes any omission which brings about an unforeseen result which, if he had intended it, would have constituted his act or omission some other offence, shall, except as otherwise provided, incur the same criminal responsibility as if he had effected his original purpose.

(4) Except where it is otherwise expressly provided the motive by which a person is induced to do any act or make any omission is immaterial'.

9a Burbury C.J., Crisp, Crawford JJ.

10 It may be that s. 13 and other similar provisions of the Code, prescribing general conditions of criminal responsibility, have an application not only to all crimes but to all summary offences as well. Without expressly deciding that question, both Crawford J. (p. 22 of his judgment) and Crisp J. (p. 7 of his judgment) appear to adopt this view. The page references refer to the transcript of the judgments handed down by the Court.

11 There was no suggestion in this case that the wound could in any way be justified as being lawfully inflicted.

he did in fact foresee, *i.e.* consciously advert to, the possibility of wounding as the result of his discharging the rifle. The foregoing definition of the word 'chance' was the main reason for ordering a retrial. It will be recalled that the learned trial judge directed the jury that intention was necessary, and that intention meant not only foreseeing *but also desiring* the possible consequences of an act.

Thus far it would appear that the Court had exhaustively defined the mental element involved in the 'event' of wounding, in the crime of wounding, as requiring either an intent to wound or subjective recklessness[12] as to the possibility that wounding might occur after an intentional causative act. However, both Burbury C.J. and Crisp J. considered it unnecessary to determine conclusively the relevance of sections 150 and 152 of the Code to the crime of wounding,[13] seeing that counsel for the Crown had not at the trial canvassed the possibility of those sections applying to the facts of the case.[14] It is respectfully submitted that, as a matter of law, the failure of counsel to argue at first instance a point of law fairly raised by the facts should not constitute a bar to its consideration on appeal. Thus, for example, counsel in the hope of an acquittal on a charge of murder will sometimes endeavour to avoid a direction on manslaughter, and counsel for the Crown may be prepared to join and challenge the gamble. But it is submitted that the trial judge is bound in every criminal case to direct the jury regarding all aspects

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12 It is suggested that the word 'recklessness' should be used in a sense which accords both with its dictionary meaning and with its common usage, *i.e.* as a synonym for carelessness. A person may do an act (or omit to do something) intentionally (*i.e.* foresight plus desire) and be either advertently or inadvertently careless as to the consequences. On the other hand, he may do an act or make an omission with inadvertent or advertent carelessness both as to the act or omission and to the ensuing consequences. The generic term 'recklessness or carelessness' means all kinds of carelessness, and the words 'subjective recklessness' are used here to mean consciously advertent carelessness. A contrary meaning of the word 'recklessness' is suggested by Glanville Williams, *Criminal Law* (1953), 49. There is no dispute, of course, that 'recklessness' is a word usually used to refer to serious carelessness.

13 Those sections provide as follows:

150. 'It is the duty of every person who has anything in his charge or under his control, or who erects, makes, or maintains anything which, in the absence of precaution or care in its use or management may endanger human life, to take reasonable precautions against, and to use reasonable care to avoid, such danger.'

152. 'A person who without lawful excuse omits to perform any of the duties mentioned in this chapter shall be criminally responsible for such omission if the same causes the death of or grievous bodily harm to any person to whom such duty is owed, or endangers his life, or permanently injures his health.'

14 Crawford J. did not concur with this view. He said (at 36): 'The summing-up of the learned trial judge should have included directions that if the wounding was foreseen as a possibility by the respondent—even if not intended—he should have been convicted; and that even if the wounding was unforeseen by the respondent he would be guilty of the crime of wounding by virtue of ss. 150 and 152 if the air gun was in the respondent's control, if it was something which in the absence of care in its use or management might endanger life if he omitted to use reasonable care amounting to culpable negligence to avoid such danger and if such an omission endangered the girl's life'. Without deciding the issue, Burbury C.J. and Crisp J. seem to have tentatively expressed the opinion that ss. 150 and 152 are ultimately governed by the necessity for proof of subjective recklessness and that a direction based on those sections would therefore have been superfluous and confusing. See pp. 31 and 29A of their respective judgments.

of the law which he considers applicable to the facts, regardless of the rival or even united contentions of counsel.[15] The only qualifying principle on appeal ought to be whether or not there has been a miscarriage of justice.[16]

From the decision of the Tasmanian Court of Criminal Appeal, an appeal was taken by Vallance to the High Court of Australia. The five judges of that Court delivered individual judgments which concurred in dismissing the application for special leave to appeal. The general basis of the judgments was that the learned trial judge had erred in not directing the jury that they might convict if it was their opinion that the accused was conscious of the possibility or likelihood of the wounding.

In effect, the High Court substantially agreed with the Court of Criminal Appeal that subjective recklessness is sufficient to prove the crime of wounding.[17]

The High Court disregarded the implications of sections 150 and 152 of the Code, presumably, adopting the majority judgment of the Court of Criminal Appeal in the matter. It should be noted that the High Court also refrained from a decision as to whether or not the accused was affected by the provisions of section 13 (3). It was arguable that the accused did an act, *i.e.* pulled the trigger, with intent to commit an offence, namely, to frighten the child, thereby committing an assault under section 182, and thus brought about an unforeseen result, the wounding. Seeing that section 172 does not of itself, or with the aid of section 13 (1), require any mental ingredient inconsistent with the purport of section 13 (3), the accused incurred the same liability to punishment as if he had effected his original purpose—criminal responsibility for wounding.. It is still an open question, therefore, whether on a charge of wounding, based on similar facts, the Crown may assert a breach of sections 150 and 152. If the accused disputes either the fact or the culpability of his carelessness the Crown may then alternatively contend that since, in the first place, the accused committed an act with intent to commit an offence, section 13 (3) in effect renders it unnecessary to establish a culpable[18] breach of sections 150 and 152. But those questions of law are still unresolved. The importance of section 13 (3) for

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15 Section 371X of the Code appears expressly to cast such duty upon the judge. Although somewhat special considerations apply to the crime of manslaughter, it is suggested that the decision of the Tasmanian Court of Criminal Appeal in *Leighton* v. *The Queen* (unreported 14/5/60) illustrates the general rule. See, too, the judgment of Crisp J. in *Hitchens* v. *The Queen* (Tasmanian Court of Criminal Appeal, 31/12/59, unreported at p. 2).

16 See s. 402 of the Code.

17 The judgments appear to differ, however, in relation to the necessity for advertence to the *possibility* or *likelihood* of wounding.

18 It seems likely that the reasoning in *Callaghan* v. *The Queen* (1952-3) 87 C.L.R. 115, would in Tasmania be held to apply to ss. 150 and 152. Apart from a defence involving an admission of carelessness but a denial of culpable carelessness, a defence to a charge based on ss. 150 and 152 would really invoke the provisions of s. 14 (honest and reasonable mistake): Howard in *U.Q.L.J.*, 4 (1961) 45. But is s. 14 a defence to a charge based on s. 13 (3)?

present purposes is that the Court of Criminal Appeal has decided that the word 'unforeseen' in section 13 (3) justifies a subjective interpretation of the word 'chance' in section 13 (1). The proviso prefacing the exculpation in respect of a chance event in section 13 (1), it is held, finds its due expression in section 13 (3), which latter purports to inculpate for an unforeseen event.

This reasoning was attacked by counsel for the Crown in the High Court. A hypothetical example will serve to illustrate. Suppose that A pushes B off a high building with intent to kill, and suppose that C (without A's knowledge or connivance) with intent to kill shoots B dead as he falls past the second-floor window. If A were charged with murder he could properly invoke section 13 (1) because that section provides an exculpation (though, as the proviso indicates, not an invariable exculpation) for a person charged with a crime in circumstances where no causal link can be shown between an act and an event.[19]

Although the necessity to prove a causal connection between an act and event would seem to be absolute and without exception in the criminal law, this is in fact not so. No resort need be had for examples to the realm of summary offences since expressly created instances of deemed or artificial cause are provided in section 154 and section 132 of the Code.[20] It was submitted to the High Court that this kind of reasoning was responsible for the proviso in section 13 (1), and that 'chance' should be given an objective meaning.

It is convenient to summarize the principal conclusions of the High Court.

1. Three judges held that 'chance' did bear an objective meaning.[21] The judgment of Kitto J. seems to express accurately the majority view in this respect—

> 'Then as to the second limb of s. 13 (1), the provision that no person shall be criminally responsible for an event which occurs by chance. Does that provision justify a direction that a person is not guilty of unlawfully wounding unless he not only foresaw that his act might cause hurt to the person who was injured but desired that it should do so? The expression "an event which occurs by chance" no doubt has its difficulties. In the Court of Criminal Appeal the view was expressed by all their Honours that in construing the expression a choice had to be made between a subjective and an objective reference, so that the question (to express it in my own words) was whether, on the one hand, the

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19 A would no doubt successfully overcome the categories of 'deemed' cause in s. 154 and be convicted of attempted murder only. But it is submitted that the question whether A caused B's death would be a matter for the jury. Although cause seems a logical inference to be drawn from the occurrence of a certain act and event, it is suggested that causal inference is fundamentally no more mysterious (in the criminal law) than customary expectation. Provided there is enough evidence of cause to go to the jury, the question is one of fact and not of law. It is submitted that A would not be caught by s. 13 (3) because the subsection is governed by the exculpation for chance event in s. 13 (1).

20 See *R.* v. *Chainey* (1914) 1 K.B. 137 for an interpretation of the English equivalent to s. 132.

21 Dixon C.J., Kitto and Windeyer JJ. Taylor J. expressed no opinion, while Menzies J. agreed with the Court of Criminal Appeal. It would appear, therefore, that in this respect the Court of Criminal Appeal has been overruled.

notion expressed by the words "by chance" excludes only an event which the person charged foresaw as a possible result of what he was about to do, or whether, on the other hand, it excludes only such events as an ordinary person in the like circumstances ought reasonably to have foreseen as such a result; and the choice made by all their Honours was for the subjective reference. I agree that an event which the person charged actually foresaw as a possibility substantial enough to be worthy of attention in deciding whether to do the act or not cannot be properly described as having occurred by chance; but it does not follow that every event which he did not foresee may be so described. In addition to having been unforeseen by him it must, I think, have been one so unlikely to result from the act that no ordinary person similarly circumstanced could fairly have been expected to take it into account. In a provision relating to a consequence of an act voluntarily and intentionally done, and denying criminal responsibility for that consequence if it has occurred by chance, it seems to me that "by chance" is an expression which, Janus-like, faces both inwards and outwards, describing an event as having been both unexpected by the doer of the act and not reasonably to be expected by an ordinary person, so that it was at once a surprise to the doer and in itself a surprising thing.'

2. Three judges[22] agreed with the Court of Criminal Appeal in deciding that the word 'act' in section 13 (1) when read together with section 172 refers to some initial causative act, and not to an act of wounding. An extract from the judgment of Taylor J. illustrates the majority opinion—

'On the other hand, the applicant insists, s. 13 (1) stipulates that no person shall be criminally responsible for an act, unless it is voluntary and intentional and this, it is said, means that an intent to wound must be proved. But in my view the provisions of s. 13 (1) do not produce, and are quite incapable of producing, this result for it is one thing to speak of "voluntary and intentional" acts when defining the general scope of criminal responsibility and another to speak of a specific intent accompanying acts done voluntarily and intentionally. To speak of an act being "voluntary and intentional" is to speak of the essential character of the act itself, and, of course, such an act may or may not be accompanied by an intent to commit some specific crime. Indeed, it is reasonably clear that s. 13 itself recognises this distinction for it conceives that criminal responsibility may attach as the result of either an intentional act (sub-s. (1)) or an intentional omission (sub-s. (2)), and then sub-s. (3) acknowledges that any such act or omission may or may not be accompanied by an intent to commit a specific offence.'

3. Since a majority of the judges adopted both an objective interpretation of the word 'chance' and the initial causative act interpretation of section 13 (1), it perhaps seems odd that each judge concluded that wounding may be established by proof of subjective recklessness.

Dixon C.J. and Windeyer J. joined together in adopting the minority *actus reus* theory of section 13 (1), but interpreted or modified the word 'intention' in that sub-section to include subjective recklessness.

'But in section 13 (1) I do not read the word "intentional" as bearing a meaning which requires that the end must be positively desired. I take it in the sense explained by Sir Courtney Kenny, an explanation he gave when he published his book in 1902. He contrasts it with the more ordinary use of the word which excludes a result that a man does not

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22 Kitto, Taylor and Menzies JJ. In dissenting judgments Dixon C.J. and Windeyer J. held that the word 'act' in s. 13 (1) referred to the *actus reus* in wounding, *i.e.* the wounding itself.

desire but foresees as likely, one the risk of which he runs possibly with regret.' [23]

'The common law treats what was done recklessly, in that way, as if it had been done with actual intent. It says that a man, who actually realises what must be, or very probably will be, the consequence of what he does, does it intending that consequence. The word "intentional" in the Code carries, I think, these concepts of the common law. I therefore do not read section 13 as altering these principles. It is, I may add, in my view undesirable to insist upon desire of consequence as an element in intention. There is a risk of introducing an emotional ingredient into an intellectual concept. A man may seek to produce a result while regretting the need to do so.' [24]

The remaining three judges chose three different avenues of reasoning in reaching their conclusions of subjective recklessness.

Kitto J. adopted the view that the verb 'wounds' in section 172 implies intent.

> 'But the expression "unlawfully wounds", read in its setting in a statute defining criminal offences, seems to me to connote a mental element attending the doing of an act which causes a wound. The Oxford English Dictionary reflects this mental element when it defines the verb "wound" as meaning "to injure intentionally in such a way as to cut or tear the flesh." The word "intentionally" is one of variable meaning, and for that reason the dictionary does not solve the problem before us; but the point which the definition brings out is that to "wound" a person is not simply to do an act which causes an injury of a particular kind: it is to do an act which causes such an injury with a state of mind extending to the injury as well as to the act. Such a state of mind must include a foreseeing of the injury as a possible consequence of the act, and it must include an assent of the causing of the injury by means of the act. The notion which the word conveys is not satisfied, I think, by the causing of an injury by mere negligence falling short of recklessness. It requires such an assent that the injury was within the contemplation and choice of the doer of the act. But there is, I think, nothing in the word to confine the notion of the causing of the injury with an actual desire to cause it. To speak of a desire as forming a necessary element to an intention may be accurate enough; for even where the result is regretted it may be desired on a balance of considerations, and so may be intended. But I am not at the moment defining intention. What is in question is the meaning of "unlawfully wounding"; and in that expression, though I do find a limitation relating to the mental attitude of the doer of a causative act, it is not a limitation which requires that the act must be done with an actual desire to cause an injury'

Taylor J. reached his conclusion through section 8 of the Criminal Code Act.

> 'We may commence this examination by postulating that it is not wounding *simpliciter* which is a crime, it is *unlawful* wounding, and the Code does not purport to specify its ingredients. But some help may be obtained from s. 8 of the Criminal Code Act itself, which provides that "all rules and principles of the common law which render any circumstances a justification or excuse for any act or omission, or a defence to a charge upon indictment, shall remain in force and apply to any defence to a charge upon indictment, except in so far as they are altered by, or are inconsistent with, the Code". This provision, it seems to me, makes it very difficult to escape the conclusion that for the purposes of s. 172 a wounding must be taken to be unlawful unless according to the rules and

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23 *Per* Dixon C.J.

24 *Per* Windeyer J.

> principles of the common law it is justifiable or excusable. This, of course, means that apart from s. 13 (1) an offence against s. 172 could be established in the absence of proof that the wounding itself was "intentional" in the sense that the acts which resulted in the wounding were done with intent to wound; it would be sufficient to show that it was the result of acts performed without actual intent to wound but with reckless or wanton indifference as to their result foreseen as a not unlikely consequence.'

Menzies J. followed the reasoning of the Court of Criminal Appeal by adopting a subjective interpretation of the word 'chance'.

Surprising—or otherwise—though it may be that, by pursuing four inconsistent lines of reasoning, five judges of the Australian High Court arrived at the same result of subjective recklessness, it is nevertheless respectfully submitted that their unanimity in the matter is little consolation for the contradictory reasoning and the unsolved problems. It is submitted with great respect that if all the questions of law[25] fairly raised by the facts had been considered, the prospect of mutual agreement would have been greater and the differences of opinion less marked. It may be that when the interpretation of fundamental provisions of a Code are in question, the piecemeal approach of the common law is inappropriate. A Code should be a logically self-sufficient system, and the interpretation of one basic section can determine the interpretation of all crimes and summary offences.

For this reason, it is suggested that a Code ought in time to result in a more sophisticated criminal law manifesting a more clearly defined set of primary concepts than can be provided by the common law. That, in turn, should lead to more certain results[26] and make available to the legislature more precise tools with which to create new crimes and summary offences.

Whether or not the boundaries of guilt in respect of the crime of wounding under the Code are marked by a criterion of subjective recklessness must still be regarded as unsettled. As a matter of policy it may be doubted whether wounding ought to be confined to cases involving subjective recklessness.

So far as crimes of violence are concerned the insistence upon intent or subjective recklessness provides a loophole of escape to an accused who is able to raise a reasonable doubt whether or not he acted in a blind rage, with no knowledge of what he was doing. It has been well said that there are degrees of knowing varying, say, from the extreme awareness of an artist to the awareness of a person awaking from sleep.[27] There

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25 Relating to ss. 150, 152 and 13 (3).

26 It has been doubted whether certainty in the criminal law is desirable: see Calvert in *M.L.R.*, 22 (1959) 621. But surely there is great merit in refining the fundamental concepts used to define criminal responsibility, such concepts, for example, as intention, cause, chance, reasonable mistake and the like. If uncertainty is a virtue then the common law of murder has a strong claim to that quality. Apart altogether from any question whether the High Court of Australia or the House of Lords should be followed, it would seem appalling that the principal ingredients of murder at common law still remain in doubt.

27 See, for instance, Norval Morris in *Res Judicata*, 6 (1952-4) 321.

appears to be no logical reason why blind rage should not negative subjective recklessness, and those who have experience of juries will appreciate the excellent prospects such a defence has to offer if the purely subjective theory of guilt for, say, wounding is sound in law.[28] It is suggested that, as a matter of policy, blind rage ought not to constitute a defence to a charge of wounding,[29] nor indeed a complete and final defence to any charge of violence.

This kind of situation would seem to raise one of the main problems concerning the requirement of intent or subjective recklessness in connection with crimes of violence. It is a problem which has yet to be considered or even mentioned by critics of the decision of the House of Lords in *D.P.P.* v. *Smith.*

E. Sikk *

FURTHER THOUGHTS ON THE QUEEN v. VALLANCE

In this case two judges of the Tasmanian Court of Criminal Appeal referred with approval to the summing-up in *R.* v. *Lucas.*[1] The latter concerned a prosecution under the Tasmanian Criminal Code for the offence of dangerous driving and, in the course of his summing-up, Gibson J. considered the effect on such prosecutions of section 13 of the Code. He held that the only intentional act on the part of the accused which it was necessary for the Crown to prove was the act of driving, and that there was no necessity to prove an intention to drive dangerously. Following this decision, Crisp and Crawford JJ. held in *R.* v. *Vallance* that the word 'act' in section 13 (1) referred to the action of depressing the trigger of the air-rifle, and not to the whole '*actus reus*' of wounding. Burbury C.J. reached the same conclusion without reference to *R.* v. *Lucas.*

All three judges then went on to hold that the second limb of section 13 (1) imported into a charge of wounding under section 172 of the Code a mental element; that the charge could not be sustained unless the jury were persuaded beyond reasonable doubt that the accused foresaw the possibility of wounding but nevertheless intentionally pressed the trigger.

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28 The judgment of Crisp J. in *Hitchens* v. *The Queen* (Court of Criminal Appeal, 13/12/59, unreported at p. 19), with which Gibson J. agreed (at p. 15), would appear to prevent an accused from suggesting that (apart from insanity) he acted under an irresistible impulse and that therefore his act was not voluntary within the meaning of s. 13 (1).

29 In the criminal law, causing a wound or bodily harm by inadvertent carelessness is no novelty. That crime exists in the Queensland Criminal Code, s. 328, Western Australia Criminal Code, s. 306, and in the New Zealand Crimes Act, s. 206. Wounding was created by statute and not by the common law. With respect, this consideration makes the judgment of Taylor J. in *The Queen* v. *Vallance* difficult to understand. Common law jurisdictions no doubt have equivalents of the English Offences against the Person Act 1861, s. 20 (unlawful and malicious wounding). In spite of the decision in *R.* v. *Cunningham* (1957) 41 Criminal App.R. 155, it is still arguable that malicious wounding is not confined to subjectively reckless wounding. The 'subjective school' of writers has never satisfactorily reconciled the decisions on this section (see, *e.g. R.* v. *Ward* L.R. 1 C.C.R. 356) with their broad theories of subjective recklessness. Moreover, the decision of the House of Lords in *D.P.P.* v. *Smith* may lead to the decision in *R.* v. *Cunningham* being limited in its application.

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1 Unreported, Tas. S.Ct. 30/10/58.

Leaving aside for the moment apparent differences caused by the use of such words as 'recklessness', 'likelihood', 'possibility' and the like, much the same result was reached in the High Court of Australia by Kitto J. and Menzies J.

Dixon C.J. and Windeyer J. arrived at the same result but did so by construing the word 'act' in section 13 (1) as connoting the whole '*actus reus*' of wounding.

Taylor J. appears to have arrived at the same result by construing section 172 by itself.

Thus, seven out of eight judges have decided that, one way or another, the effect of section 13 (1) is that in all crimes of commission it is necessary to prove that the accused foresaw the possibility that the prohibited act or event (in this case wounding) would occur.

But does this not mean that the summing-up in *R.* v. *Lucas* was deficient? It is submitted that it does, and that section 13 (1) read as a whole requires a direction that a person accused of dangerous driving should not be convicted unless the jury are persuaded beyond reasonable doubt of his advertence to the possibility that his manner of driving would create a danger to the public and that nevertheless he persisted in it.[2]

Turning back to *R.* v. *Vallance*, it must follow (if the view here put forward is correct) that any argument as to the construction of the word 'act' in section 13 (1) which is based on *R.* v. *Lucas* is suspect, for the latter case as a whole does not conform with the general proposition formulated in *R.* v. *Vallance*. If one is prepared to interpret the whole of section 13 (1) as requiring a mental element, why not go the whole way (as Dixon C.J. does) and interpret 'act' as meaning '*actus reus*'? The sub-section is then perfectly comprehensible, the first limb referring to deeds in which the thing prohibited forms part of the action of the perpetrator (*e.g.* stabbing), and the second to deeds in which the thing prohibited (*e.g.* wounding) is an 'event' separated in time and/or space from the action (*e.g.* throwing a knife). 'Intentional' is, of course, to be construed as including 'reckless'.

On either view the necessity for a direction as to foresight is not confined to cases of offences punishable on indictment. For, as Crisp J. held in *R.* v. *Vallance*, the section applies to summary offences as well as to crimes; and it follows that, except in cases where the statute creating the offence explicity or by necessary implication negatives any requirement of *mens rea*, there can be no liability to punishment for an unforeseen occurrence.

Perhaps after all the draftsman of section 13 (1) was endeavouring to enact the common law; for the last paragraph seems remarkably akin

2 It may be said that Gibson J. was constrained to hold as he did by the decision of the High Court of Australia in *R.* v. *Coventry* (1937-8) 59 C.L.R. 633. But that was an application from South Australia for special leave to appeal, and in that State there is no counterpart of s. 13 of the Tasmanian Criminal Code. Further, the section under which the change was brought (s. 14 of the Criminal Law Consolidation Act 1935-52) differs significantly from s. 32 of the Traffic Act 1925 (Tas.).

to the well-known statements of the common law on this subject in *Fowler* v. *Padget*[3] and in *Harding* v. *Price*.[4] Indeed, if there is a difference between the Code and the common law on this subject it must lie in the degree of likelihood of the criminal event occurring. Such a fine distinction may, because of its very narrowness, be a further reason for concluding that there is no distinction at all.

The judgments in *R.* v. *Vallance* are interesting also in relation to section 156 (2) of the Code.[5] It appears to be the view of all judges that (a) the word 'unlawfully' in section 172 qualifies the *actus reus* of wounding, and (b) that it means 'not justified by the provisions of the Code'. The second of those conclusions may have been based on the premise that wounding was a crime at common law. But, as Windeyer J. points out, it was not—it was merely a trespass. The first conclusion then became the basis for holding that the trial judge was wrong in directing the jury that the fact of the discharge of the firearm constituting an offence might satisfy them that the wounding was unlawful. Crisp J. was, however, at pains to point out that such a direction might be correct if the crime were 'wounding by any unlawful act'.

If section 156 (2) III is examined in the light of this reasoning, it would seem to follow that this paragraph means either—

(a) by any tort (*e.g.* trespass) not justified by the Code;

(b) by any act not justified by the Code;

(c) by any act which is itself an offence; and

(d) by any act which was prohibited by the common law and which is not justified by the Code.

The second interpretation is plainly untenable; the first is the very construction which Crisp J. strove so strenuously to avoid in *R.* v. *Davis*.[6] Both, it is submitted, are repugnant to common sense.

The third reading would lead to the strange result that although Vallance may not have been guilty of wounding while the victim lived, he would certainly, had she died, have been guilty of manslaughter.

The fourth reading is perhaps a little strained, but it achieves a more satisfactory result.

In conclusion, it is difficult to escape the view that some amendment of this section is overdue.

*H. E. Cosgrove**

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3 (1798) 7 T.R. 509, 101 E.R. 1103.

4 [1948] 1 K.B. 695.

5 Section 156 (2) provides that 'Homicide is culpable when it is caused (a) by an act intended to cause death or bodily harm, or which is commonly known to be likely to cause death or bodily harm, and which is not justified under the provisions of the Code; (b) by an omission amounting to culpable negligence to perform a duty tending to the preservation of human life, although there may be no intention to cause death or bodily harm; or (c) by any unlawful act.

6 (1955) Tas. L.R. 52.

* B.Com., LL.B. (Tasmania).