

Manslaughter

Justice Hollingworth

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Justice Tinney

It's a much easier crime to prove, manslaughter. As prosecutors quite often say to juries, you can't lift the top off someone's head and sort of read his brain, like it's tea leaves, and say, well, that's an intention to kill.

Justice Taylor

People who have been involved with an unlawful death, they are just traumatised by the death of someone, and in common language, we say someone has been 'murdered.'

Tim Marsh

When I first saw the brief and saw the number of wounds that were reported in the forensic pathologist's report, you take a bit of a gulp and you sit back in your seat and you think, 'Hmm, okay. What are we going to do with this?'

Evan Martin

Murder and manslaughter. They're two of the most serious crimes you can commit, both resulting in the death of another person. But their differences often lead to great confusion and controversy in the community.

The average sentence for murder is at least 10 years more than that for manslaughter, and when there can be such a fine line between the two, it's easy to see where the outrage stems from.

I'm Evan Martin, and this is Gertie's Law. This episode is about the crime of manslaughter.

Justice Hollingworth

From a legal point of view, it's a very clear line between murder and manslaughter.

Evan Martin

Justice Hollingworth, Principal Judge of the Criminal Division.

Justice Hollingworth

The problem is that factually, it's not always easy to immediately look at a case and say which of the categories it falls into.

Legally, murder has four elements that the prosecution have to prove.

Evan Martin

Number one.

Justice Hollingworth

They've got to prove that the accused caused the death of the deceased person.

Evan Martin

Two.

Justice Hollingworth

Did so deliberately, not accidentally.

Evan Martin

Three.

Justice Hollingworth

Did so with the relevant murderous intention. Now, murderous intention means with an intention to kill or cause really serious injury. That's a very high test, and that's the element that's most often misunderstood.

Evan Martin

And four.

Justice Hollingworth

And the fourth element the prosecution have to prove is that the accused wasn't acting with a legal excuse or justification. So they weren't acting in self-defence or under duress or something of that sort.

Evan Martin

So, that's murder. What about manslaughter?

Justice Hollingworth

Manslaughter, you could, in short terms, describe as unintentional killing. So, murder is intentional; manslaughter is unintentional.

The first two elements are the same. The prosecution have to prove that the accused caused the deceased's death and they've got to prove that it was deliberate, not accidental, but then they don't have to prove any particular intention.

What they have to prove is that the act was dangerous, and that's objectively dangerous. Would a reasonable person in the position of the accused have appreciated that doing that particular act would be likely to expose the deceased to an appreciable risk of danger? I know that sounds a bit complicated, but basically, would a reasonable person have realised this was dangerous?

And the act also has to have been unlawful. That is to say, it's got to have been done not with justification or excuse, like self-defence, et cetera.

Evan Martin

But it's not always that simple. It can be very difficult to characterise some cases as one or the other.

Justice Hollingworth

Some cases are clear-cut. If I fire a gun at you and fire a number of shots, or if I stab you 14 times, I'm going to have a very difficult job arguing that I wasn't intending to kill you or, at the very least, cause serious injury, but the far more difficult cases are the ones where, for instance, there's a single stab wound, particularly a single stab wound inflicted in the course of a fight.

Now, if the stab wound is straight to the heart or through the lungs or somewhere in a very vulnerable position, once again, some people might think, "Well, that's pretty clear-cut", but what if it's a stab wound – I've had a number of cases recently with a stab wound to the thigh in the course of a fight. Was that done with an intent to kill or cause really serious injury or some lesser intent?

Evan Martin

Justice Taylor, a judge in the Criminal Division since 2018.

Justice Taylor

So, it's the intention that accompanies the act causing death that is the real distinction between murder and manslaughter.

Evan Martin

But when the line between murder and manslaughter is so fine, it can lead to confusion and anger for the families involved and the broader community.

Justice Taylor

The line is murky I think, because the distinctions are all very legal distinctions, and while lawyers can explain that, when you are involved in the trauma of having a loved one having been killed, or indeed being an accused person or the family of the accused person who has caused the deaths, that is a very difficult thing for people to understand.

People who have been involved with an unlawful death, they are just traumatised by the death of someone, and in common language, we say someone has been 'murdered.'

Evan Martin

The maximum sentence for manslaughter was increased last year from 20 years to 25 years.

According to the Sentencing Advisory Council, the average sentence imposed on people for manslaughter in 2018–19, when the maximum sentence was 20 years, was 9 years and 3 months imprisonment.

Murder has a maximum sentence of life in prison, and in the same period, the average sentence for murder, excluding life, was 21 years and 9 months.

And an illustration of the significance the law accords to intent - the maximum sentence for attempted murder is also 25 years, even though it doesn't result in somebody's death.

Justice Taylor

The law simply says that if you attempt to commit the crime you should be punished as though you have committed the crime. So that applies across the board. It's not just murder. It applies to assault, it applies to armed robbery, that kind of thing.

Evan Martin

The line between murder and manslaughter can be unclear, but even within murder and manslaughter, there are different types of each.

Justice Hollingworth

Murder, the most common one and the one that people think of, is what we call intentional murder. And that's where one person kills another person, intending to either kill them or cause them really serious injury, and that's an easy one for people, I think, to understand.

There's then, what we call statutory murder, which is where someone is carrying out another violent offence and they unintentionally kill someone in the course of that. For instance, if I'm robbing a bank or carjacking and in the course of that, I kill someone, I could still be guilty of murder, statutory murder, even though I didn't intend to kill them.

And there's also a third type of murder which we call reckless murder, which is where, even though I don't intend to kill someone, I commit an act knowing that someone will probably die or suffer a really serious injury, as a result.

So, those are the different types of murder and they have different moral culpability within them.

Evan Martin

And then we move to manslaughter.

Justice Hollingworth

Manslaughter is where you kill someone with no intention whatsoever of killing them but you fall within one of two categories. The first, and it's the most, perhaps the best-known type of manslaughter, is what we call 'unlawful and dangerous act' manslaughter. And that's where you're committing an unlawful act, perhaps assaulting someone, perhaps some other physical act. And you, in the course of that, caused someone's death through a dangerous, an objectively dangerous act.

There's another type of manslaughter, though, called negligent manslaughter and it's less common, and that arises where you owe the person who ends up dead, some sort of legal duty of care and you breach that duty by what we call criminal negligence.

You might owe them a duty of care, for instance because you're the parent of a child or you're the spouse or partner of an injured adult spouse or partner and you're in a situation where you can do things to prevent them from dying and you fail to do that. And your failure is of such a standard, that the criminal law holds you responsible.

But there's another type of negligent manslaughter and that's where you wrongfully place someone in danger. So, for instance, if I assault you and leave you badly injured on the road, and somebody comes along and runs over you, I could still be responsible for manslaughter even though you didn't die as a result of my attack, you died as a result of the car running over you. And that would be because I'd placed you in that position where you could be injured.

Evan Martin

And even between murder and manslaughter, even allowing for all of those different categories, it's sometimes very difficult to work out where within the categories a particular attack or particular incident occurs.

Justice Hollingworth

A common area, where that arises, is in the area of stabbing. So, I stab you. I could stab you with an intention to kill you or cause you really serious injury or I could stab you accidentally or unintentionally or intending only to cause something less serious than your death or a really serious injury. And so, in that sort of case, the jury, if it's going to trial, are going to have to work out, what was my intention when I stabbed you?

Evan Martin

In many homicide trials, the jury is open to find the accused not guilty of murder, but guilty of manslaughter, which means it is going to fall on the jury to decide whether that intent was present.

Justice Tinney

A lot of situations, the event, clearly, is a murder.

Evan Martin

Justice Tinney, a judge in the Criminal Division since 2018.

Justice Tinney

So for example, if it's an organised attack, in a gangland setting where someone's shot in the head. Of course it's a murder and in those cases, manslaughter wouldn't even be left to the jury, for their consideration because everyone would accept, the only issue here is, well, perhaps in many cases, the identity. Can the Crown prove who the killer was?

But in a lot of other cases where it's an assault, even a very violent assault with lots of blows and things, there'll be a live issue as to whether manslaughter might be the appropriate charge.

It's a much easier crime to prove, manslaughter.

As prosecutors quite often say to juries, you can't lift the top off someone's head and sort of read his brain as though it's tea leaves, and say, well, that's an intention to kill.

So, in the absence of someone actually saying, "At the time I did this, I intended to kill him or cause him really serious injury," the prosecution needs to point to all of the surrounding circumstances, to prove that, that must have been the person's intention. It's a matter of looking at all of the things said and done by that person, leading up to the event, during the event and after the event, to try to work out whether those things can prove an intention to kill or cause really serious injury.

So, obviously, if there's proven ill-will between the accused and the deceased person beforehand. You know, if there was a strong hatred or animosity, that would be something that would show the existence of a strong motive perhaps to kill, and there might be other things that might show that. Or if the actual carrying out of the acts that have caused the death, if that's been done in an extravagantly violent way, that might be indicative of the necessary state of mind, the intention to kill or cause really serious injury.

I mean, if there were 100 blows to the head with a baseball bat, even if there was no admission that I was trying to kill him or cause him really serious injury, it'd be pretty obvious that that could have been the only state of mind the person had. Likewise, if you shot someone in the head from close range.

Whereas in some cases, it's perhaps a single stab wound to the chest which might rupture the heart or an artery or something and might cause death, but there's only been that one thing.

So was there an intention to cause death or really serious injury? Well, the prosecution would look at that and the prosecution would say to the jury, "Well look, members of the jury, he's an adult. He knows that there are vital organs in there, that if a knife goes in there, it may well damage vital organs that will cause death or really serious injury." So that's the approach the Crown would take.

But the approach of the defence may be, "Well, members of the jury, look at the situation the accused was in. He was frightened, he was confused, he was intoxicated. He stabbed him. But could you really be satisfied that in that one stab wound he intended to kill this person or cause really serious injury?" And if the jury couldn't be satisfied of that, then the verdict there would be guilty of manslaughter, which only requires proof that the act was unlawful, so it's an assault, and that it was dangerous.

Evan Martin

It's not up to the court or a judge to determine what charges will proceed to trial. That decision falls to the prosecution.

Before being appointed to the court in 2017, Justice Champion spent his prior six years serving as the Director of Public Prosecutions.

Justice Champion

As DPP, I considered countless cases of murder and manslaughter and had to think about the difference between those types of offending.

You have to remember that each case that comes before you is different. Different alleged offenders, different accused, different facts and circumstances. All of those things have to be considered when you make a decision whether a case ought to be put forward as a murder case or a manslaughter case.

There might be all sorts of reasons for that and the prosecution will evaluate their case on the basis of whether or not they can prove a case of murder. In other words if they can prove the four elements that we've talked about earlier.

But it will depend, almost entirely, on whether or not the prosecution take the view that they will or will not be able to prove a case of murder.

And of course, it's in the interest of defense to try and negotiate a position where they can obtain the decision of the prosecution to reduce the charge from murder to manslaughter, because there will be a big sentencing difference in that outcome.

Tim Marsh

Your client's charged with murder, you've got the brief, you've read through the evidence. What turns that into manslaughter?

Evan Martin

Tim Marsh defended countless people accused of murder or manslaughter during his time as Chief Counsel at Victorian Legal Aid.

Tim Marsh

In essence, what you are trying to do is to analyse the evidence and see what conclusions a jury would be likely to draw from the nature of the assault and the surrounding circumstances.

So, at one end of the spectrum or continuum, it's very easy to come to a conclusion about what a person's intent might have been at the time of the commission of the act. But it's unsurprising that as you sort of move down the scale of seriousness, you get to a point where there's a bit of ambiguity about what a person might have intended.

Were they intending to cause a really serious injury when they punched a person? Were they intending to cause a really serious injury when they stabbed a person?

And so, what are you looking for? Well, you might be looking for evidence that relates to, firstly, the nature of the assault itself. Was there a weapon that was used? Is it a weapon that's inherently lethal? Is it something which you would commonly expect to be able to cause the sort of injury that brought about the death of the victim? Or is there something, perhaps, more unusual about it?

Evan Martin

If a murder accused offers to plead guilty to the lesser charge of manslaughter, it's up to the prosecution whether they accept it or not.

Justice Tinney

So, it'll depend on the individual prosecutor. It'll depend on the attitude of the police. It might depend on assessment of, what's the evidence like? You know, are the witnesses gonna stand up? The case might look good on paper but is it actually going to be as good as that?

Evan Martin

Before being appointed as a judge, Justice Tinney spent 12 years as a Crown prosecutor.

Justice Tinney

There will tend to be discussions between the prosecution and the police, as to what the right approach is, and the prosecution may have a clear view that this is murder, and we will never accept anything less than that. Sometimes, it's an event where manslaughter might be a prospect. There might be a real chance that the Crown will fail to prove murder and it might end up being manslaughter or there might be a risk of it being an acquittal altogether.

Evan Martin

And often, the defence may make an offer to plead guilty to manslaughter, if the Crown will remove the murder charge, and the case would then proceed as a manslaughter.

Justice Tinney

So, when a plea offer is made by the defence, it then needs to be determined and decided by the prosecution.

So, that'll be a Crown Prosecutor. The Director of Public Prosecutions might be consulted but sometimes the Crown Prosecutor will just make the decision himself or herself. Sometimes, the decision will be an easy one. The offer will be rejected. Other times, the offer might be worthy of serious consideration and if that happens, the prosecutor will speak to the police, see what their attitude is.

The prosecutor will, in many cases, and it's a very common thing, speak to the family members of the person who was killed, and have a conference with them, and discuss what they would like. Whether they think the offer should be considered, in view of the fact that there are always risks in any prosecution.

Justice Tinney

The Crown might fail altogether. You know, the jury might do something unexpected or the evidence might fall short even, of proving manslaughter. So sometimes, an offer to plead guilty to manslaughter, may be attractive to the prosecution. I can say that, I think it would be quite an unusual thing for the prosecution to accept a plea offer to a charge of manslaughter, against the wishes of the police or the family of the deceased person. I think, in my experience, that's unusual.

I'm not saying it doesn't happen because the reality is, the decision needs to be made by the prosecution, not by the police or by the family members.

I remember one case where the case on the murder was really quite strong, quite good. But there was a plea offer for manslaughter and it was a case where a person had killed another person by running him over, on the prosecution case, deliberately running over this person, and there'd been a long running dispute between those people, and so, it happened in the

context of that. But the accused was 74 years old, had no prior convictions, and he had some psychological issues that were at play. And even on a charge of manslaughter, he was going to receive a long-term of imprisonment. And in that case, the prosecution formed the view, "Well, look, we could probably succeed on the murder but in the circumstances of this case, it may be appropriate to accept the manslaughter." That's if the police are happy with that and if the family of the deceased were happy.

They were, and so that plea offer was accepted even though, strictly, there was certainly enough evidence to prove the murder. That man ended up getting a long sentence which will see him spend, probably, the rest of his life in jail anyway. So, it's a pragmatic sort of thing, it just depends on the situation.

More offers are rejected than accepted. But sometimes, it's considered appropriate to accept an offer to plead guilty to manslaughter, which then immediately has the effect of greatly reducing the period of time that's likely to be served as a sentence and it can cause great disquiet in the community, I think, when that happens. But these things are thought about very carefully and lots of considerations come into play.

Evan Martin

One particular case that caught my eye when I was first sitting in on court was that of Gary O'Connor, who was originally charged with murder but pleaded guilty to manslaughter over the 2016 death of a man he was living with in rooming accommodation.

Tim Marsh was O'Connor's defence counsel.

Evan Martin

That case is a pretty good example, I think, of where confusion in the community reigns, because I remember reading the headline for that, and I'm pretty sure it read something along the lines of, 'Stabbed 18 times With a Screwdriver', and just reading the headline, I immediately thought, 'How is that manslaughter and not murder?'

Tim Marsh

Yeah, and it was that precise issue that was canvassed at the committal hearings. So, certainly, on the face of it, when I first saw the brief and saw the number of wounds that were reported in the forensic pathologist's report, I was... you know, you take a bit of a gulp and you sit back in your seat and you think, 'Hmm, okay. What are we going to do with this?'

Evan Martin

But after a closer look at the evidence, the case became less clear-cut.

Tim Marsh

There was some evidence that the assault, or the altercation, was initiated by the ultimate victim. There was a weapon that was involved - it was a screwdriver that appeared to have been sharpened to a point. There was no evidence one way or the other about whether the weapon had been brought by the victim or brought by the ultimate accused. And during the course of that fight, both parties sustained injuries, the victim's ultimately fatal.

It was possible to determine in the committal proceeding, with evidence from a forensic pathologist, that the number of apparent wounds to the victim, that many of those wounds were shallow, that didn't penetrate, didn't cause injury. There were only two or three which had the capacity to cause fatal injury, and those wounds themselves were consistent with the fight having been a dynamic or moving affair with both parties in constant movement as opposed to the results of a deliberate and prolonged attack upon a person.

So, that was something that supported a number of inferences that we could then make the argument to the OPP that if this matter ran to a trial, we would likely be able to say to the jury that “You shouldn’t be satisfied beyond reasonable doubt that the intention here was to kill or cause really serious injury”, but that this was an unlawful or dangerous act that resulted in the death of the victim.

Evan Martin

The Office of Public Prosecutions accepted O’Connor’s guilty plea to manslaughter.

Justice Champion (O’Connor sentence)

Gary Sean O’Connor, on 6 April 2018, you pleaded guilty to the manslaughter of Michael Barnicoat on 1 and 2 November 2016. Your guilty plea was on the basis of manslaughter by an unlawful and dangerous act, in that you stabbed Mr Barnicoat a number of times with a sharpened screwdriver.

Evan Martin

In 2018, O’Connor was sentenced by Justice Champion.

Justice Champion (O’Connor sentence)

Your offending was objectively serious as it involved the use of a sharpened weapon against an unarmed man, who died as a result of your actions. Your plea accepts that you intended to stab him, which you did more than once. I accept that your offending occurred in the course of a dynamic struggle, and that the confrontation came to your door. I further accept that you did not go out looking to harm another person.

Would you stand please, Mr O’Connor?

Balancing all the factors relevant to you and your offending I sentence you to be imprisoned for 10 years.

I order that you will serve seven years before being eligible for parole.

Tim Marsh

By way of contrast, I was involved in another case that ran to trial that involved a single stab wound to the neck of the victim. A single stab wound that transected a vital artery in the victim’s neck, causing her to bleed to death within a very short period of time. And the sole issue, literally the sole issue in that trial, was what was the inference that the jury could draw from that act? Did that act itself indicate an intention to kill or cause really serious injury? Or again, was that an act that could be characterised as an unlawful and dangerous act?

Ultimately the jury in that case, I suspect, concluded that any stab wound to the neck of a person is simply so risky or so dangerous that the only conclusion you could draw was an intention to kill or cause really serious injury, and they returned a verdict of guilty in that case.

But that gives you two examples of the sorts of issues that you might be arguing about at that sort of fine line where you transition from murder to manslaughter.

Evan Martin

There is a huge range of culpability within manslaughter, which means the sentences handed down vary greatly.

At one end, perpetrators face many years, often in the teens, in prison. While sentences can be as low as a couple of years imprisonment.

Justice Hollingworth

Many of the features that make manslaughter more or less serious are similar to or the same as those that make murder more or less serious. An important matter for both is, the extent of any premeditation or preplanning. Obviously, something that happens spontaneously is regarded as less culpable than something that's been pre-planned. The identity and any vulnerability of the victim would be relevant. Whether things happen in public or in private. Whether you've broken into someone's home in the middle of the night, so the time and the place of any assault would be relevant to moral culpability.

Whether or not a weapon is used and if so, what sort of weapon?

Another relevant matter would be the nature and extent of any previous relationship between the accused and the deceased. Whether there was any provocation. Whether there was either self-defence or something close to self-defence, even if you didn't get, quite get over the line, whether the accused felt rightly or wrongly that they needed to do what they did, in order to defend themselves. All of those sorts of things would be relevant to assessing moral culpability.

High end manslaughter can be something that's really only a hair's breadth away from murder.

Evan Martin

One example of quite a high-end manslaughter case was Moreland, Tippins and Thorp.

Justice Croucher (Moreland, Tippins, Thorp sentence)

On 12 December 2014, following a month-long trial before a jury, Mark James Moreland, Christopher Nathan Tippins and Tai Thorp were found not guilty of the murder of Gordon Hamm on 17 July 2013, but guilty of his manslaughter.

Justice Croucher

That was not at the absolute highest end, but certainly up towards the, you know, beyond the middle and towards the higher end.

Evan Martin

Justice Croucher has been a judge in the Criminal Division since 2013 and has seen his fair share of manslaughter cases before the court.

Justice Croucher

That was a case on the South Australian border where these three people were recruited in some way to go and accost a fellow on his way back from what was probably a drug run across the border. And all because they thought he had money. And he was picked up at a place called Nelson, right near the border, and dragged into a car, probably belted as well, and never seen again.

These three people, Moreland, Tippins and Thorp, were all charged with his murder, in fact. And they pleaded not guilty.

Their case, at least Moreland and Tippins, their case was, "Well, we were recruited to kidnap this fellow effectively and hand him over to some other people to whom he was said to be in debt." That was the way they ran their case. A jury found them not guilty of murder but guilty of manslaughter. And it was... the circumstances of his death weren't really known. Although there was, you know, things you could infer about it.

Justice Croucher (Moreland, Tippins, Thorp sentence)

I regard this as a very serious example of manslaughter. First, in the cases of Mr Moreland and Mr Tippins, there was an element of planning the behaviour that led to Mr Hamm's death. On their own case, they were there to abduct Mr Hamm, to hand him over to others, for the purposes of recovering debts.

Plainly, an element of violence was always going to be necessary or at least contemplated in abducting him.

Secondly, that Mr Moreland took a weapon – a gun – to intimidate Mr Hamm and that he and Mr Tippins both used that weapon adds to the seriousness of the offence. Mr Moreland struck Mr Hamm about the head with the butt of the gun and fired it as a warning shot. Mr Tippins, I am satisfied, used the gun to assault Mr Hamm further when down in the picnic area.

The offence was committed in the dead of night, by three people onto one and in a public place.

While I accept that Mr Hamm was still alive when taken from Nelson, the whole ordeal, both at Nelson and when in the car, must have been a terrifying way in which to spend his last moments alive.

Justice Croucher

But the extraordinary twist in that case was that after they were found guilty and before they were sentenced, having said that they handed him over and never saw him again, these two both approached the police through their lawyers and said, "Actually, we can take you where the body is buried and we can show you."

One of them was released from custody for the purpose of taking the police up to this remote bushland, I think in the sort of southern part of South Australia or mid part of South Australia. And sure enough, the body was found exactly where they said it was.

Evan Martin

It was at this point that police discovered that the body had also been burnt.

Justice Croucher ((Moreland, Tippins, Thorp sentence)

In the cases of Mr Moreland and Mr Tippins, their offence is aggravated by the fact they burnt and concealed the body. On the other hand, that they, after verdict, did the decent thing for Mr Hamm's family, and directed the police to his body, offsets that aggravating factor. It must also be accepted that, but for their disclosure, it is unlikely that the body would have been found or that it would have been known that it had been burnt.

While worse cases of manslaughter by unlawful and dangerous act by joint criminal enterprise might be imagined, this is still a very serious example of the offence.

Evan Martin

Moreland and Tippins were sentenced to 12 years imprisonment with a minimum of nine years.

As he was not involved in the planning, the actual violence or the concealment or burning of the body, Thorp was sentenced to 10 years imprisonment with a minimum of seven.

Justice Hollingworth

At the lower end of manslaughter, you've got things that are really just, little more than an accident.

I remember a case I had many years ago, where a young woman was in a fight with her domestic partner. She thought he was cheating on her. He'd actually been very violent to her, in the past. She was furious with him on this particular night because she'd found some evidence of him being involved with someone else that evening. He came back into the house, she grabbed a pair of scissors off the table, it was the nearest thing to hand and sort of ran at him, meaning to scare him away.

They started tussling. In the course of the tussle, they tripped and fell, and the scissors stabbed him in the eye. She was immediately incredibly remorseful, called for assistance, and couldn't believe what had happened.

Evan Martin

The victim, David Dalglish was rushed to hospital and, despite surgery, lost sight in his right eye.

Expert medical opinion was that no further operation was needed, and the doctors expected the injury to the brain to heal itself. On 8 November 2007, four days after his initial admission, Mr Dalglish was discharged.

Justice Hollingworth

He, subsequently, a few weeks later and after several hospital admissions, died as a result of an infection to the eye which went to the brain, which had been caused by the scissors. You know, it was just a series of unintended events that caused somebody's death.

Evan Martin

Justice Hollingworth sentenced Raegan Turner to four years imprisonment with a minimum of two for manslaughter.

Justice Hollingworth

There are many examples, I'm sure, but that's one example of something where you can still be convicted of manslaughter, even though the moral culpability was really very low.

Evan Martin

In 2018, Justice Croucher sentenced Jessica Donker for a particularly tragic manslaughter.

Justice Croucher (Donker sentence)

Following her interview with police, Ms Donker was charged with murder. She has remained in custody ever since.

However, prior to the committal hearing, Ms Donker offered to plead guilty to the lesser charge of manslaughter instead, which the Director accepted. Ms Donker honoured that plea agreement by pleading guilty to manslaughter when arraigned in this Court. Thus, a contested committal hearing and a contested trial have been avoided.

Justice Croucher

Hers was an unusual case because it was a combination of using a car and inadvertently obviously, to kill someone. But it was also described as an unlawful and dangerous act. Normally, they're the sort of cases that are described as criminal negligence, but it was a pretty unusual set of circumstances where you know, she was in a very difficult relationship. You know, they'd been fighting the night before, there had been a long history of violence between them.

But obviously, she was the one who came off second best in most of that. And she'd only been assaulted by the deceased, her partner, the night before. That morning, she was dragged out of the car by her hair, where she was sleeping. She was sleeping in her car because you know, they were in a hopeless state. They'd lost the care of their kids, they'd lost their home. They were both unemployed, although she was still trying to do her best. And she was dragged out of the car by her hair by him and as her counsel said, "She snapped." She'd had enough and she reacted in this way by driving the car at him several times. But just to frighten him, I accepted.

But in the end there was this freakish accident - trying to get past him by frightening him, she clipped this pole and it bent like a cleaver. But on an angle that was completely unpredictable and it hit him in the head and killed him.

Justice Croucher (Donker sentence)

In my view, while the striking of the pole with the left of the car may have been foreseeable, that it would in consequence bend at the precise angles – both on the vertical and horizontal planes – necessary to strike Mr Powell at all, who was standing at least two metres away and off to an angle so as not to be in the car's direct path, let alone strike his head, cleave it with the sharp edge of the sign, and then kill, or even injure him in such a way, was all completely unexpected and unforeseeable. As I have said, this aspect of the event was just a freakish accident.

Justice Croucher

And it was a horrible thing but it was a very low-level manslaughter in my opinion, and the sentence reflected that.

Justice Croucher (Donker sentence)

Please stand, Ms Donker.

For the reasons I have given, I regard this as an unusual case calling for an unusual sentence. I think that an element of mercy is due to Ms Donker because of the circumstances in which she offended, including the provocation under which she laboured and the relationship of domestic violence to which she was subjected. She will also have to live forever with the fact that she killed the father of two of her own children.

Balancing all factors as best I can, for the manslaughter of Richard Powell, Jessie Donker is convicted and sentenced to five years' imprisonment.

I fix a non-parole period of two years.

Evan Martin

In researching this case, I was struck by how Justice Croucher began the sentence.

Justice Croucher (Donker sentence)

In the early-1990s, singer-songwriter Archie Roach released the mournful 'Walking into Doors'. The song begins in this way:

You say you're a man, you understand, but you don't.

You should lend her a helping hand, but you won't.

'Cause I'm a man, I don't understand, but I try.

She always does what I command, while she cries.

Why should we do what we do, and sleep at night.

The crazy things we put her through, it isn't right. It isn't right.

So, my brothers, don't hurt her anymore.

She's got her law, you've got yours.

And she's sick and tired of walking into doors.

Sadly, those thoughts are as apposite today as they were over twenty-five years ago. Yet they do not resonate deeply enough with some, it seems. For it cannot be denied that domestic violence still remains a shameful scourge in our community.

This case involves an extreme example of a relationship afflicted by domestic violence and its destructive impact on those touched by the relationship. Sometimes, it is all just too much to bear for the victim of domestic violence. Sometimes, the response to the umpteenth assault is not just another excuse for the inexcusable, such as a cover story about walking into doors. Instead, sometimes, it is all but inevitable that years of abuse will produce an outburst of rage and violence by the victim. And, as we shall see, sometimes, there can be unexpected consequences of the most tragic kind for all concerned.

Evan Martin

I've not heard a song quoted in court before. What was your motivation in doing that?

Justice Croucher

It's a song I've always liked and it just struck me as apt in that case. Archie's very poetic. His words resonate with me a lot as do many others. It sounds a bit silly, but I often think of songs or writing when I look at cases. It just helps me think about them, helps me categorise things. Maybe I should put more of it in my sentences, I don't know. But I just thought it was apt to that case. If you know the song, it's a very mournful, powerful song about domestic violence and here's a case that showed the other side of domestic violence and how a victim became an accused. That's a pretty sad story. Pretty sad.

Evan Martin

In 2005, family violence played a big role in abolishing an old murder defence - provocation. The law allowed the defendant to use the defence if there was evidence that he or she lost control as a result of being provoked by the victim.

Arie Freiberg, Chair of the Victorian Sentencing Advisory Council.

Arie Freiberg

Basically, provocation, as it stood for many hundreds of years, was criticised as being unfair to women, in the sense that the law required that there be a sudden loss of self-control. It really was suitable for when men met each other, you know, drew out their swords, one, you know, said something terrible to the other or smote the other in a fight and then, in a manly way, you reacted and you lost control or you said it was out of character, and that defence really often didn't work for women, where there may be a lengthy build-up of resentment, of anger, particularly in the context of family violence.

And so, many of the actions of women, in the circumstances where there may be one act which is, you know, the straw that broke the camel's back, where she's killed her partner, and what the law said was, the current law, as it stood for hundreds of years, was not really capturing a different kind of response to a provocative act.

And another reason was, that the reason for loss of self-control, was often what we would regard as unacceptable. For example, a man loses his self-control because a woman has left him because of the relationship, because she's met somebody else and it's her right to leave a relationship. But many men believed that they had dominion over their partner, their woman and felt that they were justified in harming the woman when she left.

So, the law was abolished because of its gendered nature, and what we have in its place is a situation where provocation is now a factor to be taken into account in sentencing.

It doesn't mean you can't argue provocation. It just means provocation does not formally reduce murder to manslaughter, with its lower range of sentences.

So, what a court is now required to do, is take into account the relevant factors. Was the provocation such that it was understandable that that person would react that way? It may be proportionate to what happened but what the law basically says now is that, if the victim of the provocation is justified in their action, that is, a woman is justified in leaving her partner if he's been violent. She is justified in leaving a relationship if she's found a better one. You can't use that. If your human right is to act in a particular way, then no matter, to what degree, to what extent the other partner loses their self-control, it is not an acceptable reason. That is, you can still argue, I lost my self-control and the court says, well, that's bad luck. The victim was justified in leaving you and you can't argue on that ground.

Evan Martin

Like many crimes, sentences for manslaughter continue to evolve to match community values and expectations.

Legislation passed on 4th June last year in the Victorian parliament has increased the maximum penalty for manslaughter from 20 to 25 years.

Justice Croucher

Of course, what people accept as extreme and justifiable has changed over time.

Evan Martin

Justice Croucher.

Justice Croucher

People seem to think that sentences are getting lighter. It's quite the opposite. They're getting heavier in almost every category. And manslaughter is one of those ones that it's clear that it's increasing.

Justice Tinney

When I started in the early 80s, it was not unusual for people who pleaded guilty to manslaughter, to receive a sentence of something like four or five years as a head sentence, with a minimum of two or three years.

Evan Martin

Justice Tinney.

Justice Tinney

So, it was a very attractive thing to plead guilty to manslaughter in those days. It still is a very attractive option if you can secure it. But sentences have gone up significantly, particularly in the last ten years, I think. So, those days, of those sorts of sentences, are pretty much gone, but there's a bit of a ceiling on sentences. The maximum penalty that's ever been passed for manslaughter in Victoria, as far as I'm aware, is 15 years.

So, that was a case where someone shot someone in the head, with a shotgun, from very close range and certainly, was intending to kill but at court it was reduced to manslaughter because of the law of provocation.

Nothing's gone anywhere near reaching the maximum. So, in that sense, it's very different from murder, where of course the maximum penalty is life imprisonment, and life imprisonment has been imposed in a number of cases, and lots of sentences are well into the 20s or into the 30, 30 plus years.

But the High Court has said in fairly recent times that current sentencing practices are, of course, only one of the matters to take into account and other sentences that have been passed in other cases don't represent a maximum sentence that could be passed. The maximum sentence is what the maximum sentence is.

So, I think in future years, there will be sentences that will go higher than the 15 years I've mentioned, when you get a particularly bad manslaughter. And of course, if a member of the public was to look at what's actually been done, the person would think, well, why isn't that a murder? What's the difference? And of course, the difference is, it's the mental element for murder has not been established or has not been admitted.

So, that explains why the sentences are going to be much lower.

Evan Martin

Gertie's Law is produced by the Supreme Court of Victoria.

If you're interested in reading the full sentence remarks for any of the cases discussed in this episode, we've included links in the description.

If you have any questions you'd like to ask a judge or someone else at the court, send them to gertie@supcourt.vic.gov.au.

Thanks for listening.

Links to sentences mentioned in this episode

The Queen v O'Connor (2018)

<https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2018/516.html>

The Queen v Moreland, Tippins & Thorp (2015)

<https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2015/324.html>

DPP v Turner (2009)

<https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2009/409.html>

The Queen v Donker (2018)

<https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2018/210.html>