

THE LAW REFORM COMMISSION OF HONG KONG

REPORT ON

THE YEAR AND A DAY RULE IN HOMICIDE

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Ms Cathy Wan, Senior Crown Counsel, was principally responsible for the writing of this Commission report.

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CONTENTS

	<i>Page</i>
Introduction	1
1. Terms of reference	1
2. Historical background	1
3. Present scope of the rule	3
4. Shortcomings of the rule	4
5. Arguments against abolition of the rule	7
6. Safeguards against late or repeated prosecutions	8
7. The rule in other jurisdictions	11
8. Summary and recommendations	13
Annex	
Law Reform (Year and a Day Rule) Act 1996	16

The Year and a Day Rule in Homicide

Introduction

1. This Report examines the long-standing common law rule (“the rule”) that a person cannot be convicted of any species of homicide where the victim does not die within a year and a day after the injury was inflicted. The rule applies to murder, manslaughter, infanticide and aiding and abetting suicide.

2. In compiling this Report, the Commission has been greatly assisted by the Consultation Paper and subsequent Report of the English Law Commission on the Year and a Day Rule in Homicide.

1. Terms of reference

1.1 In April 1997, the Attorney General referred the following reference to the Law Reform Commission for consideration:

“To consider whether the existing ‘Year and a Day Rule’ in relation to homicide should be abolished, and whether any related changes in the law are necessary.”

1.2 A draft report prepared by Miss Cathy Wan, Senior Crown Counsel in the Commission Secretariat, was discussed and approved at the Commission’s meeting in April 1997.

2. Historical background

2.1 “The genealogy of the rule is, like a pedigree, easy enough to trace in recent times, and more difficult in remoter.”¹ The rule indeed has long origins and according to Yale, the rule was formulated as a result of historical accident instead of deliberate policy. Historically, two different actions could be brought in respect of the same death. Usually an appeal for felony of death, a private prosecution by interested parties or relatives of the victim, would be followed by proceedings at the king’s suit which was a public prosecution.² Unlike the king’s suit, private prosecutions, if not freshly pursued, would not be allowed.³ The Statute of Gloucester⁴ (1278), referring to the then normal action of the time of an appeal of felony for death, provided that if the relatives of the victim brought the action within a year and a day after the “deed” was done, the appeal could go forward. This provision was

¹ D.E.C. Yale “A Year and a Day in Homicide” [1989] CLJ 202 at 203.

² English Law Commission “The Year and a Day Rule in Homicide” Consultation Paper at para 2.1.

³ D.E.C. Yale, *ibid*, at 205.

⁴ 6 Edw 1, c 9 (1278).

restrictively interpreted to mean there was a time limit on the actionability of the private prosecutions. There is authority that in 1321 the public prosecution could still be brought despite that the private proceedings were out of time.⁵ The rule evolved from being a rule of procedure to becoming a rule of substantive law, and in 1557 the rule was found in a legal textbook⁶ which wrote:-

“(translation) Also it is requisite to homicide, if one strikes another so that he die, that his death should be within a year and a day next following ...”.

2.2 Holdsworth was also aware that the rule might have stemmed from a rule of procedure and wrote⁷:

“At an early date the rule was laid down that if death ensued within a year and a day sufficient connection [between the act and the death] would be presumed. Perhaps this period was connected with the fact that it was the length of time within which the relatives of the murdered man were able to bring their appeal.”

If Holdsworth’s observations are correct, then what was originally a presumption of causation between the act and the death, has become a rule prohibiting the finding of a connection between the two.

2.3 The rule was then passed down through the centuries and was reflected in the definition of murder found in Chief Justice Coke’s Institutes⁸:

“Murder is when a man of sound memory, and of the age of discretion, unlawfully killeth within any county of the realm any reasonable creature in rerum natura under the King’s peace, with malice aforethought, either expressed by the party or implied by law, so as the party wounded, or hurt, etc. die of the wound or hurt, etc. within a year and a day after the same.”

2.4 In England, the rule has been abolished by the Law Reform (Year and a Day Rule) Act 1996⁹ but it still applies in Hong Kong. We have been unable to trace any case in which the rule has precluded a prosecution in Hong Kong, but it is clear that difficulties have arisen in other jurisdictions and, as this Report explains, the rule is an anachronism which should now be consigned to history.

⁵ D.E.C. Yale, *op cit*, at 205, foot-note 20.

⁶ Staunford, *Les Plees del Coron* (1557), f. 21v.

⁷ Sir William Holdsworth, *A History of English Law*, Vol. III (5th edition 1942) p. 315.

⁸ (1809) Vol. I Part III, p 47.

⁹ A copy of the Act is annexed to this Report

3. Present scope of the rule

Manslaughter

3.1 The scope of the rule has been extended by case law, and the rule now applies to manslaughter as well. In *R v Dyson*¹⁰ the defendant was indicted for the manslaughter of his infant child who was beaten in November 1906 and in December 1907, and then died in March 1908. The trial judge directed the jury that the defendant could be found guilty of manslaughter even if the death was wholly caused by the injuries inflicted in November 1906. The Court of Criminal Appeal held that this was a misdirection to the jury because:

*“... whatever one may think of the merits of such a rule of law, it is still undoubtedly the law of the land that no person can be convicted of manslaughter where the death does not occur within a year and a day after the injury was inflicted, for in that event it must be attributed to some other cause”.*¹¹

Infanticide

3.2 The rule would also apply to the statutory crime of infanticide.¹² Section 47C of the Offences against the Person Ordinance (Cap. 212), which is equivalent to section 1(1) of the Infanticide Act 1938, reads:

*“Where a woman by any wilful act or omission causes the death of her child being a child under the age of 12 months but at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving birth to the child or by reason of the effect of lactation consequent upon the birth of the child, then, notwithstanding that the circumstances were such that but for the provisions of this section **the offence would have amounted to murder**, [emphasis added] she shall be guilty of infanticide, and shall be liable to be punished as if she were guilty of manslaughter.”*

3.3 In circumstances where more than a year and a day has elapsed between the injury and the death, the defendant cannot be convicted of infanticide because she could not have been convicted of murder.

¹⁰ [1908] 2 KB 454, [1908-10] All ER 736.

¹¹ [1908] 2 KB 454 at p 456.

¹² English Law Commission, *op cit*, Consultation Paper, at para 2.10. Also, *obiter* in *De Luca* [1989] QB 249.

Suicide

3.4 The case of *R v Inner West London Coroner ex parte De Luca*¹³ involved a 17-year old who shot himself in the head and died more than a year and a day after the self-inflicted injury. The coroner's verdict of suicide was quashed as the court held that so long as the rule continues to apply to offences under section 4(1) of the Homicide Act 1957 and section 2(1) of the Suicide Act 1961, the rule should continue to be regarded as applying to suicide, even though suicide itself is no longer a crime.¹⁴ It was therefore decided that a verdict of suicide could not be returned at an inquest if the death occurred more than a year and a day after the injury had been inflicted by the deceased. Bingham L J added that "While good social arguments could be advanced for abrogating the rule for purposes of [the above-mentioned] statutes and murder and manslaughter, I see very little social advantage in abrogating it for purposes of a coroner's verdict alone."¹⁵

3.5 The *De Luca* case further clarified the fact that the rule extends to killings pursuant to a suicide pact, reduced to manslaughter by section 4(1) of the Homicide Act 1957, and aiding and abetting suicide contrary to section 2(1) of the Suicide Act 1961. The corresponding sections in Hong Kong are section 5 of the Homicide Ordinance (Cap. 339), and section 33B of the Offences against the Person Ordinance (Cap. 212).

Causing Death by Reckless Driving

3.6 It seems that the rule also may apply to the offence of causing death by reckless driving under section 36 of the Road Traffic Ordinance (Cap. 374). Lord Roskill in *R v Governors of Holloway ex parte Jennings*¹⁶ said, *obiter*, that the legal ingredients of manslaughter and of causing death by reckless driving were identical. If the dictum is taken literally, the rule is further extended by analogy from manslaughter to causing death by reckless driving.

4. Shortcomings of the rule

4.1 Three recent cases in England illustrate some of the shortcomings of the rule:-

- (a) Miss Pamela Banyard was the victim of a savage attack in a robbery. According to the pathologist, Miss Banyard suffered irreversible brain damage from the attack, and remained in a coma for 18 months before she died of bronchial pneumonia in August 1988. The Crown could not prosecute for murder because she died more than a year and a day after the attack.

¹³ [1989] QB 249, [1988] 3 All ER 414.

¹⁴ [1988] 3 All ER 414 at p 417.

¹⁵ *Ibid.*

¹⁶ [1983] 1 AC 624.

The assailant was convicted of attempted murder and robbery, and sentenced to 10 years' imprisonment.¹⁷

- (b) A man was stabbed in early 1986, but died as a result of the stabbing almost two and a half years later in November 1988. The assailant could not be charged with murder because of the rule, and was convicted of unlawful wounding with intent to cause grievous bodily harm and sentenced to 10 years' imprisonment.¹⁸
- (c) Mr Michael Gibson was attacked in the street and suffered brain damage. His heart had to be revived and he was in a coma for 16 months until he died of pneumonia. The assailant could not be charged with murder or manslaughter because of the rule. The assailant was convicted of causing grievous bodily harm and sentenced to 2 years' imprisonment.¹⁹

4.2 It is evident that the rule when applied to modern conditions could lead to absurd results. It is highly unsatisfactory that a murder charge cannot be brought solely because of an antiquated rule, even though all other ingredients of murder can be established. It seems that the rule is neither necessary, appropriate, nor desirable. Whereas the rule might have been necessary in ancient times when medical science was too imprecise to ascertain the exact cause of death, the advance of medical science makes it unnecessary to retain the rule. It can be seen from the three examples that the actual cause of death was not in dispute and could be readily identified despite the lapse of time between the injury and death.

4.3 The rule was formulated at a time when life support machines were not in contemplation. Nowadays, the lives of seriously injured people can be prolonged for long periods of time by life support machines. The artificial prolongation of life would not affect the question of causation between the initial injury and the subsequent death.²⁰ The rule should be regarded as inappropriate, given the capacity of modern medical science to enable victims of serious assaults to survive for more than a year and a day.

4.4 It is also undesirable that an arbitrary rule which has outlived its usefulness should be able to hinder the ends of justice. If Miss Banyard had survived for 11 months instead of 18 months, the assailant would have received a life sentence instead of 10 years for attempted murder. Statistics in England and Wales indicate that murder and manslaughter attract on average substantially longer sentences than the substitute offences with which the defendant may have to be charged because of the rule.²¹ A rule

¹⁷ Cambridge Daily News, 15 August 1988, referred to in D.E.C. Yale, "A Year and a Day in Homicide" [1989] CLJ 202.

¹⁸ Oxford Times, 11 November 1988, referred to in English Law Commission, *op cit*, Report at para 1.7.

¹⁹ The Times, 1 September 1993, referred to in English Law Commission, *op cit*, Report at para 1.8.

²⁰ D.E.C. Yale, *op cit*, at p 212.

²¹ English Law Commission, *op cit*, Consultation Paper at para 3.25.

which exonerates the homicide if the victim is strong enough to cling to life for more than 12 months is not likely to attract public support.²²

4.5 Another shortcoming of the rule is that, in some circumstances where an alternative offence is not available, the rule may enable the assailant to avoid prosecution altogether. An example would be gross negligence manslaughter. If the victim died more than a year and a day after the injury, the assailant could not be prosecuted for gross negligence manslaughter or any alternative offence.²³

4.6 The existence of the rule has led to further problems and uncertainties. The scope of the rule has been extended by analogy by case law. Apart from murder, the rule now applies to manslaughter,²⁴ infanticide,²⁵ killings pursuant to a suicide pact,²⁶ and verdicts of suicide returned by coroners' juries.²⁷ As for aiding and abetting suicide under section 2(1) of the Suicide Act 1961, although the view was expressed in *De Luca* that the rule would apply, the position is arguable.²⁸ There are also uncertainties as to whether the rule applies to causing death by reckless driving.²⁹

4.7 It is also uncertain whether the period of a year and a day would start to run from the date of the defendant's act or from that of the infliction of the injury, where these are different. It seems that time starts to run from the infliction of the injury instead of the defendant's act.³⁰ For example, if a defendant planted a bomb on 1 January 1991, which exploded on 2 January 1992 and injured the victim, the defendant should be guilty of homicide if the victim died before 3 January 1993.

4.8 The rule may have insurance implications although the issue has not been tested in court. It was decided in *R v Inner West London Coroner ex parte De Luca*³¹ that a verdict of suicide could not be returned at an inquest if death occurred more than a year and a day after the relevant injury had been inflicted by the deceased. It is an implied term in every insurance contract that the assured is not entitled to recover if the loss is

²² D.E.C. Yale, *op cit*, at p 207.

²³ English Law Commission, *op cit*, Report at paras 3.17-3.18.

²⁴ *Dyson* [1908] 2 KB 454.

²⁵ *Per Bingham L J in R v Inner West London Coroner ex parte De Luca* [1989] QB 249, 252E. The corresponding provision in Hong Kong is Section 47C Offences against the Person Ordinance (Cap 212).

²⁶ *R v Inner West London Coroner ex parte De Luca* [1989] QB 249. The corresponding provision in Hong Kong is Section 5 Homicide Ordinance (Cap 339).

²⁷ *De Luca*, *ibid*.

²⁸ Section 2(1) of the Suicide Act 1961 makes it an offence to aid and abet suicide, including "an attempt by another to commit suicide". Even if the deceased could not be held to have committed suicide due to the year and a day rule, it is still arguable that there has been an attempt to commit suicide. See English Law Commission, *op cit*, Consultation Paper at p. 9 foot-note 23. The corresponding provision in Hong Kong is section 33B Offences against the Person Ordinance (Cap. 212).

²⁹ Also *R v Governors of Holloway ex parte Jennings* [1983] 1 AC 624. See paragraph 3.6 *supra*. The corresponding provision in Hong Kong is Section 36 Road Traffic Ordinance (Cap. 374).

³⁰ Smith & Hogan, *Criminal Law*, 6th edition p. 312. See also Criminal Law Revision Committee, 14th Report on Offences against the Person.

³¹ [1989] QB 249.

caused by his own wilful misconduct.³² The rule may become a problem for insurance companies which may not be able to avoid liability for life cover if the assured committed suicide but died more than a year and a day after the event initiating the suicide.

5. Arguments against abolition of the rule

5.1 The rule was considered by the House of Lords Select Committee on Murder and Life Imprisonment (“the Nathan Committee”). In 1989, the Nathan Committee reported that it would not be appropriate to recommend the abolition of the rule in relation to murder while the rule continued to apply to other offences such as manslaughter, aiding and abetting suicide which were outside the Nathan Committee’s terms of reference.³³ It is evident that the rule should be given comprehensive consideration as a subject in its own right.

5.2 The rule was also considered by the Criminal Law Revision Committee (“the Committee”) as part of a wider reference on the law relating to, and the penalties for, offences against the person, including homicide.³⁴ The Committee recommended retention of the rule. It was stated that:

*“... although with the advance of medical science it is arguably no longer necessary to retain the year-and-a-day rule, it would be wrong for a person to remain almost indefinitely at risk of prosecution for murder. A line has to be drawn somewhere and in our opinion the present law operates satisfactorily. When death follows over a year after the infliction of injury the killer does not necessarily escape justice. He may be charged with attempted murder or causing grievous bodily harm with intent ...”*³⁵

5.3 In view of the recent cases mentioned in paragraph 4.1 above, it is doubtful whether the rule could be generally regarded as operating satisfactorily. It has also been discussed that the rule would often lead to substantially lesser sentences being imposed,³⁶ and in some cases where there is no substitute offence, the defendant would actually enjoy immunity from prosecution.³⁷

5.4 It seems that the strongest objection to the abolition of the rule stems from the argument that it would be wrong for a person to remain almost indefinitely at risk of prosecution for murder. This ground, although valid, cannot outweigh the shortcomings of the rule set out in paragraphs 4.1 to 4.8 above. Further, it has been pointed out that the “remaining at risk” argument

³² English Law Commission, *op cit*, Consultation Paper at para. 3.21.

³³ Report of the Select Committee on Murder and Life Imprisonment (1989) HL 78 - I para 34.

³⁴ Criminal Law Revision Committee 14th Report, “Offence against the Person” (1980) Cmnd 7844.

³⁵ *Ibid*, at para 39.

³⁶ See para 4.4 above.

³⁷ See para 4.5 above.

would be more appropriate as a policy consideration for the formulation of any rule of limitation. It is not appropriate to questions of causation. The rule can be regarded as a rule of limitation masquerading under the appearance of a rule of causation.³⁸ It seems logical therefore that the rule should be abolished. The only question remaining is whether the existing safeguards against late or repeated prosecutions are sufficient.

6. Safeguards against late or repeated prosecutions

6.1 In England, the Law Reform (Year and a Day Rule) Act 1996 (“the Act”) has devised specific safeguards against late or unnecessary second prosecutions. The Act requires the consent of the Attorney General for instituting homicide proceedings in two categories of cases. The first category is where there is an interval of more than three years between the injury and the death.³⁹ It was conceded that a time lapse of more than three years would render it difficult to strike the balance between the interests of justice in prosecuting for a criminal offence and in protecting the defendant from oppressive and stale prosecutions.⁴⁰ Hence, the discretion rests with the Attorney General.

6.2 The second category of cases requiring the Attorney General’s consent under the Act is where the defendant is already convicted of another offence on facts connected with the death.⁴¹ The rationale for this category is that the sentence imposed in the previous conviction may be already an adequate punishment. The Act has slightly departed from the recommendation of the English Law Commission in this respect. The English Law Commission recommended this category should be restricted to previous convictions with a custodial sentence of two or more years.⁴² In cases where defendants have received less than 2 years’ imprisonment, it is believed that the task of deciding whether to prosecute for a homicide offence is made easy by the much longer sentences that are usually imposed for homicide offences.⁴³ The English Law Commission also mentioned as illustration that it would scarcely be objectionable to prosecute for murder or manslaughter in a case where the defendant had only been fined in respect of the original assault.⁴⁴

6.3 The Act’s specific safeguard of requiring the Attorney General’s consent is in addition to several existing forms of protection against late or repeated prosecutions. These include the onus on the prosecution to prove beyond reasonable doubt all the elements required of the homicide, the courts inherent power to stay proceedings which are oppressive or which constitute an abuse of process, and the principles on double jeopardy.

³⁸ D.E.C. Yale, *op cit*, p. 209.

³⁹ Section 2(2)(a).

⁴⁰ English Law Commission, *op cit*, Report at para 5.29.

⁴¹ Section 2(2)(b).

⁴² English Law Commission, *op cit*, Report at para 5.30.

⁴³ *Ibid*, para 5.37.

⁴⁴ *Ibid*, para 5.33.

6.4 The independence of the prosecuting authorities in exercising their discretion as to whether or not to bring criminal proceedings provides protection against late or repeated prosecutions. In England and Wales, the Crown Prosecution Service adopts a Code for Crown Prosecutors which sets out some of the relevant public interest criteria which should be considered before a prosecution can be commenced or continued. In Hong Kong, prosecution counsel are guided by principles contained in a public document.⁴⁵ Counsel are advised that “where there has been a long delay in prosecution, for whatever reason, common law and Bill of Rights⁴⁶ considerations make it necessary to consider the consequences of that delay. This is of special importance when delay might affect the conduct of the defence case.”⁴⁷ Similarly, “Crown Counsel should be slow to prosecute if the last offence was committed three or more years before the probable date of trial, unless, despite its staleness, an immediate custodial sentence of some length is likely to be imposed. ... Generally, the graver the allegation, the less significance will be attached to the element of staleness.”⁴⁸

6.5 As for the inherent power of the court to stay proceedings which are oppressive or which constitute an abuse of process, it is submitted that the most common basis on which the exercise of the discretion to stay proceedings for abuse of process is sought is that of delay.⁴⁹ Whether or not the delay is justifiable is not the court’s material consideration. The test is whether a fair trial would be possible in view of the delay.⁵⁰ The Court of Appeal has clarified that a stay of proceedings for delay should be imposed only in exceptional circumstances, and only if the defendant can establish, on the balance of probabilities that the defendant would suffer serious prejudice to the extent that no fair trial could be held.⁵¹ The *Privy Council in George Tan Soon Gin v Judge Cameron*⁵² confirmed that the court’s discretion to stay criminal proceedings should be exercised very sparingly, and that the burden of proving exceptional circumstances remained on the defendant even after a long delay. The court would also have the power to stay the proceedings in cases where the defendant has already been tried for a non-fatal offence, if the proceedings are oppressive or prejudicial.⁵³

6.6 The principles on double jeopardy provide protection against repeated prosecution but it seems to be established that a previous conviction for an assault offence is no bar to a later conviction for murder or manslaughter if the victim dies subsequently. In *R. v. Thomas*⁵⁴, Leonard Thomas was sentenced to 7 years’ imprisonment for wounding his wife with

⁴⁵ *Prosecution Policy - Guidance for Crown Counsel*, Attorney General’s Chambers 1993.

⁴⁶ Article 11(6) of the Bill of Rights reads that no one shall be liable to be tried or punished again for an offence for which he has already been finally convicted or acquitted. It seems that the discussion on double jeopardy would also apply.

⁴⁷ *Prosecution Policy - Guidance for Crown Counsel*, Attorney General’s Chambers 1993, at paragraph 10(x).

⁴⁸ *ibid*, at paragraph 13(ii).

⁴⁹ English Law Commission, *op cit*, Consultation Paper at para 5.15.

⁵⁰ *R v Telford Justices ex parte Badhan* (1991) 93 Cr App R 171.

⁵¹ Attorney-General’s Reference (No. 1 of 1990) [1992] 1 QB 630.

⁵² [1992] 2 AC 205.

⁵³ *Forest of Dean Justices ex parte Farley* [1990] Crim LR 568; *Humphreys* [1977] AC 1, 46.

⁵⁴ [1950] 1 KB 26.

intent to murder her. The wife subsequently died as a result of the wounds. The husband pleaded *autrefois convict* as a bar to the subsequent prosecution for murder. Humphreys J dismissed the plea of *autrefois convict* and stated that:

“The offence or crime of murder consists in the felonious killing of another with malice. It is plain that on 2 May [when the accused was convicted of wounding with intent] the accused was not convicted of that offence, nor of anything which is substantially the same offence or crime as that charged in the indictment, nor could he have been, since his wife was then alive. It follows that the plea of autrefois convict in the strict sense of the term is bound to fail, and does fail.”

6.7 The defendant also raised the issue that “no one ought to be twice punished for one offence”, and relied on *Miles*.⁵⁵ In this case, it was held that the assault for which the defendant had been convicted constituted one and the same offence with the subsequent proceedings for wounding and battery. However, it was observed in *Miles* that not every summary conviction or acquittal for common assault would operate as a bar to an indictment in which that assault was an element, and murder was given as an example. Humphreys J distinguished the *Miles* case on this ground, and went on to point out that as far back as 1867, in the case of *Morris*,⁵⁶ it had been held that a previous summary conviction for an assault is not a bar to an indictment for manslaughter founded upon the same facts.

6.8 In a more recent case,⁵⁷ a defendant sentenced to 8 years’ imprisonment for causing grievous bodily harm with intent was subsequently sentenced to life imprisonment when the victim died 11 months after the attack. The defendant’s accomplice, previously convicted of grievous bodily harm, was subsequently convicted of manslaughter.

6.9 If the defendant were acquitted of a non-fatal offence and the victim subsequently died of the wounds, it seems that prosecution for murder or manslaughter would not necessarily be barred for *autrefois acquit*.⁵⁸ It seems that *autrefois acquit* has a very narrow scope and the subsequent action is not barred because the offences of murder or manslaughter are not the same as assault or attempted murder.⁵⁹

6.10 A previous acquittal may also involve the rule in *Sambasivam v Public Prosecutor, Federation of Malaya*⁶⁰ that the prosecution in a subsequent trial against the same defendant may not challenge the validity of an earlier acquittal by adducing evidence which is inconsistent with it. This rule was applied in *Hay*,⁶¹ but was not applied in *Humphreys v DPP*.⁶²

⁵⁵ (1890) 24 QBD 423.

⁵⁶ (1867) 10 Cox CC 480.

⁵⁷ The Times 28 April 1994.

⁵⁸ Obiter in *Thomas* [1950] 1 KB 26.

⁵⁹ *De Salvi* (1857) 10 Cox CC 481.

⁶⁰ [1950] AC 458.

⁶¹ (1983) 77 Cr App R 70.

6.11 In considering whether additional safeguards, if any, are needed in Hong Kong it is useful to examine the law in other jurisdictions.

7. The rule in other jurisdictions

Canada

7.1 The rule is preserved in section 227 of the Canadian Criminal Code which reads:

“No person commits culpable homicide or the offence of causing the death of a person by criminal negligence or by means of the commission of an offence [of causing death by dangerous driving] or [causing death by driving while under the influence of alcohol or a drug] unless the death occurs within one year and one day from the time of the occurrence of the last event by means of which the person caused or contributed to the cause of the death.”

In 1987, the Law Reform Commission of Canada issued a Report on Recodifying Criminal Law.⁶³ Although it did not deal specifically with the rule, the draft legislation annexed to the Report replaced the specific causation provisions for homicide, including the rule, with a general causation provision. The Final Report of a Federal and Provincial Working Group on Homicide published in June 1990 also recommended removal of the rule.

7.2 There are a number of safeguards against delayed prosecutions in Canada. Section 11(b) of the Canadian Charter of Rights and Freedoms provides that “any person charged with an offence has the right .. to be tried within a reasonable time.” In determining whether there has been an unreasonable delay in terms of section 11(b), four factors are considered by the court:

- a) the length of the delay
- b) any waiver of time periods
- c) reasons for the delay, including limitations on the institutional resources, actions of the accused, actions of the Crown, the inherent time requirements of the case, and any other reasons
- d) prejudice to the accused

The court must balance the interest of the accused in being brought to trial within a reasonable time and the factors resulting in the delay. Reported cases suggest that delays of up to 24 months will not often be found to be unreasonable.

⁶² [1977] AC 1.

⁶³ Report No. 31 p. 56.

7.3 A further protection against delayed prosecution is to be found in section 7 of the Charter of Rights and Freedoms, which states:

“Everyone has the right to life, liberty and the security of the person not to be deprived thereof except in accordance with the principles of fundamental justice.”

This section provide the court with a discretion to stay proceedings where compelling an accused to stand trial would violate the fundamental principles of justice which underlie the community sense of fair play and decency, and to prevent the abuse of the court’s process through oppressive or vexatious proceedings. Delay, in itself, is not a basis for a stay of proceedings.

Australia

7.4 The rule was abolished in Victoria in 1991, New South Wales in 1990, South Australia in 1991, Western Australia in 1991, and Tasmania in 1993. Queensland is the only remaining state in which the rule operates. The Queensland Criminal Code Review Committee has recommended abolition of the rule.⁶⁴

New Zealand

7.5 The rule is still in operation. Section 162(1) of the Crimes Act 1961, which applies to all forms of unlawful killing, states that “no one is criminally responsible for the killing of another unless the death takes place within a year and a day after the cause of death.” The Crimes Consultative Committee recommended abolition of the rule in 1991.

United States of America

7.6 The Model Penal Code does not include the rule. However, a study has found that the rule has survived in most states either by judicial decision or statute.⁶⁵ In many states where the rule still applies, the courts have minimized its significance by interpreting it as no more than a rule of evidence or procedure.⁶⁶ It is interesting to note the Californian Penal Code No. 194 has transformed the year and a day rule into three years and a day rule.

7.7 The rule has never applied in South Africa, Scotland, France, Italy, Germany, Austria, Greece, Turkey or Poland.⁶⁷

⁶⁴ Final Report (June 1992) Sched 2.

⁶⁵ La Fave & Scott, *Criminal Law* (2nd ed 1986) p 299. English Law Commission, *op cit*, Consultation Paper Appendix B.

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

8. Summary and recommendations

8.1 The rule has been carried down the centuries and has expanded its scope despite the concern or criticism it has received. A judge⁶⁸ who regarded the rule as “something of an anachronism” and whose “initial inclination was that it should be curtailed rather than extended” had no choice but to extend the rule to suicide. If the rule is to be curtailed or abolished, it will require legislative action.

8.2 The rule has long outlived its usefulness and is neither necessary, appropriate, nor desirable given the present state of medical knowledge and the widespread use of life support machines. The rule has caused alternative lesser offences to be charged. In some cases where an alternative offence is not available, the rule may enable the defendant to avoid prosecution altogether. The rule has led to uncertainties as to its exact scope of application, the computation of time of pre-natal injuries and in cases where the defendant’s act and the infliction of injury occur on different dates. The extension of the rule to suicide may lead to insurance problems as well.

8.3 In the light of all these factors, we have concluded that the rule should be abolished in relation to all offences involving death and suicide.

8.4 There remains the question as to what safeguards are necessary to ensure that the abolition of the rule does not result in unfairness to those accused of homicide either long after the initiating injury was inflicted or after a previous conviction or acquittal. We are of the view that, even without the provisions in section 2 of the Law Reform (Year and a Day Rule) Act 1996, the existing mechanisms are sufficient for the purpose of protecting defendants from late prosecution:

- The prosecution has a discretion as to whether and when to prosecute according to the facts of the particular case. Since the court has the power to award costs in favour of a defendant who is acquitted, the prosecution has an incentive to bring proceedings for well-founded cases only.
- A substantial body of case law on double jeopardy has been developed, and the present situation has struck the right balance between protection of the accused on the one hand, and maintaining sufficient deterrent against criminals on the other.
- The court has the inherent power to stay proceedings which are oppressive or which constitute an abuse of process for delay. This power is already well-developed by case law.
- The defendant’s position is also safeguarded by a rule of evidence that the prosecution in a subsequent trial against the

⁶⁸ Hutchinson J in the *De Luca* case.

same defendant may not challenge the validity of an earlier acquittal by adducing evidence which is inconsistent with it.

- Most cogently, the onus remains with the prosecution to prove beyond reasonable doubt all the elements required of the homicide. The longer the time between the injury and the death, the more difficult it is for the prosecution to prove the homicide.

8.5 In examining section 2 of the Law Reform (Year and a Day Rule) Act 1996 we are aware that there are certain offences which specifically require the Attorney General's consent to prosecute. We are, however, of the view that the imposition of a requirement of Attorney General's consent is unnecessary in Hong Kong because:

- While there are a number of statutory provisions which currently require the Attorney General's consent to prosecution, these are generally where issues of public policy are likely to arise, rather than where the offence is one of straightforward criminality such as homicide. The Attorney General's consent is not specifically required to bring prosecutions for murder and manslaughter. If a requirement for the Attorney General's consent were inserted in the proposed legislation this would produce the anomalous position that some homicide cases would require the Attorney General's consent while others would not.
- Decisions on prosecutions for homicide are, as a matter of practice, invariably made by a senior member of the Attorney General's Chambers. There is no reason why homicides in the category of cases referred to in section 2 of the English Act should be dealt with any differently. Section 7 of the Legal Officers Ordinance (Cap 87) empowers the Attorney General to delegate his authority except in certain specific cases. In practical terms, if a requirement for consent by the Attorney General were included in the proposed legislation, this would be delegated in the normal way, for there is no reason to argue that the cases are of a character which would justify precluding delegation. The result would be that the imposition of a requirement of consent would unnecessarily complicate the legislation while having no practical effect on the way in which prosecutions proceed.
- England and Wales have stronger reasons to require the Attorney General's consent because the Crown Prosecution Service there is divided into areas, and the decision whether to prosecute is made locally except in cases of importance or difficulty.⁶⁹ In Hong Kong, all decisions on prosecution are

⁶⁹ Section 1(4) Prosecution of Offences Act 1985. Also Halsbury Statutes 4th ed. Vol. 12 page 1050.

made within a single office and the risk of inconsistency of approach is therefore appreciably less.

- Those jurisdictions which have recently abolished the rule have not felt the need to incorporate similar provisions. Such jurisdictions include the Australian states of Victoria, New South Wales, South Australia and Western Australia.
- Jurisdictions which have never implemented the rule have not experienced particular problems with late prosecutions. Such jurisdictions include almost all European jurisdictions except England and Cyprus.⁷⁰ Scotland, for example, has worked well without the rule and the safeguarding provisions. Scotland has developed its case law on oppression for delay. It was held in *H.M. Advocate v Stewart*⁷¹ that the Crown may be barred from proceeding with a trial if it would be oppressive for them to do so in view of the passage of time since the discovery of the offence. A recent decision⁷² has clarified that the test of oppression for delay is the same as that in other cases of oppression, such as oppression based on prejudicial publicity, i.e. whether the prejudice was so grave that it could not be removed by an appropriate direction to the jury. In summary cases, the prejudice must be so grave that no judge could be expected to reach a fair verdict in all the circumstances.
- The consequences of delay in bringing a prosecution are already a factor to which Crown Counsel must have regard when deciding whether or not to prosecute. The prosecution's discretion to prosecute is guided by case-law as well as by internal guidelines to ensure consistency.
- Although it is true that private prosecutions may be brought if the Attorney General's consent is not specifically required, the Attorney General has the right to intervene and take over the proceedings if appropriate. Given that private prosecutions are rare in Hong Kong, it is anticipated that the absence of the Attorney General's consent requirement would not cause problems.

8.6 We have therefore concluded that the rule should be abolished and that there should be no provision equivalent to section 2 of the English Act requiring the Attorney General's consent to prosecution in certain cases.

⁷⁰ English Law Commission, *op cit*, Consultation Paper at Appendix B para. 24.

⁷¹ 1980 J.C. 84.

⁷² *McFadyen v Annan* 1992 S.C.C.R. 186.

Law Reform (Year and a Day Rule) Act 1996

1996 CHAPTER 19

An act to abolish the “year and a day rule” and, in consequence of its abolition, to impose a restriction on the institution in certain circumstances of proceedings for a fatal offence. [17th June 1996]

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

1. The rule known as the “year and a day rule” (that is, the rule that, for the purposes of offences involving death and of suicide, an act or omission is conclusively presumed not to have caused a person’s death if more than a year and a day elapsed before he died) is abolished for all purposes.

Abolition of “year and a day rule”

2. (1) Proceedings to which this section applies may only be instituted by or with the consent of the Attorney General.

Restriction on institution of proceedings for a fatal offence

(2) This section applies to proceedings against a person for a fatal offence if -

- (a) the injury alleged to have caused the death was sustained more than three years before the death occurred, or
- (b) the person has previously been convicted of an offence committed in circumstances alleged to be connected with the death.

(3) In subsection (2) “fatal offence” means -

- (a) murder, manslaughter, infanticide or any other offence of which one of the elements is causing a person’s death, or
- (b) the offence of aiding, abetting, counselling or procuring a person’s suicide.

(4) No provision that proceedings may be instituted only by or with the consent of the Director of

Public Prosecutions shall apply to proceedings to which this section applies.

(5) In the application of this section to Northern Ireland -

(a) the reference in subsection (1) to the Attorney General is to the Attorney General for Northern Ireland, and

(b) the reference in subsection (4) to the Director of Public Prosecutions is to the Director of Public Prosecutions for Northern Ireland.

3. (1) This Act may be cited as the Law Reform (Year and a Day Rule) Act 1996.

(2) Section 1 does not affect the continued application of the rule referred to in that section to a case where the act or omission (or the last of the acts or omissions) which caused the death occurred before the day on which this Act is passed.

(3) Section 2 does not come into force until the end of the period of two months beginning with the day on which this Act is passed but that section applies to the institution of proceedings after the end of that period in any case where the death occurred during that period (as well as in any case where the death occurred after the end of that period).

(4) This Act extends to England and Wales and Northern Ireland.