Submission to Victorian Law Reform Commission in relation to its inquiry into Recklessness

by Dr Steven Tudor
Senior Lecturer, School of Law,
La Trobe University
Victoria 3086
[redacted]

Introduction

1. This is a submission in relation to the Victorian Law Reform Commission's (VLRC's) inquiry into Recklessness. I am grateful to the VLRC for the opportunity to make a submission.

2. I am a senior lecturer in the School of Law at La Trobe University (teaching and researching in criminal law), though I make this submission in my private capacity.

3. For reasons of time, this submission addresses only a few issues raised by the VLRC's Recklessness Issues Paper. Moreover, I have not had time to do further research into the issues, so this submission is only a summary document rather than a fully argued and properly researched submission.

4. In brief, this submission recommends, subject to an important proviso below, that the VLRC recommends that Victoria adopt a version of the English test for recklessness, essentially as laid out by Lord Bingham in *R v G and Another* [2003] UKHL 50; [2004] 1 AC 1034, and which was based on the Draft Criminal Code for England and Wales (drafted by the England and Wales Law Commission).

5. This test is endorsed by David Ormerod and Karl Laird, the authors of *Smith, Hogan and Ormerod's Criminal Law*, 7th edition (Oxford University Press, 2021), in section 3.2.2 'Recklessness', especially at pp 104–107. I respectfully adopt their reasons for their endorsement of Lord Bingham's formulation, and I recommend, subject to the proviso to be explained, that the VLRC do likewise.

6. In short, the English approach (as I shall call it) to defining 'recklessness' is preferrable to both the 'probability' and 'possibility' approaches to recklessness because it makes explicit what is only implicit in those two approaches. It is inescapable that recklessness has an objective element of *unjustifiability* or *unreasonableness* to it. The problem with both the probability and possibility approaches is that they seem to present the task facing fact-finders as if the *sole* question was the degree of likelihood of the circumstance or result occurring. This makes it look like the issue for the fact-finder is simply a matter of trying to work out, in a quasi-mathematical way, just what that degree of likelihood was in a particular case, as if that was all that went into making a risk a criminal risk.

7. But this is clearly not what criminal cases are about. Russian roulette cases bear this out very clearly. In Victoria, reckless murder requires the accused to have known that it was probable that death or really serious injury would result from their act. But 'probable' is not always to be understood in its ordinary meaning ('likely to occur or prove true', 'having more evidence for than against': *Macquarie Dictionary*). If the jury took that approach, they would be obliged to find Russian roulette killers not guilty of reckless murder. But, of course, they do and should find them guilty — because it is unjustified to play Russian roulette with such a high risk of death, even though that risk (1 in 6) is less than 'likely'.

8. As Brooking JA observed in *DPP v Faure* [1999] VSCA 166; [1999] 2 VR 537 (a Russian roulette case):

> The second additional point worth mentioning concerns the case of reckless murder. The crime requires knowledge that it is probable that death or grievous bodily harm will result from the act. The requisite state of mind is predicated upon an objective fact - a probability. The existence of this probability - the danger, as it may presently be called - seems to have been not discussed but rather assumed at the trial. Counsel for the applicant addressed on the basis that the question was whether his client had been shown to have knowledge of the (implicitly admitted) danger. There is no reason for doubting the correctness of the tacit concession. If one assumes that the weight of the loaded chamber does not affect the probable outcome, and that the cylinder is spun each time the trigger is pulled, the playing of Russian roulette with a six-shot revolver is like throwing a die in the hope of not getting a six. The applicant told the police that the firearm discharged on the fourth occasion and that he and the deceased had agreed that they would fire no more than two shots each. The probability of getting a six in four throws of a die is 671/1296: Eggleston, Evidence, Proof and Probability, 2nd ed., p.,16. But the case is not to be approached as Pascal would have approached it. Juries are not to be directed in terms of an "odds on" chance: La Fontaine v. R. (1976) 136 C.L.R. 62 at 99 per Jacobs, J.; Boughey v. R. [1986] HCA 29; (1986) 161 C.L.R. 10 at 15 per Gibbs, C.J. and at 19-22 per Mason, Wilson and Deane, JJ.; R. v. Piri [1987] NZCA 6; [1987] 1 N.Z.L.R. 66. The approach of the law has been pragmatic in matters of this kind. It has regarded as "dangerous" for present purposes the pulling of a trigger even though the probability of the discharge of the firearm was mathematically quite low. As long ago as 1839 it was accepted by the distinguished English Royal Commissioners inquiring into the criminal law (Holdsworth, History of English Law, vol.15, p.143) that it would be murder if, knowing that one only of two (or three or four) pistols set before him was loaded, but not knowing which one, the accused, for the pleasure of it, picked up one pistol, put it to another person's head and pulled the trigger with fatal results.

9. Consider also the reverse scenario of the surgeon undertaking a highly risky operation which is the only chance of saving the (unconscious and so non-consenting) patient's life. The operation has, let's say, a 75% chance of killing the patient, but if the operation is not carried out, the patient will be virtually certain to die from their medical condition within a week. If the patient does die during the operation, it would not be a case of reckless murder on the surgeon's part because the social value or utility of their actions is very high, the complete opposite to the Russian roulette player. (It can be argued, of course, that the surgeon has a *defence* to reckless murder — medical necessity — but I would argue that the surgeon should not even have to present a defence as such, because their state of mind in engaging in such conduct is not even prima facie a species of 'recklessness.' To describe the surgeon as acting 'recklessly' would be unjust.)

10. The ‘pragmatic’ approach of the law here is thus a matter of taking into account not just the mathematics but also the social value or utility of the action (very low in the case of Russian roulette, very high in the case of the surgeon) and the seriousness of the result being risked (in such cases, extremely serious — death or really serious injury).

11. If that is what ‘probable’ really means in legal practice, then it is not a word that is being used in its ordinary English sense (i.e. likely, or more probable than not). If that is so, then the law should be made clear that ‘probable’ in this context is a technical legal term with its own expanded meaning which overlaps but does not coincide with the ordinary meaning of the term.

12. Similarly with ‘possible’. In its ordinary English sense, ‘possible’ means ‘that may or can be, exist, happen, be done, be used, etc’, ‘that may be true or a fact, or may perhaps be the case …’ (*Macquarie Dictionary*). Crucially, there is no implication as to likelihood in saying that something is possible. Possibility is a binary concept: something is either possible or not; there are no degrees of possibility. (There can be differences between logical possibilities and factual possibilities, but they are not relevant here.)

13. But it is clear that in criminal cases, it is not mere possibility that is determinative. In those jurisdictions in which possibility is the operative concept in recklessness (e.g. Tasmania) it is inconceivable that anyone would take seriously the idea that mere logical or factual possibility would be enough for recklessness, without any consideration of the degree of probability of the circumstance or result that is known to be possible.

14. If I fly a small kite in my backyard in Launceston on a calm day, it is clearly *possible* (both logically and factually) that a sudden and unexpected powerful wind gust might send the kite crashing into the skull of my neighbour, killing them. But it would be absurd to argue that I would be guilty of reckless murder in such a case, if I was aware of that mere possibility. That is because everybody knows that it is not the mere possibility of the outcome that matters but the degree of likelihood, combined with the social value or utility of my conduct and the degree of seriousness of the result.

15. Again, the law will be ‘pragmatic’ in such cases (to use Brooking JA’s word) in treating ‘possible’ not in its ordinary English meaning but as shorthand for ‘possible and likely to a degree that is not justified in the circumstances, taking into account the seriousness of the harm and the social utility of the conduct’. In effect, then, ‘possible’ is really being used in a way similar to the way that ‘probable’ is being used — both concepts are shorthand for a more objective conception (i.e. one that makes justification or reasonableness a key element).

16. The difference is, though, that what is usually meant by ‘possible’ in such contexts is ‘having an appreciable degree of likelihood though less than likely’ — and that is usually understood to be in contrast with ‘probable’ as requiring a higher degree of likelihood. In effect, then, both the ‘possible’ and ‘probable’ approaches to recklessness are in fact ‘probabilistic’ in that they are both concerned with likelihood. It is just that the ‘possible’ approach says that ‘more than “merely possible” is needed but “less than likely” is enough’ and the ‘probable’ approach says that ‘“more than likely” is required

— except when "less than likely but still appreciable" is enough'. On both approaches the contortions of ordinary English language are manifest, and clearly undesirable.

17. It is submitted, then, that the law should not only be pragmatic but also clear and honest — and so a properly defined concept of 'recklessness' is needed. Accordingly, I would recommend understanding recklessness as being a matter of the offender taking a known risk that they were not justified in taking, and the reason why they were not justified is a combination of the *degree* of the risk (i.e. *how likely* the risk is to eventuate), how *serious* the risked harm would be, and the *social value* or social utility of the act in question.

18. The Commonwealth Criminal Code's definition of 'recklessness' (s 5.4) goes part of the way toward this goal in referring to 'substantial risk' and 'unjustifiable to take the risk'. The notion of a substantial risk is certainly vague, but it points to the idea that not just any degree of risk will count — and it does not need to be 'more likely than not' — but exactly what degree will count will depend on the circumstances.

19. However, there is more to the unjustifiability of taking that risk that the degree (or substantiality) of the risk. The other factors of seriousness of the risked harm and the social value or utility of the conduct need to go into the mix. The Commonwealth Code's definition certainly allows for that. But it should be made explicit. The English approach does that.

20. Accordingly, I recommend the following definition of 'recklessness', which is based on the English approach but which uses 'unjustifiable' rather than 'unreasonable' and spells out the factors to be considered in assessing unjustifiability. ('Unjustifiable' is the preferable concept as it is not just a matter of reason but also includes assessing the moral or social value of conduct. Nonetheless, the two concepts in practice point to much the same thing.)

Proposed definition of 'recklessness'

A person is reckless (or acts recklessly) with regard to a circumstance or result where:

(i) they are aware of a risk that the circumstance exists or will exist or that the result will occur; and

(ii) it is, in the circumstances known to them, unjustifiable to take that risk.

In assessing whether taking the risk was unjustifiable, the fact-finder must take into account, among any other relevant matters, the following:

(a) the degree of the risk; that is, how likely it is that the circumstance exists or will exist or that the result will occur;

(b) the seriousness of the circumstance or result, including the seriousness of any harm involved in that circumstance or result; and

(c) the social value or utility of the person's act.

21. All of the above, however, is subject to the following proviso: it needs to be clear that *juries will understand* the above approach to recklessness. That is an empirical question that I am not qualified to answer.

22. I think it is clear enough that, from a legal and intellectual point of view, the above approach to recklessness is preferable: it is pragmatic, makes clear and explicit what the

law actually does in practice, and reflects common sense. Nonetheless, it must be acknowledged that, once everything is made explicit in the manner above, the concept of recklessness begins to look more complicated than it would be if recklessness were simply defined in terms of awareness of a 'probable' or 'possible' risk (though, as I have argued, that surface simplicity is very misleading).

23. If the complexity of the recommended English-style approach to recklessness can be shown to be manageable when directing juries, then it is, I submit, the better way to proceed. I think the common sense aspect of the recommended approach will help in this regard. However, it remains an open question, requiring empirical research to be answered, whether the English-style approach is easily understood by juries.

24. There is also the question of how readily the above approach to recklessness, which explicitly brings the implicit objective aspect of recklessness to the fore, is to be distinguished from negligence, which is often presented as *the* objective fault element. In brief, recklessness should differ from negligence in that recklessness involves awareness of the risk, whereas negligence does not involve awareness of the risk. Negligence involves a general awareness of the situation but not an awareness of the particular risk. Negligence also involves a *failure* to take reasonable care while engaging in the (usually justified) conduct, as opposed to *positively* engaging in conduct that is not justified (as is the case in recklessness, as understood above). To be sure, there will be occasions where a given scenario could be characterised as both, but that has always been the case and it is not likely to be avoided by any combination of plausible definitions of 'recklessness' and 'negligence'.

25. I thank the VLRC for the opportunity to make this submission.

Dr Steven Tudor
Law School
La Trobe University

3 March 2023