

# The Strangulation of Female Partners

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*In England and Wales, strangulation is one of the principal methods men use to kill women in intimate relationships. Over the past three decades, this method of killing accounts for up to 37 per cent of deaths of women by male partners. Strangulation is both gender and context specific making it a high risk factor affecting the lives of women. The lack of understanding of the seriousness of strangulation, together with the legal construction of intention allows men to disavow murder and be found guilty of only unlawful act manslaughter. In most American and Australian Federal States and in Canada and New Zealand, legislation criminalises strangulation and is also an aggravating factor in sentencing in both non-fatal and fatal cases. This article makes a plea for law reform in England and Wales and a challenge to the prevailing discourse in criminal law and justice which continues to treat male body force in strangulation as less heinous than other forms of body force and weapons in fatal and non-fatal assaults against women.*

## Introduction

In my earlier work on partner homicides, I was impressed not only by the prevalence of strangulation as a method of killing female partners but also, by comparison, its absence in non-domestic cases.<sup>1</sup> In any event it attracted little attention. By contrast, the fatal strangulation of the deceased in *Coutts* (2006)<sup>2</sup> attracted considerable public and legal scrutiny and instigated law reform with regard to possession of “extreme violent pornography”,<sup>3</sup> which the prosecution submitted and the defence conceded had played a significant role in the defendant’s choice of method of killing. Significantly, *Coutts* also had a history of non-fatal strangulation of former partners. However, no further policy discussion was initiated on the dangerousness of this method of assault and killing for women as a particular group. This paper examines the risk presented by strangulation to women in intimate

<sup>1</sup> See S. Edwards, *Policing Domestic Violence* (Sage, 1989); S. Edwards, *Sex and Gender in the Legal Process* (Blackstone Press, 1996), pp.368–370; S. Edwards, “Ascribing Intention—The Neglected Role Of Modus Operandi—Implications For Gender” (1999/2000) 4(3) *Contemporary Issues in Law* 235; S. Edwards, “Abolishing Provocation and Reframing Self Defence—The Law Commission options for Reform” [2004] Crim. L.R. 181; S. Edwards, “Descent into Murder: Provocation’s Stricture—The Prognosis for Women Who Kill Men Who Abuse Them” (2007) *Journal of Criminal Law* 71 (342); S. Edwards, “Anger and Fear as Justifiable Preludes for Loss of Self-Control” (2010) *Journal of Criminal Law* 74 (223).

<sup>2</sup> *Coutts* [2006] UKHL 39; [2006] 1 W.L.R. 2154; [2007] 1 Cr. App. R. 6 (p.60).

<sup>3</sup> Criminal Justice and Immigration Act 2009 s.63. See also Criminal Justice and Courts Act 2015 s.37 and the criminalisation of possession of pornographic images of rape and assault by penetration.

heterosexual relationships and argues it is a risk insufficiently recognised in criminal law and justice.

## The genderedness of killing method

The prevalence of the gendered specificity of strangulation as a killing method in “domestic” partner homicide has remained relatively constant for at least three decades including up to 2013–2014 (latest figures available).<sup>4</sup> Since 1986, a primary method of killing a female partner in a heterosexual relationship is through the use of hands and/or the hands and a ligature to choke, strangle and asphyxiate. By contrast, when women kill male partners the use of a weapon predominates, and the use of a knife is the most prevalent method of killing. Data<sup>5</sup> shows that where female partners and former partners are killed by men, over 50 per cent<sup>6</sup> are killed with a weapon (sharp instrument, blunt instrument, shooting); whereas figures closer to half that proportion<sup>7</sup> are strangled or asphyxiated.<sup>8</sup>

America, Canada, Australia and New Zealand have also discovered significant rates of strangulation in male on female fatal and non-fatal partner assault. The Chicago study found that strangulation or smothering was the method of killing in 24 per cent of intimate male on female homicides.<sup>9</sup> These statistics assume a particular significance in a country where the use of firearms constitutes 68 per cent of all homicides (in 2012)<sup>10</sup> compared with 6 per cent<sup>11</sup> for the same period in England and Wales. Research in Canada on non-fatal strangulation in 2004<sup>12</sup> found that 19 per cent of women reporting violence by a current or previous partner over the previous five years had been choked.<sup>13</sup> Douglas and Fitzgerald<sup>14</sup> in

<sup>4</sup> I am grateful to the Home Office Statistical Department for providing me with three data sets for 1986–1996, 1995–2000, and 2000–2005. See also Office for National Statistics Chapter Two *Violent Crime and Sexual Offences Homicide* date February 13, 2014, p.14, <http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/focus-on-violent-crime-and-sexual-offences--2012-13/rpt---chapter-2---homicide.html?format=print>#tab-Method-of-Killing>. See [http://www.ons.gov.uk/ons/dcp171776\\_352260.pdf](http://www.ons.gov.uk/ons/dcp171776_352260.pdf). See Office for National Statistics Chapter Two *Violent Crime and Sexual Offences Homicide* ONS date February 12, 2015, pp.13–14, [http://www.ons.gov.uk/ons/dcp171776\\_394478.pdf](http://www.ons.gov.uk/ons/dcp171776_394478.pdf). See also *Focus on Partner/ex-partner Homicide*, <http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/focus-on-violent-crime-and-sexual-offences--2012-13/rpt---chapter-2---homicide.html?format=print>#tab-Focus-on-Partner-Ex-Partner-Homicides> [Accessed October 5, 2015].

<sup>5</sup> Set 1, (1987–1996) (n = 1004), data set 2, (1995–2000) (n = 372), data set 3, (2000–2005) (n = 584).

<sup>6</sup> 52%, 51%, 56% respectively.

<sup>7</sup> 32%, 29%, 22% respectively, and in 2013–2014 24%.

<sup>8</sup> See Office for National Statistics Chapter Two *Violent Crime and Sexual Offences Homicide* ONS date February 12, 2015, pp.13–14, [http://www.ons.gov.uk/ons/dcp171776\\_394478.pdf](http://www.ons.gov.uk/ons/dcp171776_394478.pdf). See also *Focus on Partner/ex-partner Homicide*, <http://www.ons.gov.uk/ons/rel/crime-stats/crime-statistics/focus-on-violent-crime-and-sexual-offences--2012-13/rpt---chapter-2---homicide.html?format=print>#tab-Focus-on-Partner-Ex-Partner-Homicides> [Accessed October 5, 2015].

<sup>9</sup> See C. Block, *Risk Factors for Death or Life-Threatening Injury for Abused Women in Chicago* (2000), <https://www.ncjrs.gov/pdffiles1/nij/199732.pdf> [Accessed October 5, 2015]. See also Nancy Glass, “Non-Fatal Strangulation is an important risk factor for Homicide of Women” (2008) 35 J. Emergency Med 329; S. Stapczynski, “Strangulation Injuries” (2010) 31 Emergency Med Rep 193.

<sup>10</sup> US Bureau of Justice Statistics, <http://www.bjs.gov/content/pub/pdf/htius.pdf> [Accessed October 5, 2015].

<sup>11</sup> Focus on Violent Crime and Sexual Offences 2011–2012, p.27, [http://www.ons.gov.uk/ons/dcp171778\\_298904.pdf](http://www.ons.gov.uk/ons/dcp171778_298904.pdf) [Accessed October 5, 2015].

<sup>12</sup> *Report of the Criminal Section Working Group on Strangulation*, Uniform Law Conference of Canada, May 2006 [Ottawa, Ont.] (Beaconsfield, Quebec: Canadian Electronic Library, 2013). See also *General Social Survey on Victimization* 2004, <http://www23.statcan.gc.ca/imdb/p2SV.pl?Function=getSurvey&SDDS=4504> [Accessed October 5, 2015].

<sup>13</sup> See also G.B. Strack, and C. Gwinn, “On the edge of homicide; Strangulation as a Prelude (2011) 26 Criminal Justice online: Family Justice Centre, <http://www.familyjusticecenter.org/Strangulation/Onper%20Edgeper%20per%20Homicide.pdf> [Accessed October 5, 2015].

<sup>14</sup> H. Douglas and R. Fitzgerald, “Strangulation, Domestic Violence and the Legal Response” 36 *Sydney Law Review* 231, 232, [http://sydney.edu.au/law/slr/slr\\_36/slr36\\_2/SLRv36n2DouglasFitzgerald.pdf](http://sydney.edu.au/law/slr/slr_36/slr36_2/SLRv36n2DouglasFitzgerald.pdf) [Accessed October 5, 2015].

Australia, and Robertson<sup>15</sup> in New Zealand found that strangulation is a significant factor in risk assessment for homicide of women in the domestic context. In responding to the prevalence of strangulation as a risk factor in homicides of female partners, over the last ten years these jurisdictions have developed preventive legislation, including police, prosecutorial and sentencing policy. By way of comparison and for completeness, although not further discussed in this paper, data<sup>16</sup> show that where male partners are killed by women over 80 per cent<sup>17</sup> are killed with a weapon (sharp instrument, blunt instrument, shooting). Strangulation being used in only one or two cases.<sup>18</sup>

What is clearly evident is that women's limited physical strength results in them resorting to weapons whilst men's greater physical strength allows them to use body force with different legal consequences. This raises concern for women's access to justice, trial outcomes and sentencing, as those who use weapons are regarded as more culpable, heinous, and blameworthy than those who use body force.

### Body force—weapons v body parts

The lack of understanding of the prevalence and seriousness of strangulation of female partners in assaults and killings must be considered in the broader historical context. Historically, the use of all types of body force in assaults and killings by males on females (and males on males) has attracted less approbation. Typically it functioned as a mitigating factor reflected in pleadings and length of sentence.<sup>19</sup> The following cases document the Court of Appeal's reappraisal of the seriousness of body force in fatal and non-fatal assault regardless of the relationship of victim to appellant.<sup>20</sup>

- In *Attorney General's Reference (No.7 of 1994)* (1995),<sup>21</sup> where the appellant tried to bite off the victim's thumb and nose, the Court increased the sentence for wounding with intent to four years and said. "For somebody to use his teeth as a pair of pincers to inflict disfiguring injury on somebody at point-blank range is, in our judgment, tantamount to using those teeth as a weapon."
- In *Bamborough* (1995),<sup>22</sup> a sentence of five years for manslaughter was upheld. The Court concurred with the trial judge's refusal to draw a distinction between a fist and a head on the one hand and a foot and a weapon on the other.

<sup>15</sup> N. Robertson, R. Busch, R. D'Souza, F. Lam Sheung, R. Anand, R. Balzer, A. Simpson and D. Paina, *Living at the Cutting Edge: Women's experiences of protection orders*, Ministry of Women's Affairs 2007, <http://research.waikato.ac.nz/CuttingEdge/VolOne.pdf>. See <http://research.waikato.ac.nz/CuttingEdge/VolTwo.pdf> [Accessed October 5, 2015].

<sup>16</sup> Set 1, (1987–1996) (n = 286), data set 2, (1995–2000) (n = 98), and data set 3, (2000–2005) (n = 135).

<sup>17</sup> 83 per cent, 89 per cent, 82 per cent respectively.

<sup>18</sup> When women strangle men the man is already incapacitated and immobilised through drink or having been attacked with a weapon. See *Stubbs* (1994) 15 Cr. App. R. (S) 57. See also *Patel (Jasmine)* [2014] EWCA Crim 1195.

<sup>19</sup> See *Grundy* (1989) 89 Cr. App. R. 333, a seven-year sentence was reduced to four years, the judge explained, "first no weapon was used as a boot or worse. Fisticuffs alone cause death."

<sup>20</sup> *Attorney General's Reference (No.19 of 1991)* (1992) 13 Cr. App. R. (S.) 711; [1992] Crim. L.R. 520.

<sup>21</sup> *Attorney General's Reference (No.7 of 1994)* (1995) 16 Cr. App. R. (S) 300.

<sup>22</sup> *Bamborough* (1995) 16 Cr. App. R. (S) 602.

- In *Sylvestre*<sup>23</sup> and *Lynch*<sup>24</sup> (2010) (male on female violence) the trial judge, described the throwing of the sulphuric acid into the victim's face as an assault at "point blank range" thereby emphasising the seriousness of the assault and equating it to the use of a gun.
- In *Attorney General's Reference (Nos 60, 62 and 63 of 2009)* (2009),<sup>25</sup> the Court of Appeal, increased the sentences in five cases of "one-punch manslaughter,"<sup>26</sup> and in *Appleby's* case increased the sentence from six to nine years.
- In *Cripps* (2012), 10 years was upheld for manslaughter/provocation where the deceased was kicked in the head with a "shod foot".<sup>27</sup> The courts are now describing such attacks with the feet as assaults with a "shod foot" and sentencing as if they involved a weapon.<sup>28</sup>

Notwithstanding these developments, strangulation, its potential to be lethal and the culpability of the perpetrator remain insufficiently addressed and understood. This results in inconsistency in decisions to prosecute, the charges brought, trial outcomes and sentencing. For example, at the level of policing in *Caetano v Commissioner of Police of Metropolis*,<sup>29</sup> the female claimant accepted a caution for hitting/slapping her male partner. The judge noted in his summary of the facts that the defendant had strangled her for which he received no reprimand. Her application for judicial review was granted. In the case of *Earl*,<sup>30</sup> where the victim had been strangled, the CPS decided against a prosecution for assault occasioning actual bodily harm because the complainant no longer wished to support the case proceeding on a charge of common assault only. The trial judge described the decision of the CPS as "pusillanimous" and said: "To say that this can be dealt with by means of common assault is quite honestly ridiculous." In this case the victim was found naked on the bathroom floor with marks to her neck and her hair floating in the bath water after the appellant had tried to strangle her. The defendant was sentenced to four months' imprisonment suspended for two years.

Whilst strangulation is a common method of killing in partner homicides against women<sup>31</sup> it is also frequently a feature in non-fatal domestic assault,<sup>32</sup> in sexual

<sup>23</sup> *Sylvestre* [2010] EWCA Crim 1550.

<sup>24</sup> *Lynch* [2010] EWCA Crim 2800.

<sup>25</sup> *Attorney General's Reference (Nos 60, 62 and 63 of 2009)* [2009] EWCA Crim 2693; [2010] 2 Cr. App. R. (S.) 46 (p.311), reversing the position in *Grundy* (1989) 89 Cr. App. R. 333, (see also *Povey* [2008] EWCA Crim 1261; [2009] 1 Cr. App. R. (S.) 42 (p.228), guidance on sentencing for possession of knives and offensive weapons.

<sup>26</sup> Although in the case against Jonathan Wicks 2010, an 18 month sentence for one punch to a wife was handed down. See <http://www.dailymail.co.uk/news/article-1299982/Manslaughter-TV-executive-given-18-months-killing-wife-burnt-roast-beef-row.html>. See also the *Crown against Matthew Carr* 2008, [http://www.cravenherald.co.uk/news/2211757.18\\_months\\_for\\_manslaughter\\_of\\_skipton\\_butcher/](http://www.cravenherald.co.uk/news/2211757.18_months_for_manslaughter_of_skipton_butcher/) [Accessed October 5, 2015].

<sup>27</sup> *Cripps* [2012] EWCA Crim 806; [2013] 1 Cr. App. R. (S.) 7 (p.43), following *McMinn* [1997] 2 Cr. App. R. (S.) 219. See also *Tanti* [2015] EWCA Crim 1398; *Probetts* [2015] EWCA Crim 1423.

<sup>28</sup> See also Sentencing Council, *Assault Definitive Guideline*, 2009, p.4 where aggravating factors include "Use of weapon or weapon equivalent (for example, shod foot, headbutting, use of acid, use of animal)" [http://www.sentencingcouncil.org.uk/wp-content/uploads/Assault\\_definitive\\_guideline\\_Crown\\_Court.pdf](http://www.sentencingcouncil.org.uk/wp-content/uploads/Assault_definitive_guideline_Crown_Court.pdf).

<sup>29</sup> *Caetano v Commissioner of Police of Metropolis* [2013] EWHC 375 (Admin); (2013) 177 J.P. 314. The application for judicial review was successful.

<sup>30</sup> *Earl* [2014] EWCA Crim 261.

<sup>31</sup> *Braithwaite* [2009] EWCA Crim 286. The cause of death was asphyxia, "compression of the neck" and a stab wound to the neck. *Groombridge* [2013] EWCA Crim 274, strangled his great grandmother when she refused to give him any money (she survived).

<sup>32</sup> *Attorney General's Reference (No.39 of 1994)* (1995) 16 Cr. App. R. (S.) 763.

assault, notably rape,<sup>33</sup> and in robbery where women are its victims.<sup>34</sup> The Offences Against the Person Act 1861 s.21 provides that the use of strangulation or suffocation in the commission of any indictable offence, is of itself an offence, carrying a potential life sentence. Yet, s.21 has rarely formed part of the indictment.<sup>35</sup> In *Fazli* (2009)<sup>36</sup> the defendant was proceeded against in relation to several counts of assault against his wife in that he had “[9]... throttled her with a long cotton scarf so that she was unable to breathe and was close to passing out”. The judge considered the *Sentencing Guideline on Domestic Violence* (discussed below), and in passing sentence for assault occasioning actual bodily harm following committal to the Crown Court for sentence

“[18] ... expressed surprise that the Appellant had not been charged with a more serious offence which would have enabled him to pass a sentence of imprisonment for public protection... suggest[ing] that a charge of attempting to choke, suffocate or strangle contrary to s 21 of the Offences against the Person Act 1861 might have been appropriate.”

## Intention and culpability

In circumstances where a victim dies following strangulation the question for jury determination is whether the defendant intended at least GBH (murder) or the death was non-intentional (unlawful act manslaughter). The mental element necessary for establishing intention to kill or cause really serious bodily injury is found through consideration of a defendant’s foresight of consequences, and the probability, or likelihood, that strangulation will result in death or GBH. Where it is insufficient to give the jury a simple direction on intention, then following *Nedrick*,<sup>37</sup>/*Woollin*,<sup>38</sup> juries may be directed that they may find intention if the likelihood of death or serious bodily harm is a “virtual certainty” and that the defendant appreciated that this was so.<sup>39</sup> In addition, as Lord Lane CJ asserted: “The decision is one for the jury to be reached upon a consideration of all the evidence.”<sup>40</sup>

The two questions have significance for strangulation. In considering the first question was death or serious bodily harm a “virtually certain” outcome it is important to note that strangulation does not always result in death, and where death does occur vagal inhibition may supervene as the likely cause. In considering the second question as to D’s foresight, the cases that follow suggest that the defendant’s case (excepting perhaps where a ligature is used) is nearly always that the risk of death or GBH was not foreseen and that his only intention was to silence,

<sup>33</sup> *Nolan* [2007] EWCA Crim 2410, *Doucoure* [2006] EWCA Crim 1814.

<sup>34</sup> *Mykoo* [2010] EWCA Crim 989, strangled lone females walking home and took jewellery. *Williams* [2008] EWCA Crim 2886—strangled and robbed.

<sup>35</sup> See *F (DR)* [2013] EWCA Crim 1689, *Groombridge* [2013] EWCA Crim 274, *Moura* [2009] EWCA Crim 1891, *Abdroikof* [2007] UKHL 37; [2007] 1 W.L.R. 2679; [2008] 1 Cr. App. R. 21 (p.280), *L* [2006] EWCA Crim 1902; [2006] 1 W.L.R. 3092; [2007] 1 Cr. App. R. 1 (p.1), *Dempster* [2001] EWCA Crim 571; [2001] Crim. L.R. 567.

<sup>36</sup> *Fazli* [2009] EWCA Crim 939 at [9] [17].

<sup>37</sup> *Nedrick* [1986] 1 W.L.R. 1025

<sup>38</sup> *Woollin* [1998] 3 W.L.R. 382; [1999] 1 Cr. App. R. 8.

<sup>39</sup> See *Archbold 2015* (London: Sweet & Maxwell), p.1963, para.17–35.

<sup>40</sup> *Nedrick* [1986] 1 W.L.R. 1025 at 1028. Criminal Justice Act 1967 s.8(b).

end an argument, or control his victim. This suggests oblique intention is highly relevant. In these circumstances, defence counsel routinely present strangulation as “pressure to the neck,” whilst defendants’ describe their conduct as “squeezed,” “pinned down,” or “pushed her to the chin and neck area.”<sup>41</sup> Judges have also supported the presentation of strangulation as rarely ever intended<sup>42</sup> and conduct that more likely falls into recklessness/accident or “careless disregard”.<sup>43</sup> In *Brown*, for example, the Court of Appeal affirmed the judgment of the trial judge who regarded the use of body force and strangulation as less heinous than the use of a weapon when he said:

“... to provoke a man to strike his wife a blow with his fist which might cause her death, or to grab her round the throat and throttle her in a moment of anger could amount to provocation but where, a lethal weapon in the form of a razor has been used then the degree of the provocation would need to be very grave.”<sup>44</sup>

## Questions of evidence and proof

In the first question posed above, was death or serious bodily harm a “virtually certain” outcome? Two questions of evidence and proof present problems for the prosecution. First, there is ambiguity over the weight to be attached to the presence or absence of corroborative injury, including the hypothesised duration of the attack and the implication these factors have for establishing mens rea. Secondly, in cases where vagal inhibition (cardiac arrest) supervenes as the cause of death because death can follow quickly in time upon the strangulation, the case for intention is considerably weakened. However, amidst these two uncertainties it is also possible that death can occur at any point on a continuum of lesser to greater force, and an intention to kill may be present in the mind of the defendant prior to the strangulation and also at each and every single moment throughout the duration of the victim’s demise.

### *Corroborative injury and intention*

#### The equivocal forensic signs

In contemplating whether there is an intention to kill or cause really serious bodily harm in strangulation, there is no inevitable commensurate relationship between signs of injury and the degree of force used. Strack, McClane and Hawley,<sup>45</sup> in a review of 300 attempted strangulations in the US found that in 50 per cent of cases swelling or bruising of the hyoid cartilage bone, petechial haemorrhaging and other forms of visible injury corroborating strangulation were not present. Expert

<sup>41</sup> *Ellerbeck* [2010] EWCA Crim 905.

<sup>42</sup> (1911–12) Cr. App. R. vol vii 140. It is to be noted that according to the doctor’s evidence the strangulation of the wife must have lasted five minutes where a bone in her neck was broken. Lord Alverstone said however, “... he may have put his hands on her throat to silence her” (sic).

<sup>43</sup> *Francom* [2001] 1 Cr. App. R. 17 (p.237); [2000] Crim. L.R. 1018.

<sup>44</sup> *Brown* (1972) 56 Cr. App. R. 562 at 570.

<sup>45</sup> G.B. Strack, G.E. McClane, D. Hawley, “Review of 300 attempted strangulation cases” (2001) 21(3) J. Emerg. Med. 303. Part I: criminal legal issues.

opinion in *Siddique*,<sup>46</sup> for example, confirms this uncertain relationship. Here, the surviving victim said that the appellant had seized her by the throat with one or both hands. The defence expert stated it was improbable that there could have been pressure on her neck of the kind she described without leaving signs of injury, but he also said that “he couldn’t say that every case would be accompanied by signs.”<sup>47</sup> Further, in the case of *O’Reilly*,<sup>48</sup> (in this case a cord was also used to strangle) the appellant was convicted of attempted murder of his female partner and a sentence of six years imposed (upheld on appeal). Summing up the prosecution medical evidence, the judge said:

“His findings were that she had tenderness over one of the cartilages in her neck ... bruising on the right side of the neck ... a petechial rash round both eyes ... it was new and consistent with what the complainant said.”<sup>49</sup>

On appeal, the appellant’s case was that the expert for the defence should have been called since,

“... his evidence would have ruled out the use of a ligature [and] he would have been able to explain that the presence of a petechial rash was not necessarily indicative of life threatening conduct. He could have given evidence ... about the length of time pressure would be needed to produce petechiae.”

### Duration of stranglehold and intention

Strangulation is rarely a momentary act, more likely, it is continuous, often uninterrupted, requiring moderate to considerable force with the hands or with the hands and a ligature. Experts, prosecuting counsel and jurors have broadly taken the view that the longer in time the stranglehold or “pressure to the neck” the more likely it can be inferred (found) that the defendant intended to kill or cause really serious bodily harm. A yardstick of a 30 second duration or more of the stranglehold has unfolded in legal and medical jurisprudence as a likely indicator of intention. However, since there are usually no witnesses, how long a defendant may have persisted in strangling his victim relies on his account, forensic signs of injury and conflicting medical conjecture and interpretation, which as I have suggested is without scientific exactitude. Nonetheless attempting to establish the duration of strangulation is important in assessing mens rea in so far as the passage of time allows the defendant a period of mental contemplation during which he has the opportunity to reflect on his actions and to desist in his project especially as the victim’s decline from resistance to unconsciousness is visually and tactilely observable.

This medico-legal “modelling” of time for inferring intention in strangulation cases was first mooted (as far as I have been able to discover) in *Rumping* (1962),<sup>50</sup> where a man killed a woman after breaking into her bedroom whilst she was asleep.

<sup>46</sup> *Siddique* [1995] Crim. L.R. 875.

<sup>47</sup> See for example *P (Craig)* [2014] EWCA Crim 848.

<sup>48</sup> *O’Reilly* [1994] Crim L.R. 943.

<sup>49</sup> *O’Reilly* [1994] Crim L.R. 943 at [77].

<sup>50</sup> *Rumping v DPP* [1962] 2 All E.R. 233 CA; [1964] A.C. 814; [1962] 3 W.L.R. 763 HL.

A verdict of guilty to murder was returned and upheld on appeal (the judge withholding manslaughter from the jury). The expert for the prosecution said:

“I am of the opinion that death was due to asphyxia, ... If you find signs, such as I have...then you must come to the conclusion that considerable pressure has been applied to the neck. ... pressure could well be applied for half a minute or even longer [adding] It is a well-known fact that in many cases of manual strangulation there has been no struggle at all because unconsciousness can supervene so quickly.”<sup>51</sup>

Seven years later the Court of Appeal dealt again with a question of the surmised length of time of a stranglehold as an indication of intention, albeit on this occasion, with a different outcome. In *Lomas* (1969),<sup>52</sup> the appellant was convicted of the murder of his wife. The pathologist for the Crown preferred not to call it strangulation because he said:

“... he had never seen a case of death from such a cause with less outward or internal signs of injury ... one small bruise on the neck, ... a number of petechial haemorrhages under the eyes and ears which he said led him to the opinion that there had been firm continuous pressure on the deceased woman’s neck maintained for a minimum period of 30 seconds. ... [his] opinion as to the 30-second period standing unchallenged became the cornerstone of the prosecution case.”<sup>53</sup>

On appeal, leave was granted to adduce fresh medical expert evidence for the defence. Dr Mant’s opinion, in contradistinction to the prosecution expert, surmised that the pressure may have been for a few seconds only. The conviction for murder was quashed and five years for manslaughter substituted. In 1995, the 30 second threshold was the subject of conjecture in *Light*, an unsuccessful appeal against a seven year sentence.<sup>54</sup> The husband who was convicted of voluntary manslaughter (provocation) of his wife where the defendant said, “I grabbed her and just squeezed and squeezed” following her announcement that she was having an affair and wanted to leave him. The judge in passing sentence said that strangulation was sustained somewhere between 30 seconds and two minutes suggesting on the facts that domestic matters influence the jury even where the intention to kill in strangulation is clear. In the case of *Dearn* (1990),<sup>55</sup> (attempt murder) where a ligature was used for a considerable period of time, a sentence of 15 years suggested that in the judges mind at least the defendant’s intention was clear. The defendant admitted wrapping the vacuum cleaner cable, around his partner’s neck. He said she had “been nagging him all day” and he tried to “shut her up”. A medical officer and a consultant physician for the Crown concluded that an instrument of strangulation must have been applied for a minimum of five minutes. The forensic pathologist for the defence disagreed concluding that the correct time was “in the order of half a minute.” The victim was left severely disabled, unable to use her

<sup>51</sup> *Rumping* [1962] 2 All E.R. 233 at 237.

<sup>52</sup> *Lomas* [1969] 1 W.L.R. 306; [1969] 1 All E.R. 920; (1969) 53 Cr. App. R. 25.

<sup>53</sup> *Lomas* [1969] 1 All E.R. 920 at 922.

<sup>54</sup> *Light* (1995) 16 Cr. App. R. (S.) 824, see also *Taylor* (1987) 9 Cr. App. R. (S.) 175, *Mellentin* (1985) 7 Cr. App. R. (S.) 9.

<sup>55</sup> *Dearn* (1990–91) 12 Cr. App. R. (S.) 527. See also S. Edwards, *Sex and Gender in the Legal Process*, (Blackstone Press, 2001), p.183.

arms or legs in a voluntary manner, incapable of speech and could only grunt or cry. A sentence of 15 years was reduced to 12 years on appeal because it was technically outside the accepted range.

### *Vagal inhibition and negating intention*

The second evidential factor which undermines a prosecution for murder and bolsters the case for unlawful act manslaughter is the supervention of vagal inhibition (cardiac arrest)<sup>56</sup> which, can occur within seconds upon the strangulation.<sup>57</sup> The potential to undermine the prosecution case for murder is fairly well established in the case law both here and in other jurisdictions,<sup>58</sup> resulting in the prosecution accepting a plea of guilty to unlawful act manslaughter, or in a contested trial the jury returning a verdict of manslaughter. In such circumstances the prosecution/judge/jury may be more likely to accept that the violence used is minimal and that there was no intention to kill or cause really serious bodily harm. In *Walker*,<sup>59</sup> the prosecution accepted a plea of guilty to unlawful act manslaughter stating “it was not a case of strangulation but vagal inhibition”. In *Foster*<sup>60</sup> (unreported 1995), at trial, a plea of voluntary manslaughter—diminished responsibility was accepted by the Crown, where the defendant had gripped her neck compressing it for about 30 seconds. The court accepted that strangulation was not the immediate cause of death, since “vagal inhibition had supervened”. The judge said he was prepared to accept that “violence had not been extreme ...”. In *Lopez* (2006),<sup>61</sup> where the mechanism of death may have been due to vagal inhibition, the jury convicted of murder. The judge, possibly influenced by the uncertainty of the cause of death and the uncertainty over the necessary mens rea, imposed a lenient sentence of eight years. On appeal, the sentence was increased to ten years, (the mandatory minimum term in cases of murder at the time). The High Court judge said:

“[13] Since there was no signs of violence on the body and the actual mechanism of death may have been due to vagal inhibition, the judge accepted that only ‘minimal violence’ had been used... he accepted that there had been no intention to kill ....”<sup>62</sup>

In *Clarke*,<sup>63</sup> although the cause of death was due to vagal inhibition and asphyxia from compression of the neck, the subsequent electrocution of the victim (albeit after her death) and the defendant’s statement (below) no doubt bolstered the case for intention and the jury convicted of murder. This was set against a consideration of all the evidence including a background where the deceased had applied for a number of non-molestation injunctions because of the accused’s violence towards her, and on the defendant’s admission he said:

<sup>56</sup> See also *Vollmer* [1995] SCV, CCA [1996] 1 V.R. 95.

<sup>57</sup> Pekko Saukko and Bernard Knight, *Knights Forensic Pathology*, 4th edn (Taylor Francis, 2015), p.370. See also B.N. Purdue, “Asphyxial and related deaths” in J.K. Mason, B.N. Purdue (eds), *The Pathology of Trauma* (London: Arnold Publishing, 2000).

<sup>58</sup> *Rice* [1996] 2 V.R. 406.

<sup>59</sup> *Walker* (1992) 13 Cr. App. R. (S.) 474.

<sup>60</sup> See Edwards, *Sex and Gender in the Legal Process* (2001), pp.401, 404, 414, 416.

<sup>61</sup> *Lopez* [2006] EWHC 2945.

<sup>62</sup> *Lopez* [2006] EWHC 2945 at [8], [13].

<sup>63</sup> *Clarke* unreported December 12, 1990 (Transcript: Marten Walsh Cherer).

“... I hit her with my right hand on the side of her head, I just lost control. I saw red and that were it. I grabbed her by the neck. I’d head-butted her before hitting her ... I lifted her on to her toes with her heels off the ground, then she made like a funny croaking noise, then I let go and she fell to the floor. From that noise onwards, I neither heard nor saw any sign of life from her. I went down again and pressed with both hands on her neck.”

### The defendant’s perception of risk and intention

The second question to be considered is whether the defendant appreciated the risk of death or GBH. There is more recent evidence that some judges at least are less persuaded by a defendant’s professed lack of foresight of risk and also by those who deny intention and seek to exonerate their actions by pleading an ulterior purpose as for example, “I was holding her head by the neck to make her focus, can we be clear?”<sup>64</sup> The Court of Appeal (Beldam LJ, McKinnon and Judge JJ) in upholding a conviction for murder in *Hill* (1996)<sup>65</sup> said:

“... The placing of even one hand round the throat and the exertion of sufficient pressure to fracture the cartilages to cause the interruption in the blood supply described and by constricting the windpipe to cause asphyxia, indicates at least an intention to do really serious harm; if such pressure is maintained for a period of 10–15 seconds and if at the same time the victim is making gargling or choking noises, the inference that really serious harm was intended is inescapable.”

Nor was the Court of Appeal persuaded by the appellant’s self-professed failure to appreciate the seriousness and risk in *Phoenix* (2005).<sup>66</sup> Here, the defendant strangled his wife, was convicted of murder and sentenced to a minimum term of 12 years and six months, upheld on appeal.

“[7] In interview the applicant admitted to the police that he had killed his wife. He said that he had strangled her for a period of at least 30 seconds.”

In an unsuccessful appeal against sentence counsel suggested that since there was no intention to kill, but an intention to inflict grievous bodily harm; no premeditation; and “conduct that as a matter of fact, if not in strict law, provoked the fatal attack”, strangling a wife was really a matter of “loss of self-discipline”. He said that a 15 year minimum term starting point was manifestly excessive since the applicant

“... over a period of four months, had shown self-discipline in his dealings with his wife ... and that for a period of 30 seconds during which he lost his self-discipline, he now faces a minimum term of twelve and a half years.”<sup>67</sup>

<sup>64</sup> See Charles Saatchi’s explanation of why he grabbed Nigella Lawson round the throat, <http://www.dailymail.co.uk/news/article-2518207/Why-Charles-Saatchi-grabbed-throat-Nigella-Lawson-explains.html#ixzz3Z3fuXSxm> [Accessed October 5, 2015].

<sup>65</sup> *Hill* [1996] Crim. L.R. 419 (male on male). A further CCRC referral back to the Court failed and the conviction was upheld. [2008] EWCA Crim 76.

<sup>66</sup> *Phoenix* [2005] EWCA Crim 1872.

<sup>67</sup> *Phoenix* [2005] EWCA Crim 1872 at [13].

## Bad character evidence—propensity to strangle

In cases of fatal strangulation there is frequently a background of domestic violence against the deceased and in some cases against former partners (see *Clarke* above, *Jones*<sup>68</sup> and *Thomas*<sup>69</sup> below). That background in some cases includes evidence of non-fatal strangulation. The Criminal Justice Act (CJA) 2003 ss.101,103 provides for a matter “in issue” between the parties as one which the court ought to take into account (s.101(1)(d)). In considering whether to admit such evidence the trial judge must consider fairness, likely prejudice of the evidence s.101(3), and the relevance/prejudice of old evidence. In considering bad character evidence (BCE), evidence of strangulation involving the same victim (*Williams*,<sup>70</sup>*McGrory*)<sup>71</sup> and other victim(s) (*Williams*, *Rees*,<sup>72</sup>*McGrory*) has been admitted as indicating a propensity for a “particular” kind of violence. However, domestic violence either towards the same victim or other victims has been interpreted as falling under a “general propensity for violence” and has, in some cases, been excluded (*Rees*). Following *Hanson* (2005),<sup>73</sup> no minimum number of events is necessary to demonstrate a propensity under s.103(1)(a). In considering admissibility there is some evidence of attempts (albeit unsuccessful) by defence counsel in legal argument to distinguish between “non-sexual strangulation”, “sexual strangulation” and “strangulation with a ligature” in blocking prosecution applications to adduce BCE. (The ambit of the rules of evidence have also been tested in cases of strangulation with regard to *res gestae*.)<sup>74</sup>

In the following cases, (excepting *Newman* (2007)),<sup>75</sup> the admissibility of BCE of strangulation has been the subject of defence challenge. In *Williams* (2006),<sup>76</sup> the defendant was convicted of the murder of his partner by strangulation and sentenced to a minimum term of 20 years. The deceased had reported to police of two previous occasions when he had tried to strangle her [8]. The prosecution also adduced evidence of his domestic violence including the non-fatal strangulation of his former partner. The Court of Appeal held that the BCE had been properly admitted:

“[20] The material, if true, established that this particular appellant was prone to a continuing propensity, long standing, not only to use violence against his female partners, but also and specifically to use violence of the type which resulted in the death of the deceased when he strangled her. The violence had to be considered as a whole.”

In *Rees* (2007),<sup>77</sup> the appellant had been convicted of the murder of a female partner and sentenced to a minimum term of 15 years. Medical evidence indicated “unremitting strangulation” for a period of 15–30 seconds. The prosecution

<sup>68</sup> *Jones* [2013] All E.R. (D) 181.

<sup>69</sup> *Thomas* [2009] EWCA Crim 904; [2010] 1 Cr. App. R. (S.) 14 (p.75); [2009] Crim. L.R. 746.

<sup>70</sup> *Williams* [2006] EWCA Crim 2052.

<sup>71</sup> *McGrory* [2013] EWCA Crim 2336.

<sup>72</sup> *Rees* [2007] EWCA Crim 1837.

<sup>73</sup> *Hanson* [2005] EWCA Crim 824; [2005] 1 W.L.R. 3169; [2005] 2 Cr. App. R. 21 (p.299).

<sup>74</sup> See *Barnaby v Director of Public Prosecutions* [2015] EWHC 232 (Admin); [2015] 2 Cr. App. R. 4 (p.53), where the court ruled a 999 police call made by the victim admissible and dismissed the appeal, and where also evidence of propensity to violence.

<sup>75</sup> *Foster* [2007] EWCA Crim 2869; [2008] 1 W.L.R. 1615; [2008] 1 Cr. App. R. 38 (p.470).

<sup>76</sup> *Williams* [2006] EWCA Crim 2052.

<sup>77</sup> *Rees* [2007] EWCA Crim 1837.

application to adduce evidence from three previous girlfriends of his violence was refused in respect of two of the witnesses and granted in the third case, and this ruling constituted a ground of appeal. The Court of Appeal held that the judge had been correct to exclude the evidence of the first two witnesses since such evidence went only to his general propensity for violence. Evidence of the third witness, which was evidence of strangulation (being grabbed by the throat and having a pillow pressed on her face) was held as highly relevant to the issue of whether he intended to asphyxiate his present girlfriend. In *Newman*,<sup>78</sup> the appellant was convicted of attempted murder (he had strangled the victim who became unconscious) and sentenced to imprisonment for a minimum of seven years for public protection. BCE was adduced from a number of previous girlfriends and also a number of other women with whom he had a “professional” relationship. They had similarly been grabbed by the throat by the appellant, which he had described as “play fighting”.<sup>79</sup> The prosecution case was that he had sado-erotic fantasies about strangulation. The admission of this BCE was not challenged on appeal. In *Moore* (2009),<sup>80</sup> the defendant killed his girlfriend by strangulation or suffocation and was convicted of murder with a minimum term of 20 years. BCE was adduced as to his propensity for strangulation including a previous non-fatal strangulation of his wife, during which he had said to her: “[13] ... I could kill you now and nobody would know”. The Court of Appeal held that propensity evidence had been properly admitted, albeit 12 years previously, on the basis of its “unusual nature and striking parallel”, adding:

“[16] ... It seems to me that the material which the prosecution seeks to adduce in evidence in the present case, if true, is capable of supporting the conclusion that the defendant was prone to a propensity, not only to use violence against his female partners, but also, and specifically, to use violence of the type which resulted in the death of [V].”

In *McCarry* (2009),<sup>81</sup> manual and ligature strangulation using the deceased’s bra, resulted in death. McCarry’s case was that he had sexual intercourse with the deceased and that she had encouraged him to strangle her to increase her sexual pleasure. Evidence of McCarry’s strangulation of three former partners was admitted as BCE.<sup>82</sup> On appeal, counsel for the appellant submitted that the trial judge was wrong to admit evidence of McCarry’s tendency to “non-sexual strangulation” (sic) and violence [31]. The Court of Appeal said: “[34] .... The evidence was, in our judgment, relevant to the important issue whether the Crown had surely proved that the killing was not accidental.” A sentence of 24 years for murder was upheld. In *McGrory* (2013),<sup>83</sup> the defendant strangled his wife with a dog leash. His defence of diminished responsibility failed and he was convicted of her murder. Following her announcement to him that she had another partner and wanted him to leave, he said “I just flipped.” The trial judge ruled admissible

<sup>78</sup> *Foster* [2007] EWCA Crim 2869; [2008] 1 W.L.R. 1615; [2008] 1 Cr. App. R. 38 (p.470) at [14].

<sup>79</sup> *Foster* [2007] EWCA Crim 2869; [2008] 1 W.L.R. 1615; [2008] 1 Cr. App. R. 38 (p.470) at [14].

<sup>80</sup> *Moore* [2009] EWCA Crim 821.

<sup>81</sup> *McCarry* [2009] EWCA Crim 1718. Waters was convicted of murder as an accomplice.

<sup>82</sup> *McCarry* [2009] EWCA Crim 1718 at [30].

<sup>83</sup> *McGrory* [2013] EWCA 2336.

evidence of the deceased's previous report to the police of three incidents of non-fatal strangulation made in 2005,<sup>84</sup> and said:

“... the defendant had a propensity ... to resort to strangling her and the prosecution submit that on this occasion in January he was resorting again in effect to his usual behaviour rather than it being as a result of the loss of control.”

The Court of Appeal held that evidence of earlier acts of strangulation was properly admitted as they went to propensity.<sup>85</sup> The sentence of imprisonment with a minimum term of 14 years was upheld.

## Strangulation and sentencing

In this section I consider three statutory developments which, when applied, can have a significant impact on sentencing in cases of non-fatal and fatal strangulation. However, it is to be emphasised that nowhere is strangulation specifically mentioned in the *Domestic Violence Guideline*, the sentencing schema for murder and manslaughter under the CJA 2003, or as an aggravating factor in sentencing.

### *Domestic Violence Definitive Guideline*

The Sentencing Guidelines Council guidance, *Overarching Principles: Domestic Violence Definitive Guideline*,<sup>86</sup> (issued in accordance with s.170(9) of the CJA 2003) reverses the previous situation where the domestic context was regarded as a mitigating factor allowing courts to excuse men as “not normally violent”, “no danger to the public”,<sup>87</sup> or else describe their conduct as “out of character”.<sup>88</sup> In one case, biting, putting the victim in a headlock and dragging her along the ground was described by the judge as a “lovers tiff”.<sup>89</sup> In *Silver*,<sup>90</sup> a 10 year sentence was reduced to five years where a man beat his partner to death and the Court of Appeal held that a sentence of more than five years required evidence of aggravation! The *Domestic Violence Guideline*,<sup>91</sup> is a significant development which needs to be more rigorously applied by the courts. Indeed, its under application was the subject of judicial comment by the Court of Appeal in *Attorney General's Reference (No.80 of 2009)*.<sup>92</sup> In this case, a husband held a heated iron on his wife's face, jumped on her, repeatedly punched her, causing such injury that her face required

<sup>84</sup> *McGrory* [2013] EWCA 2336. Admission of bad character in domestic violence cases, see for example *Horncastle* [2009] EWCA Crim 964; [2009] 4 All E.R. 183; [2009] 2 Cr. App. R. 15 (p.230). *Thomas* [2009] EWCA Crim 904; [2010] 1 Cr. App. R. (S.) 14 (p.75). *Sylvester* [2005] EWCA Crim 1794. *M* [2014] EWCA Crim 1523; [2015] 1 W.L.R. 495; [2014] 2 Cr. App. R. 29 (p.484). *Campbell* [2007] EWCA Crim 1472; [2007] 1 W.L.R. 2798; [2007] 2 Cr. App. R. 28 (p.361).

<sup>85</sup> *McGrory* [2013] EWCA 2336 at [12].

<sup>86</sup> Applicable to sentences passed on or after December 18, 2006. See Sentencing Guidelines Council, [https://www.sentencingcouncil.org.uk/wp-content/uploads/web\\_domestic\\_violence.pdf](https://www.sentencingcouncil.org.uk/wp-content/uploads/web_domestic_violence.pdf) [Accessed October 5, 2015].

<sup>87</sup> *Reilly* (1982) 4 Cr. App. R. (S.) 288.

<sup>88</sup> *Beaumont* (1992) 13 Cr. App. R. (S.) 270. See also M. Wasik, “Cumulative Provocation and Domestic Killing” [1982] Crim. L.R. 22.

<sup>89</sup> *Oudkerk* (1995) 16 Cr. App. R. (S.) 172.

<sup>90</sup> *Silver* (1994) 15 Cr. App. R. (S.) 836.

<sup>91</sup> Sentencing Guidelines Council *Overarching Principles: Domestic Violence Definitive Guideline*, [http://sentencingcouncil.judiciary.gov.uk/docs/web\\_domestic\\_violence.pdf](http://sentencingcouncil.judiciary.gov.uk/docs/web_domestic_violence.pdf) [Accessed October 5, 2015]. See foreword, (p.1) makes clear that offences committed in a domestic context should be regarded as being no less serious than offences committed in a non-domestic context, but still prioritises use of a weapon.

<sup>92</sup> *Attorney General's Reference (No.80 of 2009)*[2010] EWCA Crim 470.

reconstruction. The Court of Appeal, extended the two and a half year sentence to five years and identifying a number of aggravating features in applying the guideline in the offence of grievous bodily harm with intent, observed:

“[27] Investigators, prosecutors, defenders and sentencing judges should read and in our view re-read the Sentencing Guidelines Council’s *Definitive Guideline on Domestic Violence* and ensure they are truly aware of its implications.”

Later that same year the consideration of the Guidelines in *Thomas*,<sup>93</sup> where a sentence of 17½ years was upheld where the appellant murdered his partner and where evidence from the defendant’s ex-wife and a former girlfriend of his violence towards them was held to be properly admitted and consistent with CJA s.269. (Sch.21 para.10(b) and (c)) suggests that the Court of Appeal’s remarks in *Moore* had an impact in later cases.

### *Manslaughter—strangulation culpability and CJA s.143*

Where the defendant is not convicted for murder judges have the power to take “culpability” into account in sentencing in unlawful act manslaughter. The CJA 2003 s.143(1), in determining seriousness, provides, “the court must consider the offender’s culpability in committing the offence and any harm which the offence caused, was intended to cause or might foreseeably have caused”. The first consideration focuses on the gravity of the actus reus expressed in the language of “any harm”. The second consideration provides for degrees of perception of risk in setting out on a continuum at the one end a lower threshold of “might foreseeably” to the higher threshold of just below legal intention. Section 143 was considered in *Ellerbeck*.<sup>94</sup> Here, the defendant strangled his wife, who wanted a divorce, killing her by holding her neck with his forearm. There were corroborative signs of injury including bruises, abrasions, and petechial haemorrhaging. He appealed against sentence, on the ground that the judge should not have treated the offence as aggravated by domestic violence for the purpose of sentence as there was no evidence of any history of domestic violence. The judge whilst he “referred to the killing as being wholly and completely out of character, saying that he was not generally, and never had been, a violent man”, emphasised the need to take into account the gravity of the violence and the vulnerability of the victim. The Court of Appeal in refusing the appeal against an eight year sentence said the potential for injury was plain:

“[9] The judge was right to say that this was domestic violence, indeed it is difficult to see how killing one’s wife in the family home could be other than domestic violence of a most egregious nature. The judge rightly said that she was subjected to violence in her own home, the very place where she should feel safest, and he was entitled to regard that as an aggravating feature.”

<sup>93</sup> *Thomas* [2009] EWCA Crim 904; [2010] 1 Cr. App. R. (S.) 14; [2009] Crim. L.R. 746.

<sup>94</sup> *Ellerbeck* [2010] EWCA Crim 905.

Since trial judges have considerable discretion in sentencing unlawful manslaughter there is still evidence of lenient sentencing particularly where men feel thwarted (see *Ellerbeck* above) the Court of Appeal being powerless to increase sentence unless “unduly lenient”. In *Attorney General’s Reference (No.29 of 2012)*, six years for unlawful act manslaughter was not “unduly lenient” where, death was caused following “a compression of the neck” which had been caused by an arm hold from behind for a significant amount of time. The trial judge “had accepted that the offence had been committed whilst the offender had been in the grip of emotional turmoil”. He said: “[18] This was a man who was deeply in love with the deceased”. This said the defence amounted to “morbid jealousy”. The defendant hacked into the email account of the victim three days before her death accessing it 800 times!

However, as the following case suggests, where trial judges are robust in sentencing the Court of Appeal does not intervene. In *Jones (2013)*,<sup>95</sup> the defendant strangled his girlfriend and was convicted of unlawful act manslaughter. He had put one hand over her mouth and another over her chest. He straddled her body, held her around the throat, her face changed colour and she stopped moving.

“The cause of death was found to be pressure to the neck with extreme asphyxial signs to the head, potentially compatible with a broad ligature or a neck hold.”

A sentence of 15 years was upheld on appeal on the basis of the following aggravating features:

“(i) the fact that the act of violence was one of extreme dangerousness and that, ... it had been an intentional assault intended to frighten and demonstrate control over the deceased; (ii) that it was not an isolated act of violence; and (iii) the defendant’s behaviour after having killed the deceased.”

This suggests, by 2013, a growing judicial awareness of the danger and seriousness of strangulation.

### *Murder, strangulation and CJA s.269 Sch.21*

In murder cases involving strangulation, since strangulation is not identified anywhere in the CJA 2003 s.269 Sch. 21 elaborate schema, the trial judge in sentencing may of course consider s.5(1)(a) seriousness, s.5(2)(e) sadistic conduct, and the aggravating factors under s.10(b) which include, of particular relevance, “the vulnerability of the victim”, age and disability only being specified. The courts have taken the view that the list is not exhaustive and so there is the opportunity for judges to take into account the seriousness of strangulation. There is inconsistency in sentencing for murder in these circumstances ranging from 15 to 30 years. It is suggested that the variations in sentencing defy the fact specificities of the cases. At the upper end, as one might expect, are cases involving a ligature (weapon) (see above *McCarry* where a 24 year term was upheld). In *Sacket (2012)*,<sup>96</sup> where the appellant killed his girlfriend by manual and ligature strangulation

<sup>95</sup> *Jones* [2013] All ER (D.) 181.

<sup>96</sup> *Sacket* [2012] EWCA Crim 3229.

holding her in a headlock and strangling her possibly with her thong, the judge considered the seriousness (s.5(1)) as “particularly high” and a 25 year minimum term was upheld on appeal. The defence claim was that the defendant had been “play-fighting”. In *Clinton* (2012)<sup>97</sup>:

“[54] The deceased [wife] had been beaten about the head with a wooden baton, strangled with a belt, and then a piece of rope had been tightened around her neck with the aid of the wooden baton.”

*Clinton* was convicted of murder. Following an appeal the conviction was quashed<sup>98</sup> and a new trial ordered<sup>99</sup> wherein he pleaded guilty to murder and was sentenced to serve a minimum term of 20 years. In *Cope* (2014),<sup>100</sup> a sentence of 27 years was upheld: “... a cable tie had been tightly applied to her neck and the tie was then cut ... [with] multiple injuries of which 108 separate sites were found ...”.<sup>101</sup> The prosecution argued that the seriousness and nature of the offence which taken together with the defendant’s history of violence including violence against other women and numerous acts of non-fatal strangulation upon the deceased meant that the applicant’s culpability was “high” having regard to the CJA 2003 s.5(1)(a)Sch.21, requiring a starting point of 30 years.<sup>102</sup> The defendant had previously attacked his former partner, “including by way of strangulation, and had told her he intended to kill her”.

However some cases involving a ligature attract lesser sentences (*McGrory* and *Rees*, above were sentenced to terms of 14 and 15 years respectively). In *Turner* (2013),<sup>103</sup> where the appellant had killed his girlfriend and was convicted of murder the pathologist had concluded, that given the haemorrhaging to the deceased’s eyes, and a red line to the neck, that asphyxiation was the probable cause. A sentence of life imprisonment with a minimum term of 16 years was passed and upheld on appeal. The Court of Appeal described the case as “of the utmost gravity” indicating perhaps that a longer sentence would have been more appropriate. In *Campbell* (2013),<sup>104</sup> the defendant was convicted of the murder of his wife, and a minimum term of 15 years specified. He killed her with a ligature either a belt or a rope. Previous incidents of violence to other women including his first wife, were also taken into account as aggravating factors in sentencing. The trial judge said:

“It is clear that the act of killing would have taken time, would have required effort on your part and would have entailed suffering on your victim’s part. This is against a background in your case of violence towards women partners of yours, shown over a period of years by convictions for offences of assault and of harassment.”

<sup>97</sup> *Clinton* [2012] EWCA Crim 2; [2013] Q.B. 1; [2012] 1 Cr. App. R. 26 (p.362).

<sup>98</sup> A point of law arose as to whether infidelity expressly excluded by statute Coroners and Justice Act 2009 s.55(6)(c) can be taken into consideration where it is part of a course of conduct, for the purpose of loss of control manslaughter s.54.

<sup>99</sup> He pleaded guilty to murder on the first day of the retrial on September 4, 2012, <http://www.bbc.co.uk/news/uk-england-berkshire-19480076> [Accessed October 5, 2015].

<sup>100</sup> *Cope* [2014] EWCA Crim 1552.

<sup>101</sup> *Cope* [2014] EWCA Crim 1552 at [15].

<sup>102</sup> “(1) (a) the case does not fall within paragraph 4(1) but the court considers that the seriousness of the offence (or the combination of the offence and one or more offences associated with it) is particularly high ...”.

<sup>103</sup> *Turner* [2013] EWCA Crim 642; [2013] Crim. L.R. 993.

<sup>104</sup> *Campbell* [2013] EWCA Crim 155.

On appeal, counsel for the appellant submitted that no case of strangulation would of itself justify more than 15 years and pointed out that strangulation was not set out in the aggravating factors in the statutory criteria. The Court of Appeal responded:

“... the judge plainly was entitled to consider that there were such aggravating factors. First, he was entitled to have regard to some extent to the previous incidents of domestic violence. Here this was not simply strangulation with the hand, it was strangulation with a belt, if not a rope, and it was sustained. The suffering must have been very real indeed. That was an aggravating factor.”<sup>105</sup>

Sentencing outcomes are fact specific, depend on the decision of the jury to convict or acquit of murder at the outset, the discretion of trial judges, and the powerlessness of the Court of Appeal to interfere with sentences unless “unduly lenient”. What does emerge is that the Court of Appeal is resolute and firm in upholding robust sentences when handed down by trial judges only reducing them if technically incorrect and contrary to statute.

### **Other jurisdictions and new directions on strangulation**

Recognising the prevalence and seriousness of strangulation and the specific vulnerability of female partners to this method of violence and killing other jurisdictions have introduced legislation criminalising the act of strangulation as a stand-alone offence and increased sentencing where it is a feature. In the US, most federal states have made strangulation a specific felony, and increased sentencing.<sup>106</sup> For example, the New York Penal Law §121.12 (November 2010), creates three offences. Chapter 265 s.15d, defines strangulation as “the intentional interference of the normal breathing or circulation of blood by applying substantial pressure on the throat or neck of another” which has been widely accepted across many states as have the increased sentencing provisions. Some states have also widened liability to include the strangulation of a household member. For example in Idaho’s statute<sup>107</sup>:

“Any person who wilfully and unlawfully chokes or attempts to strangle a household member, or a person with whom he or she has a dating relationship, is guilty of a felony punishable by incarceration for up to (15) years ....”.

In Australia, New South Wales,<sup>108</sup> for example, the requirement of rendering a person insensible in order to commit an indictable offence is now no longer required and strangulation of itself is recognised as an indictable offence. The Crimes Amendment (Strangulation) Bill 2014,<sup>109</sup> also proposes to create a new single

<sup>105</sup> *Campbell* [2013] EWCA Crim 155 at [14].

<sup>106</sup> See [http://www.ndaa.org/nepa\\_state\\_statutes.html](http://www.ndaa.org/nepa_state_statutes.html) [Accessed October 5, 2015].

<sup>107</sup> Idaho code ann. § 18-923 (2014): attempted strangulation.

<sup>108</sup> See [http://www.legalaid.nsw.gov.au/\\_data/assets/pdf\\_file/0003/16536/Proposed-New-Strangulation-Offence-July-2013.pdf](http://www.legalaid.nsw.gov.au/_data/assets/pdf_file/0003/16536/Proposed-New-Strangulation-Offence-July-2013.pdf) [Accessed October 5, 2015].

<sup>109</sup> See [http://www.parliament.nsw.gov.au/prod/PARLAMENT/nswbills.nsf/0/731fe59b2420f495ca257cd00021f8d6/\\$FILE/2Rper%20Crimesper%20Amper%20per%20Strangulationper%20.pdf](http://www.parliament.nsw.gov.au/prod/PARLAMENT/nswbills.nsf/0/731fe59b2420f495ca257cd00021f8d6/$FILE/2Rper%20Crimesper%20Amper%20per%20Strangulationper%20.pdf) [Accessed October 5, 2015].

offence of strangulation/recklessness (s.37(1)(b)).<sup>110</sup> Currently, the Australian Law Commission is preparing a response to its consultation on strangulation and is due to report late in 2015.<sup>111</sup> In Canada, the Criminal Code, s.246, provides for strangulation with the intention of committing another offence,<sup>112</sup> efforts are being made to establish strangulation as a stand-alone offence. England and Wales needs to follow these jurisdictions and develop research, engage in policy development and raise awareness of the prevalence and seriousness of strangulation. This must include research inter alia into the application of the *Domestic Violence Definitive Guideline*, the use of s.21 Offences Against the Person Act 1861, and the interpretation and application of CJA 2003 ss.101,103, 143, and s.269 Sch.21 as well providing training for police, prosecutors and judges . There is an urgent need to develop understanding in public and legal consciousness on questions of prevalence, the lethality potential of strangulation and culpability of perpetrators in this not so unusual method of gendered violence.

<sup>110</sup> Already the Criminal Amendment Strangulation Act 2014 No.23 criminalises strangulation where through intention or recklessness a person is rendered unconscious.

<sup>111</sup> See <http://www.stuff.co.nz/national/politics/66401130/Law-Commission-stretched-to-the-limit>. See also <http://www.austlii.edu.au/au/journals/SydLRev/2014/11.html> [Accessed October 5, 2015].

<sup>112</sup> See [http://en.wikibooks.org/wiki/Canadian\\_Criminal\\_Sentencing/Offences/Assaultive\\_Offences](http://en.wikibooks.org/wiki/Canadian_Criminal_Sentencing/Offences/Assaultive_Offences) [Accessed October 5, 2015].