CASE NOTE: UNPACKING THE ELEMENTS OF INFANTICIDE – A CANADIAN APPROACH *R V BOROWIEC*

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I. INTRODUCTION

The law of infanticide has been described as "a particularly dark corner of the criminal law".[1] This description relates not so much to the nefarious character of the offence as to the hidden nature of the doctrine, which is seldom litigated. The recent decision of the Supreme Court of Canada in *R v Borowiec*[2] provides a useful window into the law governing infanticide which, in the common law jurisdictions in which it exists, provides both a discrete offence and a partial defence to women who kill their infant children while suffering from the effects of childbirth. The decision provides a valuable account of the origins and legislative purpose of the infanticide doctrine as it has developed within Canadian law which has close parallels to infanticide as it has emerged within New Zealand criminal law.

In this note I will provide an overview of the decision in *Borowiec* before examining some of the policy issues to which the decision gives rise. As it stands the infanticide doctrine is unequivocally oriented to the situation of women who have recently given birth, and makes no concessions to the circumstances of men who are charged with the care of infant children in the immediate post- birth period. This issue, and the policy considerations which support the current infanticide doctrine, will be considered at the conclusion of the note.

II. THE CANADIAN CODE PROVISIONS

Under Canadian law, infanticide is a form of culpable homicide defined in s 233 of the Criminal Code in the following terms:

> A female person commits infanticide when by a wilful act or omission she causes the death of her newly born child, if at the time of the act or omission she is not fully recovered from the effects of giving birth to the child and by reason thereof or of the effect of lactation consequent on the birth of the child her mind is then disturbed.

In addition s 662(3) of the Criminal Code provides:

> [W]here a count charges murder and the evidence proves manslaughter or infanticide *but does not prove murder* , the jury may find the accused not guilty of murder but guilty of manslaughter and infanticide, but shall not on that count find the accused guilty of any other offence.

In *R v LB*[3] this provision was conclusively held to provide a partial defence to murder.

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[1] *R v Borowiec* 2016 SCC 11 at [1] per Cromwell J.

[2] *R v Borowiec,* above note 1.

[3] 2011 ONCA 153 (CanLII).

As can be seen, infanticide is the outcome in a narrow set of circumstances. In particular, it is available only where a mother, by a wilful act or omission, kills her newborn child (defined as a child under one year of age, s 2 Criminal Code), and at the time of the act or omission, the mother's mind is "disturbed", either as a result of not having fully recovered from the effects of giving birth or because of the effects of lactation.

A distinctive feature of the Canadian definition means that there must be a mother-child relationship between the perpetrator and the victim. Furthermore the mental state of the perpetrator/mother must be disturbed and the disturbance connected to the effects of giving birth or lactation. In addition infanticide in Canada does not require a causal connection between the disturbance of the mother's mind and the decision to do the thing causing the child's death.

As under New Zealand law, in Canada infanticide operates both as a stand-alone offence and as a partial defence. Where the evidence establishes "an air of reality"[4] to an infanticide defence, the Crown must negate the defence beyond a reasonable doubt.

III. The Facts

In October 2010, a newborn baby was found crying in a dumpster in provincial Alberta. The mother was sitting nearby and admitted she had given birth to the child. It also emerged that she had also delivered babies in 2008 and 2009, abandoning them both in a dumpster, where they died. The appellant was charged with two counts of second degree murder. Two expert witnesses who gave evidence at the trial had opposing views as to whether the balance of the appellant's mind was disturbed at the time of the offences.

The main issue at trial and on appeal was whether the evidence gave rise to a reasonable doubt as to whether the mind of the appellant was disturbed by the effects of lactation or by having given birth at the time of the acts which gave rise to the infants' deaths.

At the trial before a judge alone[5] the judge had accepted the evidence of one expert witness who noted that the appellant had suffered from significant depersonalization evidenced by statements from the appellant that she felt like she had 'zero control' of her actions and was observing from 'outside her own body'.[6] The trial judge rejected the opinion evidence of a second expert that appeared to require that the respondent have a mental disorder in order to have a disturbed mind.

In acquitting the respondent of murder and convicting her on two counts of infanticide, the trial judge was influenced by the fact that the respondent had no criminal record and no psychopathic or sociopathic tendencies. Relying on the respondent's bizarre

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[4] *R v Borowiec,* above note 1, at [15].
[5] No reason is given in the proceedings as to why jury trial was not elected.
[6] Quoted in *R v Borowiec,* above note 1, at [7].

actions and the opinion of the expert witness, he found that the respondent's mind was disturbed as a result of the births. The Crown had thus failed to prove beyond reasonable doubt that the respondent's mind was not disturbed.

The majority of the Court of Appeal upheld the acquittals on the counts of second-degree murder. It found that the legislation was deliberately vague in defining infanticide, Parliament having intended to 'set a very low threshold' in using the term "disturbed".[7] The trial judge had expressed concern about the test used by one expert witness in which the expert concluded that the respondents' "balance of the mind was not disturbed." The trial judge held that whether the "balance of the mother's mind is disturbed" was not the test under s 233. He found that the 'balance of the mind' test used by the court-appointed expert was not appropriate and rejected the expert's opinion that acute mental disturbance, significant mental illness and mental disorder were necessary to establish a disturbance of the mind. The trial judge held that the Crown had set the bar too high for establishing that a mind is disturbed. The judge concluded that evidence of the respondent's 'bizarre actions' in disposing of the bodies of the infants and sitting and observing the police as they searched for the body of one child in a dumpster was enough, with the defence expert's evidence, to demonstrate that her mind was disturbed.

The Court of Appeal noted that some of the discrepancy arose because although s233 no longer uses the phrase "the balance of the mind", s 672.11(c) of the Criminal Code does employ that phrase. Although it disagreed with the trial judge's finding that there was a difference between the expressions 'balance of mind' and 'the mind disturbed', it found no error in the trial judge's analysis of the law on infanticide. The majority of the Court of Appeal also found that the threshold for what constituted a disturbed mind was very low, "far below" what was required for a person to be regarded as not criminally responsible, and falling short of what was required for a diagnosis of mental disorder under the DSM-V classification system[8]. Accordingly, the majority rejected the finding of the dissenting Judge that a disturbed mind required proof of a "substantial psychological problem."

IV. The Supreme Court Decision

The main issue in the Supreme Court concerned the legal meaning of the phrase "her mind is then disturbed". Speaking for the whole court, Cromwell J provided an overview of the law of infanticide before addressing the meaning of "disturbed mind".

A. The Previous Case Law

The law on infanticide had been previously comprehensively reviewed by the Ontario Court of Appeal in *R v LB*.[9] The Court of Appeal in *R v LB* had held that because the mother's "mental disturbance" is not connected to the decision to kill, the disturbance

[7] *R v Borowiec,* 2015 ABCA 232 (CanLII) [45], quoting *R v Coombs* 2003 ABQB 818 (CanLII) at [14].
[8] *R v Borowiec,* above note 7, at [45].
[9] *R v LB,* above note 3.

is part of the *actus reus* of the offence, and not the *mens rea.*[10] It also held that the mens rea for infanticide cannot be equated with the *mens rea* for murder. Rather, to prove infanticide the Crown must establish the *mens rea* associated with the unlawful act that caused the child's death and objective foreseeability of the risk of bodily harm to the child from that assault.[11] As such infanticide has a unique *actus reus* that distinguishes it from murder and manslaughter. The Court of Appeal found that it was those distinctions which caused Parliament to treat infanticide as a culpable homicide, but one which was significantly less culpable than murder or manslaughter. The Court of Appeal in *R v LB* also found that the presence of *mens rea* for murder, while not negating the partial defence of infanticide, was not a condition precedent to the existence of the partial defence.[12] The Supreme Court *in R v Borowiec* endorsed the decision in *LB* on the characterisation of disturbance of mind as an *actus reus* element and the *mens rea* for infanticide.

B. Infanticide As A Partial Defence

The Supreme Court held that where infanticide is raised as a partial defence, the jury should be instructed in the terms set out in *R v LB* at para [139]. Essentially this requires that the Crown prove that the accused, in causing the child's death, committed culpable homicide. The jury must consider the nature of the culpable homicide and whether it is infanticide. If the Crown fails to negate at least one of the elements of infanticide beyond a reasonable doubt the jury must be instructed to return a verdict of not guilty of murder, but guilty of infanticide.

C. The Meaning Of "Disturbed Mind"

1. The ordinary meaning

The Court noted that the meaning of the phrase "her mind is then disturbed" was one of statutory interpretation. The approach to construction adopted was to read the words in their "entire context, in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament".[13] Applying this interpretative approach to the word "disturbed" the Court accepted the Oxford English Dictionary meaning of it as "disquieted; agitated; having the settled state, order, or position interfered with" and "emotionally or mentally unstable or abnormal". Applying the grammatical and ordinary sense of the words used in s 233, the Supreme Court concluded that the legislature did not intend to restrict the availability of infanticide to situations where the psychological health of the woman was substantially compromised or where a mental disorder was established.[14]. Nor did the statutory language require a causal connection between the disturbance of the accused's mind and the act or omission causing the child's death. However, a link was required between the disturbance and not having fully recovered from the effects of

[10] *R v LB,* above note 3, at [59].
[11] *R v LB,* above note 3, at [121].
[12] *R v LB,* above note 3, at [121].
[13] *R v Borowiec*, above note 1, at [18], quoting E A Driedger, *Construction of Statutes* (2nd edn, 1983, Butterworths, Toronto), at 87.
[14] *R v Borowiec*, above note 1, at [21].

giving birth or of the effect of lactation consequent upon the birth of the child, as indicated in the words 'by reason thereof'.

2. The lack of a need for a mental disorder

In the Canadian Criminal Code, as with the Crimes Act 1961 in New Zealand, the idea of a "disturbed" mind is unique to the infanticide provisions, and is conceptually distinct from "insanity" in s 23 of the New Zealand statute and "mental disorder" in the equivalent provision in s 16 of the Criminal Code: this is defined as "disease of the mind" in s 2 of the Criminal Code. Section 16, as with s 23 of the Crimes Act 1961, provides a defence where the accused is rendered incapable by disease of the mind of appreciating (understanding) the nature and quality of the act or omission and of knowing that it was (morally) wrong.

The Court in *Borowiec* held that it could be inferred that the disturbance required for infanticide does not have to reach the level required to provide a "mental disorder" defence. The Court also inferred that the disturbance aspect of infanticide need not render the accused's acts or omissions involuntary, as is required for automatism.

After briefly describing the legislative history and evolution of the infanticide provisions, originating in the English Infanticide Act 1922*,* the Court then considered the Canadian jurisprudence on infanticide, which reveals a "very low" or "fairly low" threshold for a finding of mental disturbance, falling short of evidence that the accused has a mental disorder.[15] The Supreme Court in *Borowiec* upheld the majority view in the Court of Appeal which rejected the requirement for a "substantial psychological problem" as evidence of a disturbed mind.

3. Summary

The Supreme Court found that the phrase "mind is then disturbed" was to be applied in the following way:[16]

> (1) "Disturbed" is not a legal or medical term of art, and should be applied in its grammatical or ordinary sense.
> (2) A disturbed mind can mean "mentally agitated", "mentally unstable" or "mental discomposure".
> (3) The disturbance need not constitute a defined mental or psychological condition or a mental illness, or amount to a mental disorder sufficient to establish a mental disorder (insanity) defence.
> (4) The disturbance must be present at the time of the act or omission causing the "newly born" child's death and the act or omission must occur at a time when the accused is not fully recovered from the effects of giving birth or lactation.
> (5) There is no requirement to prove that the act or omission was caused by the disturbance. The disturbance is part of the *actus reus* of infanticide not the *mens rea.*
> (6) The disturbance must be "by reason of" the fact that the accused was not fully recovered from the effects of giving birth or from the effect of lactation consequent upon the birth of a child.

[15] See *R v Coombs,* 2003 ABQB 818, 343 AR 212; *R v Leung*, 2014 BCSC 558, at [26] & [32]; and *R v LB* (2008) 237 CCC (3d) 215 (Ont SCJ) at [50].
[16] *R v Borowiec*, above note 1, at [35].

D. Dismissing The Appeal

The Supreme Court reviewed the trial judge's reasons, and his rejection of the Crown expert's evidence that the "balance of the mind" test required proof of a mental disorder. It found the judge had relied substantially on the opinion of the defence expert who had found that the respondent's descriptions of having had an "out of body" experience associated with the deliveries, and feelings of detachment were consistent with "significant depersonalization".[17] In reliance on this evidence the trial judge had concluded that the respondent's mind was "disturbed" as a result of not having fully recovered from the effects of giving birth.

In dismissing the appeal the Supreme Court rejected the appellant's claim that that the trial judge had misunderstood the law of infanticide. Although the judge had wrongly concluded that there was a significant difference between "balance of the mind" and the requirement that the mother's mind be disturbed, this did not affect his analysis of the evidence or his application of the appropriate legal standard to it. The Court rejected the Crown submission that a "disturbed" mind could only be present if the mother's health was "substantially compromised" because of recent childbirth, since this would have imposed a higher threshold than provided for in s 233 of the Criminal Code.[18]

The Court also rejected the Crown contention that the trial judge had reasoned back from the "bizarre" nature of the respondent's conduct to conclude that her mind must have been disturbed, or that the respondent's conduct met the requirements of the definition of infanticide simply because she had killed two of her children.[19] Rather, the Court found the trial judge had relied not only on the respondent's personal history and the circumstances of the offence, but also on the opinion of the defence expert, which provided an evidentiary basis for concluding that the Crown had failed to prove that the respondent's mind was not disturbed at the time of the offence.

V. Discussion

A. Infanticide In New Zealand Outlined

The principal issue in *R v Borowiec* concerned the required mental state to establish a 'disturbed mind'. To date there has been no judicial discussion as to whether the issue would be decided in the same way in New Zealand. Some indication as to the likely approach to be taken by the New Zealand courts will be addressed in this note.

In New Zealand the partial defence of infanticide is defined in s 178 of the Crimes Act 1961. The defence was first enacted in 1961, but as with its Canadian counterpart, was a development of the Infanticide Act 1938 (UK). The New Zealand provision was amended by s 5(1) of the Criminal Justice Amendment Act 1969 to incorporate new disposition options brought about by that enactment. It was subsequently amended

[17] *R v Borowiec*, above note 1, at [38].
[18] *R v Borowiec*, above note 1, at [42].
[19] *R v Borowiec*, above note 1, at [43]-[44].

by s 8(1) Crimes Amendment Act (No 2) 1985 and by s51 of the Criminal Procedure (Mentally Impaired Persons) Act 2003.

B. Similarities Between The Jurisdictions

As in Canada, the role of infanticide in New Zealand is to operate both as an offence and as a defence. Where the charge is murder or manslaughter and infanticide is presented as a defence, the defendant will be entitled to an infanticide verdict where a sufficient evidential foundation has been laid to leave the jury in a reasonable doubt.[20] The prosecution has the legal burden of negativing the defence beyond a reasonable doubt. Where, on the other hand, the charge is infanticide, the prosecution has the legal burden of proving all elements of the offence beyond a reasonable doubt.[21] These evidential rules apply in both Canada and New Zealand.

C. The Extended Scope Of Infanticide In New Zealand

There is one significant difference between the two jurisdictions. To qualify for the infanticide defence in Canada the homicide can only be committed by "a female person" (s 233), and only in respect of her "newly-born child" (which, as noted above, means that the child is under one year).

By contrast, under s 178 of the Crimes Act 1961, the crime of infanticide in New Zealand is extended to the death of "any child *of hers"* under the age of 10 years ... where at the time of the offence ... [she had not] fully recovered from the effect of giving birth to that or any other child." Significantly, the expression "any child of hers" in s 178(1) is not restricted to the natural children of the defendant. This is significantly different to the position in Canada, where it has been held that even if a mother, shortly after adopting a baby, gave birth and then killed the adopted infant, infanticide would not be a possible defence even if the adopted infant was under one year of age. The adopted child would not be the offspring of the accused.[22] This issue was not considered by the Supreme Court of Canada in *R v Borowiec* as the issue was not live in that case. By contrast in *R v P*,[23] the New Zealand High Court held that when a child is treated in all respects as a member of the family and has the status as such to all outward appearances, confirmed in all respects by an order of the Court, and may be as old as ten years of age, the legislation implicitly contemplates more than just the natural children of an accused. The Court considered that such an interpretive approach was consistent with the fact that New Zealand did not then, and still does not have, a defence of diminished responsibility. Therefore, in this special area it is to be anticipated that the law would be required to recognise a lesser offence of infanticide as an alternative to murder to meet the circumstances that may confront a woman following recent childbirth.

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[20] *R v LB,* above note 3, at [137].
[21] *R v Borowiec*, above note 1, at [15]; See also *Adams Criminal law and Practice in New Zealand, 2nd edn,* (Sweet & Maxwell, Wellington, 1971), at para 1347.
[22] *R v Borowiec* above note 7, at [128], per Wakeling J.
[23] [1991] 2 NZLR 116

In respect of the limited scope of the defence of infanticide in Canada, applying as it does only where the victim is "newly born" (which would necessarily exclude the "child of hers" formula in the New Zealand provision), it must be said that Canadian law still reflects the narrow and quite prescriptive limitations of the original English legislation, which was designed as a concession for mothers who killed their babies, who would otherwise be liable for the death penalty. The conditions surrounding infanticide attracted significant public sympathy and the motive of illegitimate mothers attempting to hide their shame was considered to ameliorate the heinousness of the crime.[24]

It might be thought that the current New Zealand model better reflects modern social realities, whereby children are commonly fostered and subjected to the challenges of "merged" families, where new step–parents acquire parenting roles in relation to newly-added children within a domestic setting. In such socially complex environments the addition of a new born infant often may add additional stresses to family dynamics, and in extreme cases become a causal factor in intra-familial violence. In such an environment the "child of hers" model may better mitigate the risk of overcriminalising women who have given birth and face stresses in the family environment.

D. Causation- Relevance Of Mental Disturbance

Curiously in both jurisdictions while, at the time of the act or omission, there must be evidence that the accused woman suffered mentally from the effects of giving birth or of lactation, there is no requirement that the mental disturbance have any causal relationship with the actual killing.[25] It is suggested instead that there is an implicit assumption that where a woman with a disturbed mind kills her child, it is the disturbance that led to the killing.[26] Yet only a temporal connection between mental disturbance and the actus reus is required for the infanticide doctrine. As Arlie Loughnan notes, the relationship between the specified mental incapacity and the actus reus looks different from similar relationships in the criminal law.[27] For example, the Infanticide Act 1938 is unlike the insanity defence, at least in its common law formulation, in that it does not require that the defendant show her knowledge of the nature and quality of her act was affected by a 'defect of reason' resulting from a 'disease of the mind'.[28] Because the relationship is wholly temporal there is no requirement that the defendant woman's mental disturbance must *cause* her to kill her child. Since only a temporal coincidence between the defendant's incapacity and the lethal act is required, commentators have suggested that this "obscures the detail of the relation between mental disturbance and the killing under the law of infanticide."[29] This may suggest that an 'infanticidal woman' is exculpated by means of an implicit assumption that the defendant woman's act of killing 'is caused or

[24] *R v Borowiec*, above note 1, at [27].
[25] See Manning, Mewett & Sankoff, *Criminal Law* (4th ed, Lexis Nexis, Ontario, 2009) at 797 for the position in Canada.
[26] See Manning et al, above note 25 at 797.
[27] See A Loughnan, 'The 'Strange' Case of The Infanticide Doctrine' (2012) 32 (4) Oxford Journal of Legal Studies 685, 702.
[28] *M'Naghten's Case* (1843) 10 Cl & Fin 200, 8 ER 718, [1843-60] All WR Rep 229 (HL).
[29] See Loughnan, above note 27, at 703.

determined behaviour',[30] perhaps warranting a 'virtual presumption' that the woman defendant was not fully responsible by reason of mental illness.[31] Loughnan reasons thus:[32]

> This 'virtual presumption' forecloses the question of the defendant's responsibility for her offence. In foreclosing the question of the defendant's criminal responsibility, the infanticidal woman is in effect decreed to have attenuated responsibility for her actions. On this reading, the infanticidal woman's partial responsibility dovetails with the generalized social construction of an infanticidal type, which substitutes for individualized inquiries into an individual's mental capacities at the time of the offence.

Whether this analysis is reflected in the policy decisions involved in crafting infanticide provisions in Canada and New Zealand must be doubted. It is unlikely that law-makers had in mind a 'virtual presumption' of mental incapacity in such cases. Nevertheless, the analysis provides a useful rationale for the temporal versus the causal model, and reinforces the implicit policy of such laws that sympathy and compassion towards women whose criminal responsibility is attenuated by reason of the emotional effects of childbirth overshadows the need for a harsh punitive response.

Even though it is now clear that 'mental disturbance' in many cases may be no more than a heuristic device for allowing some evidence of emotional perturbation to influence the legal outcome in infanticide cases, it is useful to reflect on the actual impact of mental illness in infanticide.

Recent research on maternal infanticide in Australia has concluded that the majority of infanticide cases do not involve a maternal mental illness.[33] While various studies have identified anything between 29%-36% of cases of maternal infanticide involving a mental illness, it is acknowledged that the relationship between maternal mental disturbance in infanticide is not consistently identified in research.[34] While the literature has highlighted the role of untreated depression as a contributor to infanticide, affecting attachment with the child and sometimes leading to a lack of interest in caring for a child, other stressors may be equally influential in producing the psychosocial stress levels that may lead to child homicide.[35] These include other social variables including domestic violence, unemployment, and poverty, all of which may constitute risk signals in appropriate cases.

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[30] Loughnan, above note 27, at 703-4.

[31] N Walker, *Crime and Insanity in England* (*Vol 1*, *The Historical Perspective*) (Edinburgh University Press, 1968) 135, cited in Loughnan, above note 27 at note 94.

[32] Loughnan, above note 27, at 704.

[33] L De Boertoli, J Coles and M Dolan, "Maternal Infanticide in Australia: Mental Disturbance during the Postpartum Period" (2013) 20 Psychiatry, Psychology and Law 301. See also S Friedman and P Resnick, "Postpartum Depression: An Update" (2009) 5 Woman's Health 287-95; T Porter and H Gavin, "Infanticide and Neonaticide: A Review Of 40 Years Of Research Literature On Incidence And Causes" (2010) 11 Trauma, Violence and Abuse 99-112.

[34] De Bortoeli, et ors, above note 33, at 307.

[35] De Bortoeli, et ors, above note 33, at 307.

E. Concerns As To Rationale

The other criticism of infanticide is that its continued rationale is "questionable". It is suggested that although post-partum mental illnesses are not uncommon, a proven link between those illnesses and child homicides remains elusive.[36] Other feminist writers have argued that the infanticide defence is based on flawed assumptions of female inferiority and hormonal instability, and that it risks trivialising woman's criminality while masking the true reasons why women kill their children.[37] Furthermore, an ongoing debate concerning the biological justification for infanticide has exposed an analysis of the socio-political factors driving the sentencing of infanticidal women. The experiences of recent sentencing in this area show that judges are concerned to achieve a therapeutic disposition for women who kill their children, who are typically poor, young, and have unacceptable childcare responsibilities. Judicial concern and compassion in these cases typically reflects a desire on the part of judges that offenders should be rehabilitated, not criminalised. Indeed, as Chisholm J noted in *R v CRS*,[38] no mother has been sent to prison for infanticide in New Zealand, and in the circumstances of that case the "saddest possible"[39] health and personal circumstances, the defendant's guilty pleas and her genuine remorse justified a sentence of two years intensive supervision with a counselling condition following a charge of attempted infanticide.[40]

However, there does not appear to be strong support for the idea that the same humanity and compassion should be extended to fathers who kill children in their care. While there is some evidence that such fathers are often young, unemployed, socially isolated and inexperienced as parents and dealing with childcare pressures, their characteristics are generally significantly different from mothers who kill. Most have a criminal history and were twice as likely to kill in a physically violent way.[41]

VI. Conclusion

Infanticide is a seldom encountered social phenomenon. It is, nonetheless, a deeply troubling event when it does occur, engaging a raft of medical, legal, ethical and sociological issues. As the case which is the subject of this note amply demonstrates, it serves a very valuable purpose to shield from highly punitive sanctions women who kill their dependent children while suffering mental disturbance induced by the birth process. Nevertheless, it would seem that prosecuting authorities are by no means uniformly sympathetic when confronted with a case of infanticide. It has been shown, for example, that in England and Wales the Crown Prosecution Service do not use infanticide as an alternative offence in cases of homicide involving infant children. In all six cases in which women were found guilty of infanticide they had initially been

[36] Manning et ors, above note 25 at 797.
[37] See eg B McSherry, "What Is A Disease Of The Mind? The Untenability Of The Current Legal Interpretation" (1993) 1 JLM 76.
[38] *R v CRS* (2012) 25 CRNZ 839 at [21].
[39] *R v CRS*, above note 38, at [18].
[40] See also *R v A* HC Invercargill, CRI 2009-025-000329, 9 March 2010.
[41] See M Marks & R Kumar, "Infanticide in England and Wales" (1993) 33 Med Sci Law 329.

charged with murder and it was left to the jury to decide if infanticide occurred.[42] Appellate courts in England, Canada and New Zealand, however, have consistently refused to impose custodial sentences in cases where mothers have been found guilty of infanticide. For example, in *R v Sainsbury*[43] the English Court of Appeal, in an appeal against a sentence of 12 months detention in a young offender's institution for a 17 year old woman who pleaded guilty to infanticide, held that in the previous ten years, none of the 59 cases of infanticide had resulted in a custodial sentence. The Court held there was nothing to take the case out of the ordinary pattern of such offences, and that the sentencing judge was wrong in saying that the welfare of society demanded a custodial sentence. It found the mitigating factors were overwhelming and the prison sentence was replaced with probation.[44]

As such cases demonstrate, although once characterised as "wicked women", or "lewd" women, the typical infanticidal mother is young, immature, inexperienced in childcare, socially isolated and mentally disturbed. In these circumstances the law in many jurisdictions where the partial defence exists almost invariably shows unusual compassion and sympathy for the offending mother, often firmly rejecting calls for a punitive custodial sentence.

Although there exists an ongoing debate regarding the biological justification for infanticide, the reality is that it serves a valuable social purpose in circumstances in which common humanity demands compassion, understanding and support.

[42] R Griffith, "Dealing With Incidents Of Feticide And Infanticide In England and Wales" (2015) 23 British Journal of Midwifery 370.
[43] *R v Sainsbury* (1990) Crim LR 348.
[44] Griffith, above note 42, at 371.