

**REPORT OF THE CRIMINAL SECTION  
WORKING GROUP ON STRANGULATION**

**UNIFORM LAW CONFERENCE OF CANADA**

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# TABLE OF CONTENTS

	<u>Page</u>
<b>INTRODUCTION.....</b>	<b>1</b>
<b>THE CRIMINAL CODE .....</b>	<b>2</b>
<b>CURRENT PRACTICE.....</b>	<b>3</b>
FAMILY VIOLENCE.....	3
(1) Attempted Murder.....	3
(2) Aggravated Assault.....	4
(3) Assault Causing Bodily Harm .....	4
(4) Assault.....	4
(5) Sexual Assault.....	5
(6) Section 246(a) .....	5
(7) Miscellaneous .....	5
NON-FAMILY VIOLENCE CASES.....	5
(1) Attempted Murder.....	6
(2) Aggravated Assault.....	6
(3) Assault Causing Bodily Harm .....	6
(4) Assault.....	6
(5) Sexual Assault.....	7
(6) Section 246(a) .....	7
Sexual Assault and Section 246(a) .....	7
Other Offences and Section 246(a).....	7
<b>THE MEDICAL CONTEXT .....</b>	<b>8</b>
<b>STRANGULATION AND RISK ASSESSMENT .....</b>	<b>9</b>
<b>LEGISLATION IN OTHER JURISDICTIONS .....</b>	<b>11</b>
STAND ALONE OFFENCES .....	12
Alaska .....	12
Nebraska .....	12
North Carolina .....	12
Oregon.....	13
DOMESTIC VIOLENCE OFFENCES .....	13
Idaho .....	13
Missouri .....	13
Minnesota.....	14
Oklahoma.....	14
<b>CONCLUSION .....</b>	<b>14</b>

## Introduction

Strangulation is a serious form of assault, and a significant percentage of assaults, especially in the context of domestic violence, involve allegations of strangulation or choking. The 2004 General Social Survey on Victimization indicated that 19% of women who reported violence by a current or previous spouse over the previous five years reported being choked. This figure is consistent with that revealed in the same survey in 1999, where 20% of women who reported violence by a current or former spouse over the preceding five years reported being choked.<sup>1</sup>

Significant legislative changes in several states in the United States have placed a greater emphasis on strangulation as an elevated form of assault. Studies also illustrate both the significant medical risks created by strangulation, and that strangulation may be an indicator of a higher risk of serious violence or domestic homicide. In that context, this Conference passed the following resolution:

*A working group should be created to examine the feasibility of creating a distinct offence of strangulation as a general intent offence, and to assess whether existing provisions adequately address the seriousness and significance of this specific conduct. This form of assault is particularly prevalent in the context of domestic violence.*

The Working Group was comprised of the following individuals:

Josh Hawkes (Alberta Justice, Appeals Branch) - Chair  
Val Campbell (Alberta Justice, Domestic Violence Coordinator)  
Joanne Klineberg (Justice Canada, Criminal Law Policy)  
Nathalie Levman (Justice Canada, Criminal Law Policy)  
Dean Sinclair (Saskatchewan Justice, Senior Crown Prosecutor)

For the reasons that follow, the group concluded that while existing *Criminal Code* provisions provide adequate scope to address this form of assault, additional training of police and prosecutors may be needed to ensure that appropriate charges are laid, and that these matters are prosecuted effectively.

The group examined the applicable *Criminal Code* provisions, together with medical and other expert evidence and the legislative initiatives undertaken in other jurisdictions. Finally, we

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<sup>1</sup> Family Violence in Canada: A Statistical Profile, 2005, Statistics Canada.

considered examples of some of the education and training material used by medical professionals and police and prosecution services in relation to these offences.

## The Criminal Code

The primary offences applicable to this conduct are those of assault, assault causing bodily harm and aggravated assault. The offence of attempted murder may also apply where the specific intent to kill can be established.<sup>2</sup> Other attempt offences may also apply.

The offence of choking or strangling to overcome resistance is obviously also applicable. However, it requires that this conduct occur with the intent to enable or assist in the commission of another indictable offence.<sup>3</sup>

Strangulation would clearly constitute at least a common assault. Depending on the circumstances, it may well constitute an assault causing bodily harm, or an attempt to commit such an assault depending on the nature of the resulting injury.<sup>4</sup>

However, based on the potential for life-threatening consequences, described in greater detail below, the most appropriate charge may be aggravated assault or attempted aggravated assault. These offences attract maximum penalties of 14 and 7 years incarceration respectively.

Although strangulation may cause injury sufficient to satisfy the definitions of wounding, maiming or disfiguring as described in the case law, in many cases it will clearly constitute either an endangerment to life or an attempt to do so. In **R. v. Williams**, the Supreme Court summarized the definition of this element as follows:

*In Godin, supra, Cory J. stated, at p. 485, “[t]he section pertains to an assault that has the consequences of wounding, maiming or disfiguring” (emphasis added) or (to complete the list) endangering life. “Endanger” means to “put in danger ... put in peril ... incur the risk”: New Shorter Oxford English Dictionary on Historical Principles (1993), vol. 1, at p. 816.<sup>5</sup>*

Bodily harm is not a precondition to establishing endangerment for the purposes of aggravated assault. However, the completed assault must actually endanger the life of the

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<sup>2</sup> See for example **R. v. Rhee** [2000] CarswellBC 491 (B.C.C.A.), upheld (2002) 158 C.C.C. (3d) 129 (S.C.C.).

<sup>3</sup> See for example, **R. v. Miller** (2000) 147 C.C.C. (3d) 156 at paras. 44-47 (B.C.C.A.).

<sup>4</sup> Bodily harm is defined in s. 2 of the *Criminal Code* as any hurt or injury that interferes with health or comfort in a manner more than merely transient and trifling. Psychological harm is included in this definition – **R. v. McCraw** (1991) 66 C.C.C. (3d) 517 (S.C.C.).

<sup>5</sup> **R. v. Williams** (2003) 176 C.C.C. (3d) 49 at para. 43 (S.C.C.).

complainant, and not merely give rise to the potential of such a consequence.<sup>6</sup> Examples of such conduct include the following hypothetical examples:

*For example, if D. and V. are standing on a 20<sup>th</sup>-floor balcony and D. pushes V., causing V. to go over the railing, but V. miraculously holds on and is rescued before falling, can it be doubted that D's common assault endangered the life of V.? In this example, D. has assaulted V. and the assault has endangered V.'s life even though V. suffered no bodily injury. The same could be said if D. pushed V. into a busy intersection in the face of oncoming vehicular traffic. Assuming that an alert motorist was able to avoid striking V., can it be doubted that V.'s life was endangered?*<sup>7</sup>

Where this element has not been established, a conviction for attempted aggravated assault may result where the mental element of this offence is complete and the actions of the offender go beyond mere preparation.<sup>8</sup>

## Current Practice

A review of reported cases involving choking or strangulation since 1990 reveals a wide range of charging and prosecution practices. These incidents often involved multiple charges, and it was not always possible to determine the precise charge laid in relation to this act.

### Family Violence

Fifty-four family violence cases involving strangulation were identified of 89 cases in total. This includes trials, appeals, sentencing, sentencing appeals and bail review decisions.

#### (1) Attempted Murder

Two cases involved attempted murder charges for choking the complainant to the point of unconsciousness.<sup>9</sup> Both are sentencing cases.

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<sup>6</sup> *R. v. De Freitas* (1999) 132 C.C.C. (3d) 333 at paras. 12-13 (Man. C.A.); *R. v. S.(F.)* [2006] CarswellOnt 1539 at paras. 26-29 (Ont. C.A.)

<sup>7</sup> *R. v. Melaragni* (1992) 75 C.C.C. (3d) 546 at p. 552 (Ont. Gen. Div.)

<sup>8</sup> See for example, *R. v. Williams*, *supra*, at paras. 60-66.

<sup>9</sup> *R. v. Edwards* (2001) 155 C.C.C. (3d) 473 (Ont. C.A.); *R. v. M.V.* [1998] O.J. No. 3164 (C.J.)

## (2) Aggravated Assault

Three cases involved aggravated assault charges. In all of the cases, the act of choking was life threatening and caused direct harm to the victim (air trapped in the chest cavity,<sup>10</sup> bruising,<sup>11</sup> bruising and abrasions<sup>12</sup>). All are sentencing cases.

## (3) Assault Causing Bodily Harm

Eleven cases involved assault causing bodily harm charges. In nine cases, the act of choking caused harm to the victim (bruising,<sup>13</sup> soreness,<sup>14</sup> nosebleed,<sup>15</sup> unconsciousness<sup>16</sup>). There were convictions in all of these cases. In one appeal, a new trial was ordered; the trial judge erred in failing to consider the reasonableness of the force applied by the accused in repelling the complainant's attack.<sup>17</sup> In another case the accused was acquitted on the basis of lack of evidence of bodily harm.<sup>18</sup>

## (4) Assault

Fifteen cases involved assault charges. The majority of these cases involved no physical injury to the complainant as a result of the act of choking.<sup>19</sup> In one case, some bruising and redness to the complainant's neck was noted.<sup>20</sup> In another, the complainant nearly lost consciousness and suffered a sore neck and throat as a result of the choking.<sup>21</sup>

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<sup>10</sup> *R. v. Desmond* [1992] N.S.J. No. 58 (C.A.)

<sup>11</sup> *R. v. D.M.T.* [2004] O.J. No. 1416 (S.C.J.)

<sup>12</sup> *R. v. M.E.N.* [1994] S.J. No. 107 (Q.B.)

<sup>13</sup> *R. v. Coston* [1990] A.J. No. 633 (C.A.); *R. v. K.E.B.* [2004] O.J. No. 3587 (S.C.J.); *R. v. A.M.* [2000] B.C.J. No. 1324 (S.C.); *R. v. D.A.S.* [1999] A.J. No. 31 (P.C.); *R. v. Vulcan* [2004] A.J. No. 1364 (P.C.)

<sup>14</sup> *R. v. J.M.M.* [1998] A.J. No. 749 (P.C.)

<sup>15</sup> *R. v. Sheehan* [2000] A.J. No. 824 (Q.B.)

<sup>16</sup> *R. v. Campbell* [1997] M.J. No. 652 (C.A.); *R. v. D.A.S.*, *supra*; *R. v. Sheehan*, *supra*; *R. v. Nakashook* [1995] N.W.T.J. No. 91 (S.C.)

<sup>17</sup> *R. v. C.J.O.* [2005] O.J. No. 5006 (S.C.J.)

<sup>18</sup> *R. v. Adams* [2001] O.J. No. 5247 (C.J.). It is unclear why the accused was not convicted of the lesser included offence of assault.

<sup>19</sup> *R. v. A.D.C.* [2002] A.J. No. 1128 (Q.B.); *R. v. Boucher* [1999] O.J. No. 3527 (C.J. G.D.); *R. v. Smaaslet* [2003] B.C.J. No. 2132 (S.C.); *R. v. Carson* (2004) 185 C.C.C. (3d) 541 (Ont. C.A.). In this case, evidence of the alleged choking assault was dismissed as unreliable; *R. v. O.T.* [2005] O.J. No. 1499 (C.A.); *R. v. Morrison* [2003] O.J. No. 5446 (C.J.); *R. v. N.K.* [2005] A.J. No. 1348 (Q.B.); *R. v. S.T.K.* [2002] O.J. No. 5035 (C.J.); *R. v. Nazareth* [2002] O.J. No. 4085 (C.J.); *R. v. Nensi* [2001] O.J. No. 3565 (C.J.); *R. v. Green* [1997] O.J. No. 4082 (C.J.); *R. v. Sundquist* [1999] A.J. No. 538 (P.C.); *R. v. Dawson* [1999] O.J. No. 2836 (C.J. P.D.).

<sup>20</sup> *R. v. Robinson* [2005] A.J. No. 1548 (P.C.)

<sup>21</sup> *R. v. Andrew* [1993] N.W.T.J. No. 26 (S.C.)

Two were bail review cases<sup>22</sup> and one was an application by the accused to remove a “no contact” order.<sup>23</sup> There were convictions in the remaining 12 cases.

## **(5) Sexual Assault**

Three cases involved sexual assault charges. The choking aspect of the offence was reflected in the type of sexual offence charged; two sentencing cases involved charges of aggravated sexual assault.<sup>24</sup> In the remaining case, the accused was charged with sexual assault causing bodily harm,<sup>25</sup> and his appeal of conviction was dismissed.

## **(6) Section 246(a)**

Sixteen cases involved charges under s. 246(a). In these cases, s. 246(a) was charged in combination with sexual assault, forcible confinement or assault charges. There were convictions in five cases.<sup>26</sup> One was a bail review case.<sup>27</sup> In two cases a new trial was ordered on appeal.<sup>28</sup> Acquittals on all charges were entered in four cases for reasons of credibility.<sup>29</sup> In four cases, the accused was found guilty of other offences, but not s. 246(a).<sup>30</sup>

## **(7) Miscellaneous**

In four cases, it was not possible to determine which charges were laid for the act of choking; multiple charges were laid for various criminal acts. Three were sentencing cases<sup>31</sup> and one was a bail review in which bail was denied.<sup>32</sup>

## **Non-Family Violence Cases**

Thirty-five non-family violence cases involving strangulation were identified. This includes trials, appeals, sentencing, sentencing appeals and bail review decisions.

<sup>22</sup> *R. v. A.D.C.*, *supra*; *R. v. Boucher*, *supra*.

<sup>23</sup> *R. v. N.K.*, *supra*.

<sup>24</sup> *R. v. D.C.* [2005] Y.J. No. 54 (S.C.); *R. v. Sennie* [2005] M.J. No. 208 (P.C.)

<sup>25</sup> *R. v. T.M.E.* (2005) 199 C.C.C. (3d) 51 (B.C.C.A.)

<sup>26</sup> *R. v. Betker* [2004] A.J. No. 795 (Q.B.); *R. v. E.N.F.* [2005] M.J. No. 338 (C.A.); *R. v. A.C.R.* [2003] A.J. No. 1727 (P.C.); *R. v. J.K.M.* [2001] O.J. No. 6008 (S.C.J.); *R. v. S.D.M.* [2003] O.J. No. 5625 (S.C.J.).

<sup>27</sup> *R. v. M.W.* [2001] A.J. No. 1496 (Q.B.)

<sup>28</sup> *R. v. A.S.D.* [1994] O.J. No. 1455 (C.A.); *R. v. Wait* [1994] O.J. No. 31 (Y.T.C.)

<sup>29</sup> *R. v. D.J.W.* [2003] O.J. No. 3057 (S.C.J.); *R. v. R.F.* [2000] Y.J. No. 15 (Y.T.C.); *R. v. Van Patter* [2006] O.J. No. 648 (C.J.); *R. v. J.M.* [2004] O.J. No. 5976 (S.C.J.)

<sup>30</sup> *R. v. D.T.* [1997] O.J. No. 688 (C.J. G.D.); *R. v. B.W.* [1992] O.J. No. 4011 (C.J. G.D.); *R. v. S.A.M.* [1993] O.J. No. 4240 (C.J. G.D.); *R. v. S.K.H.* [2002] O.J. No. 5694 (S.C.J.)

<sup>31</sup> *R. v. Martin* [2006] Y.J. No. 2 (Y.T.C.); *R. v. Hunka* [2003] B.C.J. No. 2102 (P.C.); *R. v. Osmond* [2000] O.J. No. 4267 (S.C.J.)

<sup>32</sup> *R. v. A.C.D.* [2004] O.J. No. 1539 (C.J.)

### (1) Attempted Murder

Two cases involved attempted murder charges. Both cases involved strangulation resulting in unconsciousness. One involved a “brutal” rape resulting in convictions for attempted murder and aggravated sexual assault.<sup>33</sup> In the other case, an appeal of a conviction for attempted murder was dismissed.<sup>34</sup>

### (2) Aggravated Assault

Five cases involved aggravated assault charges. One sentencing case involved choking to unconsciousness resulting in a severe brain injury.<sup>35</sup> The remaining cases involved severe choking, accompanied by an attack with a weapon (i.e. a knife,<sup>36</sup> a pipe,<sup>37</sup> and a screwdriver<sup>38</sup>). All are sentencing cases.

### (3) Assault Causing Bodily Harm

One sentencing case involved assault causing bodily harm charges; the complainant sustained injury (haematomas to the face).<sup>39</sup>

### (4) Assault

Three cases involved assault charges. None of the cases involved any injury; in one case a young offender pulled a string around a classmate’s neck;<sup>40</sup> in another the accused pretended to strangle the complainant in the change room of a store;<sup>41</sup> and, in the last case, a scuffle among picketers resulted in one picketer attempting to choke another.<sup>42</sup> There were convictions in two of the cases<sup>43</sup> and an acquittal was entered in one on the basis of the *de minimis* defence.<sup>44</sup>

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<sup>33</sup> *R. v. Poslowsky* [1997] B.C.J. No. 2585 (S.C.)

<sup>34</sup> *R. v. Hibbert* [2000] B.C.J. No. 392 (C.A.)

<sup>35</sup> *R. v. Wallin* [2003] B.C.J. No. 1267 (S.C.)

<sup>36</sup> *R. v. Smith* [2000] O.J. No. 3093 (C.A.); *R. v. Ransome* [1986] O.J. No. 1574 (P.C.)

<sup>37</sup> *R. v. Small* [1990] B.C.J. No. 790 (C.A.)

<sup>38</sup> *R. v. H.S.L.* [2000] B.C.J. No. 2810 (S.C.)

<sup>39</sup> *R. v. Doyle* [1993] P.E.I.J. No. 66 (C.A.)

<sup>40</sup> *R. v. J.G.* [2000] O.J. No. 3101 (S.C.J.)

<sup>41</sup> *R. v. Elek* [1994] Y.J. No. 31 (Y.T.C.)

<sup>42</sup> *R. v. Oleksiw* [1998] O.J. No. 6302 (C.J. P.D.)

<sup>43</sup> *R. v. Oleksiw supra*; *R. v. J.G., supra*

<sup>44</sup> *R. v. Elek, supra*



## **(5) Sexual Assault**

One case involved an offender's appeal of sentence for aggravated sexual assault, which was dismissed. The offender had choked the complainant with a belt to unconsciousness several times during the course of the sexual assault.<sup>45</sup>

## **(6) Section 246(a)**

Twenty-three cases involved charges under s. 246(a).

### **Sexual Assault and Section 246(a)**

The vast majority of these cases (20) involved sexual assault or aggravated sexual assault charges in addition to the s. 246(a) charges. There were convictions on all charges in nine cases. Five were sentencing cases,<sup>46</sup> in two cases appeals of convictions were upheld<sup>47</sup> and in the remaining two cases, convictions were entered.<sup>48</sup> Four cases resulted in acquittals due to: mistaken identification of the accused,<sup>49</sup> credibility of the complainant;<sup>50</sup> and in the remaining case, there was an acquittal on the sexual assault charge that formed the basis of the s. 246(a) charge.<sup>51</sup> In one case a new trial was ordered<sup>52</sup> and in three cases the accused was convicted of other offences but not s. 246(a).<sup>53</sup> The three remaining cases involved various applications/appeals on peripheral issues.<sup>54</sup>

### **Other Offences and Section 246(a)**

Three cases involved several other offences charged along with s. 246(a): robbery,<sup>55</sup> extortion<sup>56</sup> and assault causing bodily harm.<sup>57</sup>

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<sup>45</sup> *R. v. K.R.H.* [2002] B.C.J. No. 2364 (C.A.)

<sup>46</sup> *R. v. Baker* [1990] B.C.J. No. 1995 (C.A.); *R. v. Peskoonas* [1999] A.J. No. 616 (Q.B.); *R. v. J.W.F.* [2002] O.J. No. 5481 (S.C.J.); *R. v. Shrubsall* [2002] N.S.J. No. 466 (S.C.); *R. v. Kimiksana* [1998] N.W.T.J. No. 133 (S.C.)

<sup>47</sup> *R. v. Snow* [1996] B.C.J. No. 3107 (C.A.); *R. v. Kirby* [1996] B.C.J. No. 2153 (C.A.)

<sup>48</sup> *R. v. Smith* [2005] O.J. No. 5273 (S.C.J.); *R. v. A.J.S.* [1998] O.J. No. 5606 (C.J. G.D.)

<sup>49</sup> *R. v. Elkins* [1992] O.J. No. 2634 (C.J. G.D.); *R. v. Clyne* [1998] M.J. No. 171 (Q.B.)

<sup>50</sup> *R. v. Onyee* [1999] M.J. No. 100 (C.A.)

<sup>51</sup> *R. v. Bathgate* [1997] A.J. No. 370 (C.A.). The appeal judge noted that no further evidence was brought in relation to the s. 246(a) charge such that a new trial could not be ordered.

<sup>52</sup> *R. v. D.P.* [2002] A.J. No. 526 (C.A.)

<sup>53</sup> *R. v. J.A.R.* [1993] O.J. No. 1566 (C.J. G.D.); *R. v. Patey* [1992] N.S.J. No. 361 (S.C.); *R. v. Niedermier* [2002] B.C.J. No. 3340 (S.C.)

<sup>54</sup> *R. v. Poole* [1993] A.J. No. 54 (Q.B.); *R. v. C.(P.A.)* [1991] O.J. No. 734 (C.J. G.D.); *R. v. Ladouceur* [1992] B.C.J. No. 2854 (S.C.)

<sup>55</sup> *R. v. Robinson* [1993] A.J. No. 228 (C.A.)

<sup>56</sup> *R. v. Dastous* [2004] O.J. No. 242 (C.A.)

<sup>57</sup> *R. v. Kruse* [2004] A.J. No. 1227 (P.C.)

It is evident that incidents involving strangulation are prosecuted under a range of provisions under the *Code*. Increased emphasis, coupled with the use of expert testimony to explain the risks inherent in strangulation, could result in more frequent use of the offence of aggravated assault or attempted aggravated assault based on the concept of endangering life. These offences may more accurately reflect the risk inherent in such conduct, and the elevated moral blameworthiness associated with it.

## The Medical Context

Not surprisingly, medical evidence confirms that strangulation is a particularly dangerous form of assault. Strangulation is medically defined as the closure of blood vessels and/or air passages of the neck as a result of external pressure on the neck.<sup>58</sup> Only 11 pounds of pressure placed on both carotid arteries for 10 seconds is sufficient to cause loss of consciousness. If the pressure is removed consciousness will be regained within 10 seconds. Thirty-three pounds of pressure is required to completely close the airway. If strangulation persists brain death will occur within four to five minutes.<sup>59</sup> Serious and life-threatening conditions can develop a significant period of time after the strangulation occurred. This can include a swelling of the tissues of the neck as long as 36 hours after the incident. Such swelling can obstruct the airway, or lead to long-term vocal changes or dysfunction.<sup>60</sup> Other life threatening or permanently disabling conditions have also been documented.<sup>61</sup>

Despite these risks, strangulation may not result in readily observable injuries or bruising. For example, a review of 300 strangulation cases in San Diego revealed that police noted no

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<sup>58</sup> Strangulation: A Full Spectrum of Blunt Neck Trauma, *Ann Otol Rhinol Laryngol*, 94: 6:1, Page 14 of 16, Nov. 1985, 542-46. Strangulation: A Review of Ligature, Manual, and Postural Neck Compression Injuries, *Annotated Emergency Medicine*, 13:3, March 1984, 179-85. K.V. Iserson.

<sup>59</sup> *How to Improve Your Investigation and Prosecution of Strangulation Cases*, Gael Strack and Dr. George McClane, available on the Internet at [www.ncdsv.org/images/strangulation\\_article.pdf](http://www.ncdsv.org/images/strangulation_article.pdf).

<sup>60</sup> *Strangulation Injuries*, Maureen Funk, Julie Schuppel, *Wisconsin Medical Journal* (2003) Vol. 102, No. 3, 41 at pages 42-43.

<sup>61</sup> For example, “Thyroid Storm” – a life threatening condition brought on by trauma to the thyroid in an attempted strangulation as described in *Thyroid Storm Induced by Strangulation* Jesús I. Ramírez, MD; Patrizio Petrone, MD; Eric J. Kuncir, MD, FACS; Juan A. Asensio, MD, FACS, *South Med J* 97(6):608-610, 2004, or “Adult Respiratory Distress Syndrome” as described in *Adult Respiratory Distress Syndrome after Attempted Strangulation*, P. G. Murphy, B.A., M.N. CH.B., F.R. C. et al., *British Journal of Anaesthesia*, 1993; 70 583-6, *Delayed Postanoxic Encephalopathy After Strangulation. Serial Neuroradiological and Neurochemical Studies*, *Archives of Neurology*, Vol. 48, No. 8 (1991).

visible injuries in 50% of these cases, and only minor visible injury in a further 35%.<sup>62</sup> This may relate to the mechanism of injury, described as follows:

*Because of the slowly compressive nature of the forces involved in strangulation, victims may present with seemingly harmless signs and symptoms. There may be no or minimal external symptoms of soft tissue injury. The upper airway may also appear to be normal beneath intact mucosal, despite hyoid bone or laryngeal fractures.*<sup>63</sup>

This poses obvious challenges for the effective investigation and prosecution of strangulation cases. Medical or other expert evidence may be needed to establish the significance of the risk created by acts of strangulation, especially in cases where there may be little or no observable physical injury.

## Strangulation and Risk Assessment

The Chicago Women's Health Risk Study had a significant impact on legislative, responses to strangulation in the United States. This study compared longitudinal data on abused women with similar data on women who had been killed by their intimate partners. The study conducted domestic violence screening for 2,616 women as they came into a hospital or clinic for any kind of treatment in the Chicago area. This group was compared with a "homicide sample" of all intimate partner homicides in Chicago over a two-year period.<sup>64</sup>

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<sup>62</sup> *A Review of 300 Attempted Strangulation Cases: Part I: Criminal Legal Issues*, Gael B. Strack, George E. McClane, and Dean A. Hawley, *Journal of Emergency Medicine: Elsevier Science Inc.*, Vol. 21, No. 3, October 2001, pages 303-309.

<sup>63</sup> *Strangulation Injuries*, *supra*, at page 42. As a further example, post-mortem examinations reveal fractures to the hyoid bone in only 1/3 of strangulation homicide cases ("Fracture of the Hyoid Bone in Strangulation: Comparison of Fractured and Unfractured Hyoids From Victims of Strangulation" M.S. Pollanen, D.A. Chaisson, *Journal of Forensic Sciences*, 1996 Jan, 41(1):110-3).

<sup>64</sup> "Risk Factors for Death or Life-Threatening Injury for Abused Women in Chicago", (Block, Devitt, Fugate et al., 2000), reproduced in *Violence Against Women and Family Violence: Developments in Research, Practice and Policy*, Bonnie S. Fisher (Ed.). This paper is also available online at [www.ncjrs.org/pdffiles1/nij/199701.pdf](http://www.ncjrs.org/pdffiles1/nij/199701.pdf).

With respect to strangulation, the study noted:

*In addition to weapon use, attempted strangulation or choking were also important risk factors. In 20 percent of the homicides committed against a woman intimate partner, the man strangled his partner, and in an additional 4 percent, he smothered her. Of all the women killed by a male partner, those who had been choked or grabbed around the neck in the previous year were more likely to have been strangled or smothered in the fatal incident than those who had not (40 percent compared to 20 percent). In addition, when a partner had tried to choke or strangle clinic/hospital women, follow up incidents were more likely to be severe or life threatening (63 percent compared to 40 percent).<sup>65</sup>*

Further, a literature review in the United Kingdom concluded:

*In a large US homicide study, abused women whose partners had tried to choke/strangle them in the past were found to be ten times more likely to be murdered by them (Campbell et al. 2003). Similar findings emerged in large-scale US hospital study (Block 2003). A past attempt to strangle or choke a woman was a risk factor for severe or fatal violence and was the cause of death in 1 in 4 partner femicides. Violent incidents involving choking were more likely to prove fatal.<sup>66</sup>*

A study of the Dangerous Assessment Instrument, a 15-question instrument designed to assess the level of risk of further domestic violence, indicated significant risk associated with strangulation. In this instrument, prior strangulation ranked third behind prior threats with a weapon, and prior threats to kill in terms of factors elevating future risk.<sup>67</sup>

However, multivariate analysis demonstrated that prior incidents of strangulation were not associated with increased risk when considered in light of other factors that more closely predict intimate partner femicide risks.<sup>68</sup> This study examined homicides in 11 American cities from 1994 to 2000, and contrasted information obtained about the victim in these cases with a randomly selected control group of over three thousand abused women from these same areas.

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<sup>65</sup> *Risk Factors*, *supra*, at II-4-5.

<sup>66</sup> *Domestic Violence: A Literature Review*, Barnish (2004), published by the Home Office Inspectorate of Probation.

<sup>67</sup> “Research Results from a National Study of Intimate Partner Homicide: The Danger Assessment Instrument”, (Campbell et al. 2004), at page II-5-5, reproduced in *Violence Against Women and Family Violence: Developments in Research, Practice and Policy*, Bonnie S. Fisher (Ed.). This paper is also available online at [www.ncjrs.org/pdffiles1/nij/199701.pdf](http://www.ncjrs.org/pdffiles1/nij/199701.pdf).

<sup>68</sup> *Risk Factors for Femicide in Abusive Relationships: Results From a Multisite Case Control Study*, Campbell et al., July 2003, Vol. 93, No. 7, American Journal of Public Health 1089-1097.

As a result, while it appears that there is support for the proposition that prior acts of strangulation may be uniquely indicative of elevated risk, a methodologically robust study by the same authors casts doubt on the predictive significance of this factor where other factors such as prior threats with a weapon, or prior threats to kill are added to the analysis.

## Legislation in Other Jurisdictions

The approach to assault offences generally, and the offence of strangulation in particular, differ as between Commonwealth countries and the United States. In Commonwealth countries such as Canada, Great Britain, Australia and New Zealand, the approach is consistent with that articulated in the early English Draft Code, and reflected in the *Offences Against the Person Act (1861)*.<sup>69</sup> In general, that approach creates broad levels or categories of assault corresponding roughly to the offences of common assault, assault with a weapon or causing bodily harm, and aggravated assault.

A separate offence of choking or strangulation with intent to overcome resistance or to facilitate the commission of another offence is also a common formulation in these jurisdictions.<sup>70</sup> Some legislation, such as that in New Zealand, adopts a broader formulation which prohibits all forms of assault that have the effect of “wounding, maiming, disfiguring, causing grievous bodily harm, or otherwise stupefying rendering unconscious or incapable of resistance” committed with the intent of facilitating the commission of a crime.<sup>71</sup>

In contrast, at least eight states in the United States have enacted specific provisions that create offences or otherwise recognize strangulation as a discrete and elevated form of assault. Prior to these enactments, strangulation was frequently treated as a misdemeanour.

All but one of these new provisions stipulate that strangulation is punishable as a felony offence. These offences created a wide range of increased maximum sentences from 1 to 20 years depending on the presence or absence of additional aggravating factors. Some are stand-

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<sup>69</sup> See for example, *The New Offences Against the Person: The Provisions of Bill C-127*, David Watt, Butterworths:1984, 1-2, “An Enduring Influence: Sir Samuel Griffith and his Contribution to Criminal Justice in Queensland”, Geraldine Mackenzie, in Vol. 2, No. 1, QUTLJJ at pages 59-60.

<sup>70</sup> See for example *Offences Against the Person Act (1861)* s. 18, 20-21 (United Kingdom). The history of the development of this area of the law in Australia is summarized in the 1998 report of the Model Criminal Code Committee of Australia entitled “Non Fatal Offences Against the Person”, available on the Internet at [http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/Publications\\_Model\\_Criminal\\_Code\\_Chapter\\_5](http://www.ag.gov.au/agd/WWW/agdHome.nsf/Page/Publications_Model_Criminal_Code_Chapter_5).

<sup>71</sup> Section 191, *Crimes Act (1961)*, available online at [http://www.legislation.govt.nz/browse\\_vw.asp?content-set=pal\\_statutes](http://www.legislation.govt.nz/browse_vw.asp?content-set=pal_statutes).

alone offences that apply in all contexts. Others apply only in the context of a domestic or intimate relationship.

### **Stand Alone Offences**

Alaska, Nebraska, North Carolina and Oregon have all enacted legislation addressing strangulation as a separate form of assault, without reference to the context of the relationship in which it occurs. A brief summary of the legislation in each of these jurisdictions follows.

#### **Alaska**

In April 2005 the definition of “dangerous instrument” in the Criminal Code was amended to include hands or other objects used to impede normal breathing or circulation by applying pressure on the throat, neck, or by obstructing the nose or mouth. As a result, assaults involving strangulation would now be classified as a felony offence. Maximum terms of imprisonment increased depending on the nature or intent to cause serious physical injuries. The statutory maximum terms of incarceration range from 7 to 20 years.<sup>72</sup>

#### **Nebraska**

In April 2004, Nebraska created a new offence of strangulation defined as knowingly or intentionally impeding the normal breathing or circulation of the blood of another person by applying pressure on the throat or neck. It is punishable as a felony, with maximum penalties ranging from 5 to 20 years. Aggravating features such as serious injury, use of a weapon or dangerous instrument, or prior related history enable sentences at the higher end of this range.<sup>73</sup>

#### **North Carolina**

On August 12, 2004, North Carolina enacted a package of legislative reforms designed to address domestic violence. Included in this package was a provision elevating strangulation causing physical injury to a felony offence. The sentencing impact of this new provision was difficult to determine as a result of the sentencing grid used in that jurisdiction. A legislative

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<sup>72</sup> The provision, HB 219 was enrolled on April 28, 2005. The classifications of assaults from first through third degree are contained in AS 11.41.200-AS 11.41.220. The sentencing regime for these offences is contained in AS 12.55.125.

<sup>73</sup> Nebraska Criminal Code 28-310.01. The classification of offences for sentencing purposes is found in sections 28-105.

report related to this provision concluded that it would be difficult to assess the impact on prison population, as the State Sentencing Commission has had no experience with the new offence.<sup>74</sup>

## **Oregon**

In July 2003, Oregon created a new offence of strangulation, defined as knowingly impeding normal breathing or circulation of the blood of another person by applying pressure on the throat or neck, or blocking the nose or mouth of that person. The offence is punishable as a misdemeanour with a one-year maximum term of imprisonment. It is punishable as a felony offence if it is committed in the presence of or witnessed by a child related to the victim or residing in the house, a weapon was used or physical injury caused, or if there were previous related convictions. The maximum penalty for such a felony is five years imprisonment.<sup>75</sup>

## **Domestic Violence Offences**

The remaining states, Idaho, Missouri, Minnesota and Oklahoma, created strangulation offences in the specific context of a domestic or intimate partner relationship. A brief summary of the legislation in each of these jurisdictions follows.

## **Idaho**

On April 6, 2005, legislation was proclaimed creating an offence of wilfully or unlawfully choking or attempting to strangle a household member, or a person with whom he or she has had a dating relationship. No injuries are required in order to prove attempted strangulation, nor is the prosecution required to show that the defendant intended to kill or injure the victim. This is a felony offence, punishable by up to 15 years incarceration.<sup>76</sup>

## **Missouri**

In August 2005, a new provision was enacted stipulating that an attempt to cause or knowingly cause physical injury to a family or household member, or an adult who is or has been in a continuing social relationship of a romantic or intimate nature, by any means including use of a deadly weapon or dangerous instrument, or by choking or strangulation is a felony punishable by a term of imprisonment of up to seven years.<sup>77</sup>

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<sup>74</sup> North Carolina General Assembly Legislative Fiscal Note, pages 4-7.

<sup>75</sup> HB 2770, Chapter 577 Oregon Laws 2003.

<sup>76</sup> 18-923, Criminal Code of Idaho.

<sup>77</sup> Section 565.073, 558.011 Missouri Revised Statutes.

## Minnesota

In August 2005 the new offence of assaulting a family or household member by strangulation was created. It is a felony offence, punishable by not more than three years incarceration. Strangulation is defined identically to the Oregon provisions – intentionally impeding normal breathing or circulation of the blood by applying pressure to the throat or neck or by blocking the nose or mouth of another.<sup>78</sup>

## Oklahoma

On July 1, 2005, a new offence relating to strangulation was proclaimed. It provided that assault and battery with intent to cause great bodily harm by strangulation or attempted strangulation against a defined set of persons was a felony offence. It is punishable by a term of imprisonment of between 1 to 3 years, and, for second and subsequent offences, for a period of imprisonment of between 3 to 10 years.

The statute defined strangulation as a form of asphyxia characterized by closure of the blood vessels or air passages of the neck as a result of external pressure on the neck.

In general, these provisions are consistent with an approach tending to particularize several different modes of assault. That approach differs from the general approach in Canada, and from the direction urged by law reform bodies in other Commonwealth jurisdictions, summarized as follows:

*Having examined these reports, the Committee is attracted to the general scheme of reform first put forward by the English Criminal Law Revision Committee in Fourteenth Report, Offences Against The Person, Cmnd 7844, (1980). In general terms, the scheme replaces the basic offences of assault and wounding with offences based on causing injury, thus focusing not on the way in which harm is done, but on the degree of harm caused. In addition, there are offences dealing with the endangerment of the lives and safety of others (See Appendix 1 for more details). All of these are graded in terms of seriousness by the criminal fault which accompanies the act and the harm which is caused or the risk of harm created.*<sup>79</sup>

## Conclusion

Strangulation is a particularly serious form of assault with the potential of life threatening consequences. The existing provisions of the *Criminal Code* provide several alternatives in

<sup>78</sup> Section 609.2247, Criminal Code of Minnesota.

<sup>79</sup> *Model Criminal Code, supra*, at page 4.



relation to the prosecution of this offence. The statutory range of sentence contemplated by these offences is also quite broad.

While the Working Group recognizes the different legislative approach taken by several jurisdictions in the United States, we have concluded that the existing *Code* provisions adequately address this issue. In many instances these provisions have higher maximum penalties than those provided by the new enactments in the United States.

Further, while there is support in the literature for the proposition that strangulation may serve as a marker for increased risk of future violence, this proposition is not without controversy. We have concluded that while a discrete offence of strangulation may assist in documenting prior history of this type of assault, that basis alone is insufficient to justify the creation of a new offence.

However, we also recognize that strangulation may give rise to serious consequences, and that the medical literature supports the contention that such assaults endanger the life of the victim. As a result, we are of the view that further education and training in relation to the investigation and prosecution of these offences will enhance the understanding of that risk and will improve the prosecution of these serious offences.

Several jurisdictions have provided training addressing the need for effective documentation, investigation and prosecution of strangulation cases. This training addresses medical practitioners, police, and prosecution services.<sup>80</sup> The Working Group is of the view that this broad-spectrum approach is a vital component of any training in relation to the investigation and prosecution of domestic violence cases. The collection and dissemination of best practices in relation to these prosecutions would also be useful.

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<sup>80</sup> See for example *Strangulation Injuries*, *supra* at FN 60, *How to Improve Your Investigation and Prosecution of Strangulation Cases*, *supra*, at FN 59, *Domestic Violence Handbook: For Police and Prosecutors in Alberta*, available online at [http://www.justice.gov.ab.ca/criminal\\_pros/default.aspx?id=4373](http://www.justice.gov.ab.ca/criminal_pros/default.aspx?id=4373).