

Killings Short of Murder: Examining Culpable Homicide in Scots Law

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Introduction

In a society which gives legal recognition to the right to life,¹ the state is required to have laws which ensure that, as a right, this is respected.² Thus, causing the death of another is, generally, absolutely proscribed and murder, one part of the recognition of this principle in criminal law, is, on occasion, described as the most serious crime³ - though even murder can be aggravated.⁴ Indeed, protection for the sanctity of life has been a part of Scots law throughout its history.⁵ In 1827, for example, Lord Mackenzie was able to state that '[t]he law of Scotland is peculiarly tender of human life'.⁶

Murder is not, however, the only crime which can be charged where the accused has caused death. Scots law also encompasses the lesser offence of culpable homicide demonstrating that it is not merely the taking of life which murder censures (because culpable homicide sends this message too) but the particularly seriously wrong way in which, and/or (wicked) mindset with which, this is done. While identifying the relative seriousness of (even broadly similar) crimes

¹ For example, Art 2 of the European Convention on Human Rights [1950] states 'Everyone's right to life shall be protected by law. No one shall be deprived of his life intentionally save in the execution of a sentence of a court following his conviction of a crime for which this penalty is provided by law.'

² *A v United Kingdom* (1999) 27 EHRR 611. See also *McCann v United Kingdom* (1996) 21 EHRR 97

³ See, eg Barry Mitchell and Julian Roberts, 'Public Attitudes Towards the Mandatory Life Sentence for Murder: Putting Received Wisdom to the Empirical Test' [2011] Crim LR 456, 456; David Ormerod, 'Worth the Wait?' [2012] Crim LR 79, 80; Isabel Grant, 'The Boundaries of the Criminal Law: The Criminalization of the Non-Disclosure of HIV' (2008) 31 *Dalhousie Law Journal* 123, 125; Felicity Stewart and Arie Freiberg, 'Provocation in Sentencing: A Culpability-Based Framework' (2008) 19 *Current Issues in Criminal Justice* 283, 302

⁴ For example, the Preamble to the Rome Statute of the International Criminal Court (1998) makes reference to 'the most serious crimes of concern to the international community as a whole' defining these (in Art 5(1)) as genocide, crimes against humanity, war crimes and the crime of aggression

⁵ Sir George Mackenzie of Rosehaugh, *Law and Customs of Scotland in Matters Criminal* (James Glen 1678) 109; Baron David Hume, *Commentaries on the Law of Scotland Respecting Crimes*, vol 1 (Benjamin R Brown ed, 4th edn, Bell & Bradfute 1844 (The Law Society of Scotland 1986)) chap VI

⁶ *Spring-Gun Case* (1827) Syme 209, 214

in relation to each other is not straightforward,⁷ a murder conviction signals that the killing was grave and the perpetrator was conspicuously blameworthy. Given, however, that the mechanisms by which one person may be the agent of the destruction of the life of another are myriad, from a relatively minor act which activates a pre-existing condition⁸ to an entirely intentional attack using extreme violence which is inflicted in order to kill,⁹ there are advantages in relation to quantifying seriousness in having these two separate offences.

This paper examines the crime of culpable homicide, looking, in particular, at the way in which it navigates the broad range of behaviours which may be brought within its own ambit of lesser seriousness in killing. Criminalisation is generally only regarded as necessary or justified at all for seriously harmful behaviours. Killing is perhaps the clearest example of such a behaviour – few would dispute the need to criminalise murder – and culpable homicide also reflects society’s absolute repugnance towards killing by ensuring that the criminal sanction is still imposed even where the destruction of life was not deliberate but the by-product of some other reprehensible behaviour.

In fulfilling this function, culpable homicide occupies potentially more difficult, and certainly rather broader, terrain than murder, extending from killing which is so serious as to sit on the borderline with it to that which, for any of a wide variety of reasons, renders the agent of the death so unblameworthy that the question may be whether to prosecute for a homicide offence at all.

This paper will first of all provide an overview of the way in which culpable homicide is defined in Scots law. It will then consider the way in which it operates on the borderline with murder – where the accused has killed in a manner which bears possible hallmarks of the more

⁷ See, for example, Matthew Gibson, ‘Getting their “Act” Together? Implementing Statutory Reform of Offences Against the Person’ [2016] Crim LR 597

⁸ See, for example, *Bird v HM Advocate* 1952 JC 23

⁹ The point is raised in *HM Advocate v R* 2010 GWD 35-722

serious crime but the lesser offence is, in fact indicated. Next, it will move to consider culpable homicide in its own right where this is the crime to be charged from the outset. The law recognises two forms of this “involuntary” type: lawful act and unlawful act. Finally, it will draw on these discussions to evaluate the efficacy of the offence as it operates in Scots criminal law currently.

Defining Culpable Homicide in Scots Law

Culpable homicide occupies the borderlands of killing less than murder – concerned with the reasons for deeming (otherwise serious) killings “not murder” at one end of the spectrum and with the reasons for convicting of an offence of homicide at all at the other, whilst also accommodating any killing which is *clearly* culpable homicide (rather than murder) from the outset. This highlights the broad range of the crime from killings which are relatively grave (not quite murder) to those which only just qualify as criminally blameworthy at all.

Unlike other areas of homicide law,¹⁰ and perhaps surprisingly, there is no time-honoured definition to which all cases initially make reference. Instead, the crime tends to be described rather than defined. Thus, in *Drury v HM Advocate*¹¹ it was stated that ‘the crime of culpable homicide covers the killing of human beings in all circumstances, short of murder, where the criminal law attaches a relevant measure of blame to the person who kills’.¹²

¹⁰ For example, the definition of: murder – originally stated in Sir John H A Macdonald, *A Practical Treatise on the Criminal Law of Scotland* (Roger McGregor Mitchell ed, 4th edn 1929) 89 and see *HM Advocate v Purcell* [2007] HCJ 13, 2008 JC 131, [9] (Lord Eassie); provocation – Macdonald, 94; diminished responsibility – Criminal Procedure (Scotland) Act 1995, s 51B

¹¹ 2001 SLT 1013

¹² *ibid* [13] (LJ-G Rodger). This dictum has been cited with approval in subsequent cases including *Transco plc v HM Advocate No 1* 2004 JC 29 [4] (Lord Osborne); and *Lilburn v HM Advocate* [2011] HCJAC 41, 2012 JC 150 [4] (LJ-G Hamilton)

On this basis, then, culpable homicide incorporates any killing which is not murder but which is still criminally blameworthy. By, effectively, identifying the crime as “not murder” this description draws murder’s own definition into the equation:

‘Murder is constituted by any wilful act causing the destruction of life, whether [wickedly] intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences.’¹³

Culpable homicide shares with murder the *actus reus* (the destruction of life). Macdonald writes of the ‘death of a person [being] caused, or materially accelerated by the improper conduct of another’.¹⁴ In general, then, since both murder and culpable homicide arise through the killing of another person, this first dividing line between them is drawn by whether one or other of murder’s two alternative *mentes reae* (wicked intention to kill or wicked recklessness) can be established. The proximity between the two forms of homicide, at this level of seriousness, can be seen in this description, from *Ross v Lord Advocate*,¹⁵ a case concerning the Lord Advocate’s policy on the prosecution of assisted suicide. Lord Justice-Clerk Carloway stated:

if a person does something which he knows will cause the death of another person, he will be guilty of *homicide* if his act is the immediate and direct cause of the person's death¹⁶ ... Depending upon the nature of the act, the crime may be murder or culpable homicide. Exactly where the line of causation falls to be drawn is a matter of fact and circumstance for

¹³ Macdonald (n 10) 89 (as amended by *Drury* (n 11) [11] (LJ-G Rodger))

¹⁴ Macdonald (n 10) 150

¹⁵ [2016] CSIH 12, 2016 SC 502

¹⁶ (referencing *MacAngus v HM Advocate* [2009] H CJAC 8, 2009 SLT 137 [42] (LJ-G Hamilton))

determination in each individual case. That does not, however, produce any uncertainty in the law.¹⁷

The question of whether the law is certain may be debatable – indeed the view has been expressed elsewhere that ‘the mental element in murder and culpable homicide in contemporary Scots law ... is in need of a thorough re-examination’¹⁸ What is clear, however, is that descriptions such as these from *Drury* and *Ross* alone would leave culpable homicide as rather an amorphous category, lacking even a clear definition of *actus reus* and *mens rea*. In practice, then, it is divided into voluntary and involuntary forms, with the latter being subdivided into lawful act and unlawful act types. While these divisions have existed since historical times,¹⁹ conviction will always be of the generic offence of culpable homicide without necessarily much discussion of the form. These forms do, however, have slightly clearer definition.

Voluntary culpable homicide arises where the accused has killed in a way which would, in principle, satisfy the definition of murder but a partial defence (of provocation or of diminished responsibility) operates to “reduce” the crime to the lesser form.²⁰ These defences are discussed in detail elsewhere in this series²¹ and voluntary culpable homicide will not, therefore, be considered in detail in this chapter. Involuntary culpable homicide generally arises where the death of the deceased was not within the accused’s actual or deemed contemplation but s/he is

¹⁷ *Ross* (n 15) [29] (LJ-C Carloway). Emphasis added.

¹⁸ *Petto v HM Advocate* [2011] HCJAC 80, 2012 JC 105 [20] (LJ-C Gill)

¹⁹ Hume (n 5) identified ‘Culpable homicide by doing a lawful act without due caution’ 233, ‘Culpable homicide where death ensues on a purpose to do some slight injury’ 235 and ‘Culpable homicide where there is a mortal purpose, but taken up on gross provocation’ 239

²⁰ *MacAngus* (n 16) [27]. The terminology of ‘reducing’ is not accepted in *Drury* (n 11) where LJ-G Rodger described it as ‘essentially misleading’ [17] however it has continued to be used. See James Chalmers and Fiona Leverick, *Criminal Defences and Pleas in Bar of Trial* (W Green 2006) para 1.02 n 6

²¹ Alan Reed and Michael Bohlander (eds), *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Routledge 2011). For a discussion of provocation in Scots law, see Claire McDiarmid, ‘Don’t Look Back in Anger: the Partial Defence of Provocation in Scots Criminal Law’ in James Chalmers, Lindsay Farmer and Fiona Leverick (eds) *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh University Press 2010)

nonetheless considered to be sufficiently blameworthy for it that criminal liability is entailed. The unlawful act type arises where the accused is involved in committing another crime (in modern times this is almost invariably the crime of assault) and death ensues. Macdonald explains this category as “the doing of any unlawful act ... from which death results though not foreseen or probable”.²² The *mens rea* is that for the underlying crime. Involuntary lawful act culpable homicide,²³ by contrast, occurs where the accused’s act is (for these purposes) lawful but nonetheless causes the victim’s death. The *mens rea* is recklessness.²⁴

The way in which culpable homicide operates at the top end of seriousness (where the issue is the division with murder) will be considered first.

Murder or Culpable Homicide: Policy Decisions

It is fair to say that one of the functions of culpable homicide is to make it possible for the law to be seen to acknowledge the inherent wrongfulness of killing, without the “baggage” (stigma and mandatory life sentence²⁵) of murder. This being the case, on occasion, it may seem that the decision as to category (murder or culpable homicide) is taken for policy reasons without clearly engaging legal principle. Such killings, then, though named culpable homicide, may be particularly difficult to classify in terms of seriousness. Precisely for that reason of the difficulty of fitting them into the homicide binary however, they clearly sit on the line with murder. In other words, there are perhaps equally good reasons to classify as one as the other.

Prior to trial, such decisions are entirely the Crown’s. ‘In Scotland the master of the instance in all prosecutions for the public interest is the Lord Advocate. It is for him to decide when and

²² Macdonald (n 10) 150

²³ See *Transco* (n 12) [35]– [38] (Lord Hamilton)

²⁴ *ibid*

²⁵ Criminal Procedure (Scotland) Act 1995, s 205

against whom to launch prosecution and upon what charges.’²⁶ Given the range of ways in which, and reasons for which, death may be caused, the public interest encompasses a wide variety of considerations. The concept of ‘mercy killing’ may illustrate these points. In *HM Advocate v Brady*,²⁷ the accused had, at least *prima facie*, met the (then) requirements of murder by destroying the life of the victim (his terminally ill brother) with intention to kill. He had administered a high dose of the deceased’s prescription medicine to render him unconscious and had then smothered him with a pillow. Whilst the original charge was murder, the Crown accepted a plea of guilty to culpable homicide. The other members of the family (who, given the nature of the killing were the family of both the deceased and the accused) supported the accused’s actions and were relieved that the deceased’s suffering (from Huntingdon’s disease) was at an end.²⁸ The trial judge imposed the most lenient sentence available (admonishment). Here, the existence of culpable homicide allowed the Crown leeway to balance the competing public interests in respecting the very particular wishes and interests of the deceased’s family for clemency against the fact of the, entirely deliberate, taking of the life of another.²⁹ The structure of homicide allows this to be accomplished at conviction rather than merely through sentencing. It also raises that question of the way in which the law mediates its own principles. The Crown’s decision to accept the plea of guilty to culpable homicide may meet the justice of the case (though, for example, church leaders were not in agreement with it, considering that it failed to uphold the importance of the sanctity of life).³⁰ Nonetheless, it allocates the issue

²⁶ *Boyle v HM Advocate* 1976 JC 32, 37 (Lord Cameron)

²⁷ 1997 GWD 1-18

²⁸ ‘Family Declare Support for Brother’s Mercy Killing’ *The Herald* (Glasgow 1 October 1996) (available at: <http://www.heraldscotland.com/news/12024044.Family_declare_support_for_brother_apos_s_mercy_killer/> accessed 1 January 2018)

²⁹ Having given the deceased increased quantities of his standard medication and some alcohol, the accused then smothered the deceased with a pillow

³⁰ ‘Family Declare Support’ (n 28)

wholly to the Crown's discretion thereby bypassing the *law* on the distinction from murder. It does not assist in understanding, or developing, the legal principles of that distinction.

The more recent case of *Ross v Lord Advocate*³¹ concerned the related issue of assisted suicide, where a seriously ill petitioner sought further guidance from the Lord Advocate as to the circumstances in which anyone helping him to bring his own life to an end would be prosecuted. As noted above, the Inner House of the Court of Session simply accepted that the law of *homicide* would apply,³² again failing to differentiate murder from culpable homicide at the level of principle in such circumstances. While clearly the so-called right to die raises particularly fraught issues of law, ethics, morality and compassion it is precisely in such cases, and because of the intense anxiety which attends them, that clearer legal principle is particularly valuable and necessary. Without bespoke legislation in relation to assisted suicide, the common law on homicide requires to do this work.

The Line with Murder

Such policy decisions are, then, concerned with the usefulness of having a lesser form of homicide available rather more than with the legal principles. Where the matter is not determined at a preliminary stage on policy grounds but is tested in court, legal reasons for the outcome become available for scrutiny. Thus, to be convicted of culpable homicide, such a reason must be identified. Is there, however, any remaining scope to apply the binary question of murder / not murder rather than clearly to cast the determination in terms of culpable homicide's own mental and behavioural elements?

³¹ *Ross* (n 15)

³² See text accompanying n 17

Because murder and culpable homicide share the *actus reus* of the destruction of life,³³ in principle, the question for a court to determine is whether or not the accused has the *mens rea* of murder.³⁴ For murder, both possible mental elements incorporate wickedness (wicked recklessness or wicked intention to kill) and both require some attitude on the part of the accused towards the death of the victim.³⁵ The accused must either have (wickedly) intended to kill the victim or else have had (in addition to an intention to cause physical injury)³⁶ an indifference as to whether the victim lived or died.³⁷ It is possible for the matter to be determined by reference to the (tautologically) murderous quality of the act itself.³⁸

The fact that conviction of the lesser offence is always for the generic crime of culpable homicide creates possible scope for the argument, not necessarily that the accused's crime conforms to the principles of culpable homicide in either its voluntary or involuntary form but rather that the accused is, simply, insufficiently blameworthy to be convicted of murder. In other words, the argument is that the crime committed is "not murder" rather than that it *is* (on its own terms) culpable homicide. Where such an argument is led in an appeal, the fact that the jury at first instance has returned a murder conviction supports the seriousness of such cases and indicates that, even if they *could* constitute culpable homicide, they still occupy this liminal territory right on the line with murder.

In such cases, the accused's claim is likely to be that the scope for a culpable homicide verdict (and hence a more favourable outcome for him/her) was not fully exploited thereby resulting

³³ Gerald H Gordon, *The Criminal Law of Scotland*, vol 2 (4th edn, James Chalmers and Fiona Leverick (eds) W Green 2017) para 30.01

³⁴ See, for example, *Scott v HM Advocate* [2011] HCJAC 110, 2012 SCCR 45 [10], [16] (Lord Bonomy)

³⁵ For a full discussion, see Claire McDiarmid "'Something Wicked This Way Comes": The *Mens Rea* of Murder in Scots Criminal Law' (2012) *Juridical Review* 283

³⁶ See *Purcell* (n 10)

³⁷ See, for example, *Cowie v HM Advocate* [2009] HCJAC 76, 2010 JC 51 [21] (LJ-C Gill)

³⁸ See *Meikle v HM Advocate* [2014] HCJAC 116, 2014 SLT 1062 [15] (Lord Drummond Young); *Humphrey v HM Advocate* [2016] HCJAC 5, 2016 SCL 275 [32] (LJ-C Carloway)

in detriment. Following *Ferguson v HM Advocate*,³⁹ the (murder) trial judge has a responsibility to put the possibility of a culpable homicide verdict (indeed any alternative verdict reasonably available on the evidence) to the jury unless there is no basis at all on which such a verdict could be returned. In principle, then, this is an issue of procedure however it requires an assessment of the principles of the substantive law on homicide by the trial judge to determine whether a culpable homicide instruction needs to be given.

In *Ferguson*, and the subsequent case of *Anderson v HM Advocate*,⁴⁰ such an instruction had been omitted. Both appeals are concerned with the nature of the act bringing about death. In *Ferguson* a single stab wound to the back, just below the shoulder blade was considered still to leave open the possibility of a culpable homicide verdict⁴¹ because only the one wound was inflicted (rather than “multiple injuries”)⁴² and this was not regarded as a “particularly vulnerable area[...] of the body”.⁴³ By contrast, in *Anderson*, a single stab wound to the abdomen, directed upwards so that it injured the heart was considered to preclude any such option because this was a “vulnerable part of the deceased’s body and in particular [because it was] in the direction of his heart.”⁴⁴ It can be seen, then, that the *actus reus* of murder is not entirely separate from the *mens rea*. Certain acts – here, a stab wound to a vulnerable part of the body - allow at least wicked recklessness to be inferred. Culpable homicide is mobilised to sweep up any possibility of lesser blameworthiness (even where this is ultimately rejected). Such appeals are, of course, concerned with the review of the matter undertaken by the trial judge, who, in determining how to frame the charge to the jury, is likely to have considered

³⁹ [2008] HCJAC 71, 2009 SLT 67. See also *Woodside v HM Advocate* [2010] HCJAC 94, 2011 JC 100

⁴⁰ [2010] HCJAC 9, 2010 SCCR 270

⁴¹ Ferguson was re-tried following the success of his appeal and was again convicted of murder: “Evil Airdrie Thug Convicted for Teenager’s Playground Murder” *Daily Record* (Glasgow 12 August 2009) (available at :< <https://www.dailyrecord.co.uk/news/local-news/evil-airdrie-thug-convicted-teenagers-2831954>> accessed 12 January 201

⁴² *Ferguson* (n 39) [37] (Lord Osborne)

⁴³ *ibid*

⁴⁴ *Anderson* (n 40) [17] (Lord Mackay of Drumadoon)

whether, and why, culpable homicide (on its own principles) was or was not an option. At the appeal stage, the issue is cast more in terms of whether or not murder is unequivocally indicated. The argument here is not that the *principles* of culpable homicide have no relevance. It is rather that they tend to be subsumed in the more general, higher level question of whether the crime *must* be characterised as murder.

Another area in which the resort to a culpable homicide verdict on a murder charge sits a little outside the voluntary / involuntary formulations is in relation to art and part killing.

Art and Part Killings

The particularities of Scots law on killing on an art and part basis are such that, in some circumstances, individual co-accused can seek to argue that grounds exist for a conviction of culpable homicide even where others are convicted of murder.⁴⁵ The distinction between murder and culpable homicide *is* generally underpinned by principle in that a distinction exists between killing where there is pre-concert and killing which arises spontaneously,⁴⁶ though this distinction has been described as ‘nonsensical’.⁴⁷

Where a crime is pre-arranged and there is a common plan to commit it then all co-accused who are parties to that plan must be convicted of the same offence.⁴⁸ Again, the key issue is whether or not the accused has the *mens rea* for murder which, in such cases, relates to analysis of the plan. Thus

⁴⁵ See, for example, *Sim v HM Advocate* [2016] HCJAC 48, 2016 JC 174; *Carey v HMA* [2016] HCJAC 10, 2016 SLT 377

⁴⁶ See, for example, *Parfinowski v HM Advocate* [2013] HCJAC 123, 2014 SCCR 30, [24] (Lady Dorrian)

⁴⁷ Fiona Leverick, ‘The (Art and) Parting of the Ways: Joint Criminal Liability for Homicide’ (2012) Scots Law Times 227, 231

⁴⁸ *McKinnon v HM Advocate* 2003 JC 29

an accused is guilty of murder art and part where, first, by his conduct, for example his words or actions, he actively associates himself with a common criminal purpose which is or includes the taking of human life or carries the obvious risk that human life will be taken, and, secondly, in the carrying out of that purpose murder is committed by someone else.⁴⁹

Rather than wicked intention or wicked recklessness, this active association with such a risk (where life is in fact taken) constitutes the *mens rea* for murder on an art and part basis.⁵⁰ The rule can have serious consequences. In the leading case of *McKinnon*⁵¹ for example, there was a common plan to commit robbery using chef's knives as a weapon. The forensic evidence indicated that the fatal stab wounds had most likely been inflicted by only one co-accused but four of the co-accused were convicted of murder on the art and part basis. Since the purpose of art and part is to ensure that responsibility is brought home to those who are associated with a crime but who may not actually have carried it out,⁵² it is at least logical that all should be convicted of the same crime.

Nonetheless, and somewhat less logically, where the conduct with fatal consequences arises spontaneously, there is scope for each accused to be judged on his or her own actions, yet still under the ambit of art and part liability. The issue is whether the co-accused shared a common murderous purpose:⁵³

Where [a co-accused] is not proved to have associated himself [sic] with that [common murderous] purpose [ie carrying the obvious risk that human life will be taken] or is proved to have participated in some less serious common

⁴⁹ Ibid [32] (LJ-G Cullen)

⁵⁰ *Poole v HM Advocate* [2009] HCJAC 42, 2009 SCCR 577 [11] (Lord Kingarth)

⁵¹ (n 48)

⁵² See, for example, Lord Patrick's charge to the jury in *Lappen v HM Advocate* 1956 SLT 109

⁵³ *Parfinowski* (n 46) [24] (Lady Dorrian)

criminal purpose in the course of which the victim dies, [that] accused may be guilty art and part of culpable homicide, whether or not any other person is proved guilty of murder.⁵⁴

The art and part principle is thus operating to make the co-accused guilty of a homicide offence – to draw him/her into taking responsibility (albeit at a lower level) for the death – whilst deeming the offence itself, potentially at least, one of murder. Given that the essence of art and part liability is that the co-accused shared *the same* criminal purpose, this may be problematic.

In *Carey v HM Advocate*⁵⁵ the death arose from a fracas in a flat in Saltcoats during which the deceased was punched, kicked and, ultimately stabbed in the chest. The co-accused Carey was charged and convicted of culpable homicide and this was upheld on appeal but his conviction stood on an art and part basis with the other co-accused, McCulloch, who inflicted the fatal wound and was charged with, and convicted of, murder. Lord Justice-Clerk Carloway stated ‘[t]here appears to be an illogicality in this approach; that a person can be art and part guilty of culpable homicide when the victim is found to have been murdered, but this is the law as it presently stands’⁵⁶

It is, presumably, always better for an accused person to be convicted of culpable homicide than of murder and this ‘illogicality’ does allow such an outcome. This potential benefit to a co-accused can be seen in a case such as *Parfinowski v HM Advocate*,⁵⁷ where there was clear evidence of the accused’s participation in a fatal attack but insufficient evidence that his or her own purpose was, during that attack, murderous. In this case, the deceased was killed by a (spontaneous) attack with a baseball bat accompanied by punching, kicking and stamping. The

⁵⁴ *McKinnon* (n 48) [32] (LJ-G Cullen)

⁵⁵ (n 45)

⁵⁶ *Ibid* [29] (LJ-C Carloway)

⁵⁷ (n 46)

fatal blow was delivered by a co-accused named Robertson. Parfinowski had apparently, prior to the attack with the bat, punched the deceased and, subsequent to it, he had kicked him. Parfinowski was, however, wearing light canvas shoes and the forensic evidence was that, his kicks could not have caused the fatal injuries. Also, it could not be stated with confidence that he had shared the murderous purpose. A conviction of culpable homicide was substituted for the murder conviction⁵⁸ because the jury had not been instructed that this was possible when the evidence, did, in fact support such a conclusion. Lady Dorrian explained that ‘[o]n the evidence, it could be said that there was scope for a finding that there were striking differences between the actions of the first accused and the appellant.’⁵⁹

In such circumstances, then, the ability to return different verdicts even though the conviction for homicide at all still depends on the existence of art and part liability *may* be viewed by the accused as an advantage. Nonetheless, it does not resolve the logical problem outlined above which, as Lord Carloway also noted, ‘opens up the prospect of a conviction for homicide where the co-accused has not associated himself with a lethal attack.’⁶⁰

At the heart of art and part liability is the issue of the common criminal purpose to which the accused signed up. If this question is addressed, as in *Parfinowski*, from the perspective of ‘saving’ the accused from a murder conviction then the issue will be whether there is scope to say that the s/he did *not* share the murderous purpose. In *Carey*, by contrast, it was eventually determined that the fatal blow had been inflicted by the co-accused (McCulloch). If Carey had been judged on his own actions, then, he had not carried out the *actus reus* of homicide so he could only have been convicted of assault. He was only able to be convicted of culpable homicide by being tied into the homicide element art and part.

⁵⁸ ‘Andrew Parfinowski Brett Lodge Murder Conviction Quashed’ (*BBC News*, 19 November 2013) <<http://www.bbc.co.uk/news/uk-scotland-edinburgh-east-fife-25001625>> accessed 12 January 2018

⁵⁹ *Parfinowski* (n 46) [24]

⁶⁰ *Carey* (n 45) [27], discussing *Brown v HM Advocate* 1993 SCCR 382

It is not quite clear how the common criminal purpose is being defined for these purposes, however. The ‘obvious risk of life being taken’ test applies to the common plan – that is to cases involving pre-concert. The *mens rea* of murder on an individual basis is, of course, wicked intention to kill or wicked recklessness. As will be discussed in more detail below, the *mens rea* for involuntary culpable homicide is not directed towards the bringing about of death. How then can it be determined that the criminal purpose to which an individual co-accused signed up falls somewhere between assault only and murderousness? It is (involuntary unlawful act) culpable homicide where an assault causes death but, almost by definition, in those circumstances, the criminal purpose is not towards death. Involuntary means that the death was not contemplated. It is hard to think of a common criminal purpose to commit culpable homicide *per se*. In such cases, the accused is getting the benefit of the decision that his/her crime is not murder – but if s/he only joined into an assault and is horrified that another co-accused caused death a culpable homicide verdict may be cold comfort.

Given that the incidents from which the relevant deaths occur are often fast-moving and, by definition, involve a number of people, it is not always easy to impose the legal framework on the facts. It is also fair to say that these cases frequently involve relatively extreme violence. Culpable homicide allows the law to recognise, in spite of this, that such acts, even such as cause death, should still be legally graduated. They also illustrate the crime’s close proximity to murder in such cases.

It is clear, also, that where the art and part concept arises spontaneously, the definition of involuntary culpable homicide on an individual basis can come into play and attention will now be turned to this.

Involuntary Culpable Homicide

Where culpable homicide is the crime charged from the outset it is trite to say that the accused's fault or the circumstances attending the death are of a lesser order of seriousness than for murder. In terms of fair labelling,⁶¹ this seems helpful, but it is worth bearing in mind that the accused is still being labelled a killer. It is unclear to what extent this favourable distinction from "murderer" is recognised in the popular consciousness. It is therefore important to look at the operation of involuntary culpable homicide and to see to what it attaches blameworthiness.

Unlawful Act Type

As noted above, different rules apply depending on whether the death arises from a lawful or an unlawful act on the part of the accused – though the category of *unlawful act* is narrow. This form of the crime is found where the accused carries out an unlawful act and (unanticipated) death results. In general, the unlawful act will be an assault on the victim, following from the historical position recognised by both Hume⁶² and Archibald Alison where one category of culpable homicide was constituted 'By the unintentional deprivation of life, in pursuance of an intention not to kill, but to do some inferior bodily injury, from which it was not probable that death would follow'.⁶³

It is not the case that, where an accused is engaged in any criminal act whatsoever and death results, this constitutes unlawful act type. Indeed, assault is probably the only crime which is accepted without question as the basis for it.⁶⁴ Scots law is then somewhat more restricted in

⁶¹ See James Chalmers and Fiona Leverick, 'Fair Labelling in Criminal Law' (2008) 71 MLR 217

⁶² n (19) (second category)

⁶³ Archibald Alison, *Principles of the Criminal Law of Scotland* (William Blackwood 1832) 92

⁶⁴ The view has also been expressed that death arising from fire-raising might constitute unlawful act type culpable homicide because fire is so volatile that a particular duty to take care arises. See Gordon (n 33) para

the underlying crimes which can constitute this form of culpable homicide than are those other jurisdictions which require only criminality and dangerousness.⁶⁵

The criterion for relevant unlawful acts is affirmed in *MacAngus v HM Advocate*⁶⁶ where it is stated that ‘there appears to be no support for the view that unlawful act culpable homicide can be made out except where, as in assault or analogous cases, the conduct is directed in some way against the victim.’⁶⁷

As a crime, assault, in Scots law, requires an attack on the person of another⁶⁸ carried out with evil intent which is defined as intent to cause immediate bodily harm or the fear of immediate bodily harm.⁶⁹ The *mens rea* for culpable homicide arising from an unlawful act is simply that for that underlying offence. The usual rules of causation apply so that the accused must take the victim as s/he finds him/her. Thus if, even very slight, violence, activates a pre-existing condition and the victim dies, culpable homicide is a possible outcome.⁷⁰ In charging the jury in *HMA v Hartley*,⁷¹ Lord Sutherland gave this example

So, to take an example, if you are having an argument with somebody and give him a punch on the chin, not a very hard one, but a punch on the chin, and he is taken aback and stumbles backwards, catches his heel on the kerb of the pavement, falls over, cracks his skull and dies, you would be guilty of culpable homicide because you have committed an unlawful act, an assault

31-27 n 167 referring to *Mathieson v HMA* 1981 SCCR 196. By contrast, the case of *Sutherland v HMA* 1994 JC 62 found that death arising from fire-raising had to be treated as lawful act type.

⁶⁵ See Tony Storey, “Unlawful and Dangerous: A Comparative Analysis of Unlawful Act Manslaughter in English, Australian and Canadian Law” (2017) 81 *Journal of Criminal Law* 143

⁶⁶ (n 16)

⁶⁷ *Ibid* [29] (LJ-G Hamilton)

⁶⁸ Macdonald (n 5) 176

⁶⁹ *Smart v HMA* 1975 JC 30, 33 (LJ-C Wheatley)

⁷⁰ As in *Bird* (n 8) where the accused had caused the victim considerable fear but had used very little actual violence against her. By contrast in *Gay v HM Advocate* [2017] HCJAC 62, 2017 SCL 913, the accused punched the deceased in the face and he died very shortly afterwards having suffered from a number of underlying conditions. Gay was convicted by the jury only of assault to the severe injury.

⁷¹ 1989 SLT 135

by punching him, and as a direct consequence of that act he sustained injuries from which he died.⁷²

In *Gay v HMA*⁷³ the accused inflicted a single punch on the victim who died subsequently in hospital. He had sustained injury to his chin and to the back of his head as well as a fractured jaw and was found to have had a cardiac arrest. He suffered from underlying health issues including heart disease.⁷⁴ The jury convicted Gay of assault to the severe injury on a charge of culpable homicide. The case is reported only as an appeal against sentence so there is no discussion of the principles of the substantive law. While juries are always free to return any verdict open to them, this does at least suggest that there is scope for criminal culpability to be tailored to the accused's perceived blameworthiness so that it is not always necessary to label him/her a killer simply because death ensued following his/her initial act. Culpable homicide then also occupies this territory at the opposite end of the seriousness spectrum from murder where death has resulted but, for whatever reason, it is not ultimately deemed appropriate to attach the stigma of a homicide conviction, only that of assault

Lawful Act Type

In *Sutherland v HM Advocate*⁷⁵ fire-raising to defraud insurers was not accepted as a relevant unlawful act⁷⁶ because it is not a crime against the person.⁷⁷ To convict of culpable homicide,

⁷² Ibid 136. Issues arising in relation to so-called "one punch assaults" including dangerousness, are discussed in Jason Schreiber, Angela Williams and David Ranson, "Kings to Cowards: One-Punch Assaults" (2016) 44 *Journal of Law, Medicine and Ethics* 332

⁷³ (n 70)

⁷⁴ "Kirkcaldy Football Coach Acquitted of Culpable Homicide" (*Fife Today*, 8 March 2017) <<https://www.fifetoday.co.uk/news/crime/kirkcaldy-football-coach-acquitted-of-culpable-homicide-1-4386743>> accessed 6 January 2018

⁷⁵ (n 64)

⁷⁶ Ibid 68 (LJ-G Hope setting out ground of appeal)

⁷⁷ Ibid 65 (LJ-G Hope explaining trial judge's directions)

therefore, recklessness⁷⁸ on the accused's part was required. In other words, because the underlying act was not directed against the victim in the necessary way, lawful act type was deemed the appropriate form. Because any conviction will always be simply for culpable homicide, this potential overlap, or slippage between lawful and unlawful act is not likely to be problematic in practice. The complexity is that certain acts which *do*, in fact, constitute criminal offences (like fire-raising to defraud insurers) need to follow the rules of *lawful act* type (ie *actus reus* of the destruction of life; *mens rea* of recklessness) for a culpable homicide conviction to ensue.

The category of crimes which can be unequivocally seen to be directed against the victim (ie assault alone) is, thus, pretty narrow. Behaviour constituting other criminal offences will be placed in the lawful act category for culpable homicide purposes. This may be confusing semantically – but possibly only at that level. The issue arises particularly in cases where the accused supplied drugs to the victim with his/her consent (or even at his/her request) and s/he ultimately died from ingesting these.⁷⁹ While, clearly, supply of a controlled drug is an offence in terms of s 4(3)(a) of the Misuse of Drugs Act 1971, the law is that 'a charge libelling culpable homicide in the context of the supplying (or the administration of) a controlled drug is relevant only if the Crown offers to prove that the supplying (or the administration) of the drug was in the circumstances reckless.'⁸⁰ Scots law recognises two relevant crimes of recklessness – causing real injury as in *Khaliq v HM Advocate*⁸¹ and causing reckless injury from *HM Advocate v Harris*.⁸² Either of these crimes might be appropriately directed against the victim (Khaliq was selling glue-sniffing kits to children in the knowledge that this was the (harmful)

⁷⁸ Ibid 67, variously described as fire-raising 'done in the face of obvious risks which were or should have been guarded against or in circumstances which showed a complete disregard for any potential dangers which might result' and, more simply 'criminal negligence' (LJ-G Hope)

⁷⁹ See *Lord Advocate's Reference No 1 of 1994* 1996 JC 76; *MacAngus* (n 16)

⁸⁰ *MacAngus* (n 16) [30] (LJ-G Hamilton)

⁸¹ 1984 JC 23

⁸² 1993 JC 150

purpose for which they would be used; Harris was a bouncer who ejected a woman from a nightclub by pushing her in such a way that she fell down a flight of stairs and out onto the road where she was run over by a passing car.) Where either of these crimes is committed and death results it will not be clear whether lawful or unlawful act type culpable homicide has been committed since both have the *mens rea* of recklessness. Conviction for the overarching generic offence allows access to the full gamut of sentencing options from admonishment⁸³ through community service⁸⁴ to a (discretionary) life sentence⁸⁵ so that there is scope for a nuanced approach to overall blameworthiness. The lawful / unlawful act dichotomy in such a case is therefore of limited significance. It does however matter considerably to an accused who has committed another type of crime from which death resulted. The need to establish recklessness protects him/her from conviction of a homicide offence where this was completely outwith his/her contemplation.

The development of lawful act type recognises the need for the law to identify sufficient fault on the accused's part that conviction of a criminal offence is warranted. *Paton v HM Advocate*,⁸⁶ which has been influential in defining recklessness more generally, noted this fault requirement whilst not wholeheartedly welcoming it. Lord Justice-Clerk Aitchison said

There is evidence in the case that the appellant was driving his car at a fairly high speed, and there is also evidence in the case that there was, perhaps, a want of care. The difficulty that the case presents is whether there was evidence that the appellant was guilty of criminal negligence in the sense in which we use that expression. At one time the rule of law was that any blame was sufficient, where death resulted, to justify a verdict of guilty of culpable

⁸³ *Brady* (n 27)

⁸⁴ *Docherty v HM Advocate* 2000 SCCR 106 (300 hours community service)

⁸⁵ *K (A Child) v HM Advocate* 1993 SLT 237 (detention without limit of time for a child-accused aged 12); *Kirkwood v HM Advocate* 1939 JC 36 (penal servitude for life)

⁸⁶ 1936 JC 19

homicide. Unfortunately, this law has to some extent been modified by decisions of the Court, and it is now necessary to show gross, or wicked, or criminal negligence, something amounting, or at any rate analogous, to a criminal indifference to consequences, before a jury can find culpable homicide proved.⁸⁷

While in *Paton* the accused was charged with culpable homicide (though ultimately convicted of a lesser motoring offence) it is interesting that this concept of recklessness, used as the fault element, is disconnected completely from the issue of the destruction of life. Thus, the concept has developed in both lawful act culpable homicide cases and cases of other, non-fatal, crimes of recklessness. *Paton*'s definition of recklessness was quoted with approval in *Quinn v Cunningham*,⁸⁸ a case relating to riding a bicycle recklessly (though without causing death). Lord Justice-General Clyde offered the further definition of 'an utter disregard of what the consequences of the act in question may be so far as the public are concerned'⁸⁹ and 'a recklessness so high as to involve an indifference to the consequences for the public generally'.⁹⁰ Finally *Transco plc v HM Advocate*,⁹¹ - an (unsuccessful) attempt to prosecute a company for bringing about the deaths of a family of four in a gas explosion - whilst broadly accepting the concept, took issue with the circularity of the *Paton* definition. Lord Justice-General Hamilton stated 'There may be some difficulty in regarding Lord Justice-Clerk Aitchison's observation as a comprehensive definition — not least because of the circularity which arises from the use (twice) of the adjective "criminal" in the definition of the crime. But it does at least point ... to a degree of want of care which is grave.'⁹²

⁸⁷ Ibid 22

⁸⁸ 1956 JC 22

⁸⁹ ibid 24

⁹⁰ Ibid 25

⁹¹ (n 12)

⁹² Ibid [37]

There are two issues here. The first is the rather unsatisfactory way in which this central concept of recklessness is defined. The other is the disconnect between the *mentes reae* of lawful and unlawful act culpable homicide and the victim's death.

Absence of Reference to Homicidal Attitude

Considering, first, the latter point - murder arises where the accused causes death either intending to do so (wicked intention to kill) or intending to cause (only) physical injury together with an indifference as to whether the victim lived or died (wicked recklessness). Both of these formulations encapsulate blameworthiness arising from the accused's aim, or, at least, acceptance of causing the death of the victim. The *mens rea* components of culpable homicide (which are that of the underlying (non-fatal) offence for unlawful act type and recklessness for lawful act type) by contrast, make no reference to death whatsoever. Culpable homicide is a serious offence. It is, for example, sometimes charged in road traffic cases on the basis that 'the degree of culpability required to prove that charge is greater than that required for the statutory offences and in particular is greater than that required for s 1 of the Road Traffic Act, causing death by dangerous driving'.⁹³ Its *mens rea* elements however are the same as for non-fatal offences and, in recklessness, even for the crime of reckless endangerment⁹⁴ which requires only the creation of a foreseeable risk without any actual adverse consequences. How, then, is its seriousness to be gauged alongside these other crimes of recklessness? The principle of *actus non facit reum nisi mens sit rea*⁹⁵ is generally applied in Scots law meaning that the act cannot be reprehensible unless the mind is also guilty. If it is accepted that the mental

⁹³ *HMA v McDowall* 1999 SLT 243, 245 (Lord Abernethy's charge to the jury). In *Purcell v HMA* (n 10), the driving was considered so dangerous that the Crown initially tried to charge the accused with murder. This was unsuccessful

⁹⁴ See *Cameron v Maguire* 1999 JC 63; *Robson v Spiers* 1999 SLT 1141

⁹⁵ See also Jeremy Horder, 'Two Histories and Four Hidden Principles of *Mens Rea*' (1997) 113 LQR 95, 95

element is deemed to confer blameworthiness in this way, then it is noticeable that involuntary culpable homicide's *mens rea* elements are the same as those of the non-fatal offences of assault (unlawful act type) and various crimes of recklessness (lawful act type). This, therefore, brings the behavioural component (the destruction of life) into focus in terms of allocating culpability. Since the mental element equates to that of non-fatal offences, presumably it must be the fact of causing death – of violating the value placed on the sanctity of life or breaching the victim's right to life – which supplies culpable homicide's seriousness. Thus, if it is accepted that it is the *mental* element which *generally* imputes blameworthiness (and, potentially, degrees of blameworthiness)⁹⁶ then it becomes necessary to accept that the act of destroying the life of another is, in itself, so wholly unacceptable that it is given a leading role not necessarily accorded to the behavioural element in other crimes in determining culpability within culpable homicide. Nonetheless, killing on its own is far from sufficient and the concept of recklessness used as the mental element in lawful act type is worthy of some scrutiny

Recklessness

Findlay Stark has undertaken an exhaustive and meticulous critical analysis of the (many) concepts of recklessness applied in Scots law⁹⁷ concluding, in part, that culpable homicide's recklessness is not, and should not be, different to that employed in non-fatal crimes against the person.⁹⁸ It is not entirely clear whether, for this purpose, it has to denote a state of mind⁹⁹ so that the accused recognised, in his/her own mind, a risk and chose to ignore it, or whether it

⁹⁶ See, for example, see Michael D Bayles, 'Character, Purpose, and Criminal Responsibility' (1982) 1 Law and Philosophy 5

⁹⁷ Findlay Stark, 'Rethinking Recklessness [2011] Juridical Review 163

⁹⁸ Ibid 180

⁹⁹ *Transco plc No 1 v HMA* (n 12)

can simply be inferred from the quality of the behaviour.¹⁰⁰ *MacAngus v HM Advocate*¹⁰¹ insisted on the need for recklessness in cases of death resulting from the supply of a controlled drug but it may also illustrate the vagaries of identifying the existence of the concept. The appeal court heard the conjoined appeals of Kevin MacAngus and of Michael Kane in relation to entirely separate incidents. MacAngus had supplied ketamine to a number of people known to him at their request and the deceased has selected how much to ingest (or 'snort' herself). Kane, on the other hand, administered heroin (by injection) to the deceased who was unable to do this for herself and, having seen her slump to the ground and having been informed that the other (assault) victim (who did not die) had never taken heroin before, he proceeded to inject him also. Are both equally reckless? The case was brought as a preliminary plea to the relevance of the charges so the outcome is not reported.

A further key point is that, unlike in English law, the deceased's voluntary intervention does not necessarily break the chain of causation between the supply and the death¹⁰² and the appeal court linked the causal question directly to the existence of recklessness. Lord Justice-General Hamilton said

Moreover, while causation is distinct from the *mens rea* of the accused, the foundation in Scots law of the charge of culpable homicide in cases of this kind (namely, recklessness) is not, in our view, wholly irrelevant. The law can with justification more readily treat the reckless, as against the merely unlawful, actor as responsible for the consequences of his actions, including consequences in the form of actings by those to whom he directs such recklessness. Reckless conduct, judged in the context of any vulnerability of

¹⁰⁰ Stark 184

¹⁰¹ *MacAngus* (n 16)

¹⁰² *Ibid*

the victim, may of its nature have a compelling force. ... Subject always to questions of immediacy and directness, the law may properly attribute responsibility for ingestion, and so for death, to the reckless offender.¹⁰³

Such a formulation effectively removes the agency of the victim in deciding to ingest a potentially harmful substance¹⁰⁴ and relies heavily on the accused's recklessness as a justification. English law has taken a different course and has determined that the voluntary act of the deceased, certainly in freely administering controlled drugs supplied by a defendant, negates any criminal liability on that defendant's part. Here, again, then, is a possible example of culpable homicide's liminal quality, occupying a space in relation to the destruction of the life of another which in another jurisdiction has been regarded as not criminally blameworthy.

Conclusion

Culpable homicide serves an important function in Scots criminal law. It offers two certainties: (1) it cannot be charged unless the accused's behaviour has brought about the death of someone else; and (2) it is always less serious than murder. As such, it covers a broad range of terrain sweeping up killings the seriousness of which places them on the borderline with murder at one edge and crossing a range of its own territory, through clear examples of its involuntary and voluntary forms, to reach fatal behaviours which might almost escape criminal liability altogether or at least the stigma carried by a homicide conviction in any form. Culpable homicide facilitates fair labelling within the homicide category, censures violations of the

¹⁰³ Ibid [45]

¹⁰⁴ For a fuller discussion see Alan Reed, 'Culpable Homicide and Drug Administration' (2009) 73 *Journal of Criminal Law* 207; and Lindsay Farmer, '*MacAngus (Kevin) v HM Advocate: 'Practical Yet Nonetheless Principled'?*' (2009) 13 *Edinburgh Law Review* 502

principle of the sanctity of life and recognises the gravity and the distress caused by taking life, even where this is not done intentionally or wickedly.

When approached on a murder / not murder binary, as an attempt to argue that the Crown has not proved the more serious crime, its own principles may be a little subsumed in the attempt to establish that those of murder have not been made out. Taken on its own terms, however, it offers a relatively reasoned set of formulations for determining when a killing is, as its name suggests, criminally culpable. In its involuntary forms, the absence of any reference to a mental attitude specifically encompassing killing demonstrates again the significance which it attaches to the act of ending another's life. Overall, it offers an interesting perspective on mechanisms for criminalising a generally abhorrent behaviour (killing) where this takes place in circumstances which the accused did not orchestrate for the purpose.