Between Accidental Killing and Murder: Culpable homicide

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I. Introduction

This article examines the crime of culpable homicide in Scotland, considering, in particular, the position which it occupies between non-criminal killings and murder. It will set out the law on culpable homicide looking at that position within the overarching structure of homicide law in Scotland. It will consider the breadth in seriousness of the forms of killing which culpable homicide encompasses; its different, rather informal, formulations (voluntary; involuntary lawful act; involuntary unlawful act); and its mental elements. This paper is part of the work undertaken by the author during a four-month secondment, from September until December of 2018,[1] to the Scottish Law Commission's project on the law of Homicide. It raises a number of questions about various aspects of the law, with an eye to possible reform. This approach of critical engagement with the legal principles is in keeping with that of the Commission's Discussion Paper on the Mental Element in Homicide[2] with which this paper was originally released.

II. What is culpable homicide?

It is necessary, first of all, to consider the legal meaning of culpable homicide. Unlike murder, it does not have a "classic" definition.[3] Instead, the law tends to describe rather than define it. Macdonald stated that culpable homicide was:

> "the name applied in law to cases where the death of a person is caused, or materially accelerated by the improper conduct of another, and where the guilt does not come up to the crime of murder."[4]

In modern cases, a dictum of Lord Rodger's in *Drury v HM Advocate*[5] is often referred to:

> "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."[6]

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[1] The paper was first published on the Scottish Law Commission's website in March 2021 (available at: Between Accidental Killing and Murder—Culpable Homicide—Professor Claire McDiarmid (*http://scotlawcom.gov.uk*) (last visited 1 March 2023).

[2] Scottish Law Commission, *Discussion Paper on the Mental Element in Homicide* (Discussion Paper No.172, 2021).

[3] For the definition of murder, see *HM Advocate v Purcell*, 2008 J.C. 131 at 137, at [9] (Lord Eassie).

[4] Sir John H.A. Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 1st edn (Edinburgh: W. Paterson, 1867), p.150 (footnote omitted).

[5] *Drury v HM Advocate*, 2001 S.L.T. 1013.

[6] *Drury v HM Advocate*, 2001 S.L.T. 1013 at 1017, at [13] (LJ-G Rodger).

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Along similar lines, in the case of *Transco*, it was noted that culpable homicide:

> "is unlawful killing of a criminal kind in circumstances where the crime does not amount to murder. It can occur in a wide variety of circumstances."[7]

Other definitions have been given in specific cases. In the context of assisted suicide, for example, (the then) Lord Justice-Clerk Carloway noted that:

> " … 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 death (*MacAngus v HM Advocate [2009 SLT 137*], Lord Justice-General (Hamilton), para 42). 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 determination in each individual case. That does not, however, produce any uncertainty in the law."[8]

These definitions, or descriptions, are all somewhat vague. Indeed, they give a sense, apparent also from culpable homicide's status as the residual category of the two homicide offences, of covering a very broad range of behaviour, all of it characterised by the fact that the accused has caused the death of another person in a way to which some (albeit sometimes little) blame attaches. The only other element of the crime which is similarly settled is that it is less serious than murder. Beyond this, the ways in which life can be ended are numerous and culpable homicide is so broad that it is possible for all and any of these to be caught within its ambit.

A few examples give a flavour of this breadth. Culpable homicide has been deemed relevant:

- where an accused went out armed with a knife to commit robbery but, in the end, his co-accused inflicted the fatal wound in a manner which he might not have anticipated;[9]
- where death has resulted from the supply and/or administration of controlled drugs, the deceased having voluntarily ingested these;[10]
- in so-called mercy killing cases;[11]
- where a passenger died in a train crash because certain risks inherent in his journey had not been guarded against;[12]
- where death resulted from a house fire started by the accused (and the deceased), with the intention of defrauding insurers;[13]
- where the accused manhandled the deceased out of a car;[14]
- where the death was caused by the accused leaving the deceased outside, exposed to the elements, following an assault;[15] and

[7] *Transco Plc v HM Advocate (No.1)* 2004 J.C. 29 at 47, at [35] (Lord Hamilton).
[8] *Ross v Lord Advocate*, 2016 SC 502 at 511, at [29].
[9] *Hopkinson v HM Advocate*, 2009 S.L.T. 292.
[10] *Lord Advocate's Reference (No.1 of 1994)* 1996 J.C. 76; *MacAngus v HM Advocate*, 2009 S.L.T. 137.
[11] *HM Advocate v Paul Brady*, Lord McFadyen/High Court, 14 October 1996, unreported (see "Brother in Mercy Killing Walks Free from Court" *The Independent*, 15 October 1996, p.2); *HM Advocate v Susanne Wilson* Lady Rae/Glasgow High Court, 9 January 2018, unreported; *Gordon v HM Advocate*, 2018 S.C.C.R. 79.
[12] *HM Advocate v Paton and McNab* (1845) 2 Broun 525.
[13] *Sutherland v HM Advocate*, 1994 J.C. 62.
[14] *Bird v HM Advocate*, 1952 J.C. 23.
[15] *HM Advocate v McPhee*, 1935 J.C. 46.

- where a woman killed her abusive husband with a kitchen knife while he dozed in a chair.[16]

Together with the very broad forms of definition, this survey raises questions as to the boundaries of culpable homicide in terms of its seriousness.

It is worth considering, then, whether a clear and specific definition (or definition*s* if it were to be redrawn, say, in different degrees), setting out the *actus reus* and *mens rea* of culpable homicide would be valuable. If so, what should that definition be?

III. Seriousness of culpable homicide

It is clear already that culpable homicide occupies broad territory in relation to seriousness. It includes cases where the accused was charged with murder but the conviction, in the end, was for the lesser offence and also some successful appeals against murder. It can also be charged in its own right.

At one end of the spectrum, then, it sits on the border with murder, catching killing which only just, sometimes for technical reasons, fails to be categorised as the more serious offence. The case of *Hopkinson*[17] might be regarded as an example. Here, two co-accused made a plan to rob the deceased. It was agreed that Hopkinson would carry a knife with which to threaten the victim if he did not hand over his wages when the co-accused demanded them. In the event, the co-accused also carried a knife with which she inflicted the fatal wound. Both co-accused were initially convicted of murder. Because, however, it had not been made clear to the jury that a culpable homicide verdict might be possible for Hopkinson (on the basis that the way in which the killing came about was different from the plan originally made), his murder conviction was overturned in favour of culpable homicide.

At the other end of the seriousness spectrum, culpable homicide is on a boundary with acts causing death which are regarded as insufficiently serious to constitute an offence of criminal homicide at all. Thus, for example, no criminal proceedings were brought in the case of Alison Hume who died in 2008 when her rescue from a mineshaft down which she had fallen was delayed due to health and safety concerns within the relevant fire and rescue service.[18] Her family was said to be "very upset" by the non-prosecution decision.[19] A further example is *Gay v HM Advocate*,[20] in which the jury returned a verdict of assault to severe injury on a culpable homicide charge where the accused had punched the victim once and death had ensued.[21] In the former case, there was no prosecution at all. In the latter, the Crown must have taken the view that an offence of homicide had been committed but this was not the view of the jury.

[16] *June Greig* Lord Dunpark/High Court May 1979 unreported (see Raymond Fraser, "Mercy and a Helping Hand" *The Herald* 5 June 1996, p.20).

[17] *Hopkinson v HM Advocate*, 2009 S.L.T. 292.

[18] See "No Prosecution over Alison Hume Ayrshire Mineshaft Death" BBC News 29 November 2013 (available at: *https://www.bbc.co.uk/news/uk-scotland-glasgow-west-25153177*) (last visited 2 March 2023).

[19] See "No Prosecution over Alison Hume Ayrshire Mineshaft Death" BBC News 29 November 2013 (available at: *https://www.bbc.co.uk/news/uk-scotland-glasgow-west-25153177*) (last visited 2 March 2023).

[20] *Gay v HM Advocate*, 2017 S.C.L. 913, reported in relation to sentencing.

[21] The appeal is reported only in relation to sentence, so that there is no indication of the legal reason for this decision, nor of the evidence presented on causation of the death.

Culpable homicide also occupies a middle ground of seriousness where it serves as a more serious alternative to certain statutory offences of causing death. Thus, where

> "on the trial on indictment … of a person for culpable homicide in connection with the driving of a mechanically propelled vehicle by him [sic] the jury are not satisfied that he [sic] is guilty of culpable homicide but are satisfied that he [sic] is guilty of [certain other offences including causing death by dangerous driving[22] and causing death by careless driving when under the influence of drink or drugs[23]], they may find him [sic] guilty of that offence."[24]

The relative blameworthiness is explained by Lord Abernethy in his charge to the jury in *McDowall v HM Advocate*:[25]

> "[The Crown] have … chosen to charge the common law offence of culpable homicide and 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."[26]

Culpable homicide, then, occupies very broad territory from killings which are so serious that they sit on the borderline with murder to those where, by contrast, the question is rather whether the accused deserves to be found guilty of a crime of homicide at all. It covers all criminally blameworthy killings in between, within which middle category the crime is also recognised as more serious than certain statutory offences of causing death. This again raises the question of whether there should be more gradations (degrees) of culpable homicide to recognise its breadth and to accommodate the widely varying seriousness of the killings which it catches. If so, by reference to what criteria should these be drawn? All its forms constitute a reflection of the importance placed on the sanctity of human life[27] and its breadth recognises the variety of circumstances in which this principle may be impugned. It is obvious, but important, to bear in mind that, in all cases where a culpable homicide charge is contemplated, a person has lost his/her life. This is an extremely serious consequence requiring both proper acknowledgment and fair calibration of the blameworthiness of any accused in relation to it.

IV. Forms of Culpable Homicide

In any given case, conviction will be for the (generic) crime of culpable homicide but there is, nonetheless, recognition within the law of two different forms of the crime, each with its own principles. These are voluntary and involuntary culpable homicide with the latter category being further divided into unlawful act and lawful act types. These categories have some roots in the history of the law[28] and their

[22] Road Traffic Act 1988 s.1.
[23] Road Traffic Act 1988 s.3A.
[24] Road Traffic Offenders Act 1988 s.23.
[25] *McDowall v HM Advocate*, 1999 S.L.T. 243.
[26] *McDowall v HM Advocate*, 1999 S.L.T. 243 at 245.
[27] See, for example, *Gordon v HM Advocate*, 2018 S.C.C.R. 79 at 93–94, at [47] and [48] (Lord Brodie).
[28] In his discussion of culpable homicide Hume makes reference to "slaughter … in the doing even of a *lawful act*" and to where "death ensue on the doing of some *unlawful* and prohibited *thing*" (David Hume, *Commentaries on the Law of Scotland Respecting Crimes*, 2nd edn (Edinburgh: Bell & Bradfute, 1819), Vol.I, p.228) (emphasis added).

appearance in Gordon's *Criminal Law*[29] has allowed them to pass into more general use today.[30]

The categories raise a number of questions: Are voluntary and involuntary (lawful and unlawful act) the best formulations of the sub-divisions of culpable homicide? Are they descriptively clear? Are there better forms of words which could be applied for this purpose? Are there better concepts to apply in sub-dividing the offence? Indeed, is sub-division required at all? Some of these issues will be addressed below.

1. Voluntary Culpable Homicide

i. Where Provocation or Diminished Responsibility Apply

Voluntary culpable homicide arises where the crime would, all things being equal, amount to murder but, usually, the accused is able to plead a defence—provocation or diminished responsibility—which allows a conviction for the lesser offence to be returned. This form is defined by the partial defences and therefore depends, to a considerable degree, on the way in which they are established in law. It is worth noting that provocation and diminished responsibility are the only formal mechanisms available in Scots law for the "reduction"[31] of murder to culpable homicide and both have historical origins—Hume discusses provocation[32] and diminished responsibility was first applied in 1867.[33] Accordingly, it may be worth considering, in a twenty-first century society, what circumstances would *always* merit the possible reduction of a murder charge to culpable homicide or, in other words, given a clean slate, what partial defences to murder would a twenty-first century society require? Indeed, even if the view is taken that diminished responsibility and provocation are still the only two appropriate partial defences, do their principles require reform and, if so, in what way?

The case of *Drury v HM Advocate*[34] is of significance in relation to the mental element of murder. Its judgment that a (simple) intention to kill is not sufficient for murder and a wicked intention is required[35] also has resonance in relation to voluntary culpable homicide and has created some uncertainty. The key question, in the voluntary culpable homicide context, was whether, if wicked intention to kill was, in some way, different from a simple intention to do so, there existed a further partial defence to murder of "lack of wickedness". The appeal court, in the

Macdonald talks of "homicide by the doing of any unlawful act" and "homicide resulting from negligence or rashness in the performance of lawful duty" (Sir John H.A. Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 1st edn (Edinburgh: W. Paterson, 1867, p.150)) (emphasis added).

[29] Sir Gerald H. Gordon, *The Criminal Law of Scotland*, (edited by James Chalmers and Fiona Leverick) 4th edn, (Edinburgh: W. Green, 2017) Vol.II, paras 31–01 and 31–03.

[30] See *MacAngus v HM Advocate*, 2009 S.L.T. 137 at 139, at [9] (LJ-G Hamilton); *Transco Plc v HM Advocate (No.1)* 2004 J.C. 29 at 31–36, at [3]–[8] (Lord Osborne) .and at 47-48, at [35] (Lord Hamilton).

[31] In *Drury v HM Advocate*, 2001 S.L.T. 1013, LJ-G Rodger regarded this terminology of "reduction" as "essentially misleading" (at 1018, at [17]), however, it has continued to be used—e.g. *Donnelly v HM Advocate*, 2018 S.L.T. 13 at 23, at [42] (LJ-C Dorrian), citing *Thomson v HM Advocate*, 1986 S.L.T. 281 at 284.

[32] David Hume, *Commentaries on the Law of Scotland Respecting Crimes*, 2nd edn (Edinburgh: Bell & Bradfute, 1819), Vol.I, pp.238–249.

[33] *Alexander Dingwall* (1867) 5 Irvine 466.

[34] *Drury v HM Advocate*, 2001 S.L.T. 1013.

[35] *Drury v HM Advocate*, 2001 S.L.T. 1013 at 1016, at [11] (LJ-G Rodger).

cases of *Elsherkisi*[36] and *Meikle*,[37] both decided subsequent to *Drury*, has moved to remove any scope for an undefined partial defence of this nature so that an intention to kill, absent either provocation or diminished responsibility, will, generally, signify murder. These cases curtailed any expansion beyond provocation and diminished responsibility and into "lack of wickedness" in the mechanisms by which a culpable homicide verdict may be returned on a murder charge. Nonetheless, the insistence in *Drury*, a full-bench decision of the appeal court, on the need for a wicked intention before murder can be established may still have resonance in relation, particularly, to so-called mercy killings.

2. *on policy / discretionary grounds*

Mercy killings have sometimes been treated as voluntary culpable homicide, forming part of a set of cases where the Crown, for policy reasons, decides to charge culpable homicide or, in the course of a murder trial, to accept a plea to the lesser offence, even though, strictly, the *mens rea* of murder could probably be made out.[38] In all circumstances, and in all cases, the Lord Advocate has a complete discretion as to which crime to charge (or not) in any given situation. As Lord Cameron stated:

> "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 against whom to launch prosecution and upon what charges. It is for him to decide in which Court they shall be prosecuted. It is for him to decide what pleas of guilt he will accept and it is for him to decide when to withdraw or abandon proceedings. Not only so, even when a verdict of guilt has been returned and recorded it still lies with the Lord Advocate whether to move the Court to pronounce sentence, and without that motion no sentence can be pronounced or imposed."[39]

It is therefore both *intra vires*, and legally acceptable for culpable homicide to be substituted for murder by the Crown where circumstances indicate this. Gordon's *Criminal Law*[40] provides its own list of the "unofficial circumstances" which may lead to such decisions being taken, viz: "infanticide, euthanasia, suicide pacts, necessity, excess of duty … omissions" and "the killing of a violent partner in circumstances which do not give rise to a recognised defence".[41] Writing in 2011 (and, at this stage, referring only to the first six categories), James Chalmers stated that:

[36] *Elsherkisi v HM Advocate*, 2011 S.C.C.R. 735, at 742–744, at [12]–[13] (Lord Hardie).

[37] *Meikle v HM Advocate*, 2014 S.L.T. 1062, at 1065–1066, at [17] (Lord Drummond Young).

[38] Mercy killings, sometimes termed assisted dying, and assisted suicide are excluded from the scope of the Scottish Law Commission's Discussion Paper on the Mental Element in Homicide (see para.1.24 of Discussion Paper No.172, 2021).

[39] *Boyle v HM Advocate*, 1976 J.C. 32 at 37.

[40] Sir Gerald H. Gordon, *The Criminal Law of Scotland*, (edited by James Chalmers and Fiona Leverick) 4th edn, (Edinburgh: W. Green, 2017) Vol.II, paras 31–01 and 31–03.

[41] Sir Gerald H. Gordon, *The Criminal Law of Scotland*, (edited by James Chalmers and Fiona Leverick) 4th edn, (Edinburgh: W. Green, 2017) Vol.II, at para.31–01 (footnotes omitted), referring back to a fuller discussion in the 3rd edition at paras 25-02–25-07 and to the article by Clare Connelly, "Women Who Kill Violent Men", 1996 Jur. Rev. 215.

> "[t]here is fairly clear evidence for the first of these three categories, although given that they involve the exercise of discretion they cannot be regarded as firm categories. In particular, it should not be assumed that all cases of euthanasia will necessarily result in the Crown accepting a plea of guilty to culpable homicide. As regards the other two categories, they arise in part because of the absence of legislation analogous to that which exists south of the border. Scots law has no equivalent of the Suicide Act 1961 or the Infanticide Act 1938. … The remaining categories are, however, open to more doubt."[42]

In fact, it is not particularly clear whether all, or the majority, of cases falling into these seven categories would, currently, be treated in this way—or whether these continue to be the appropriate sets of circumstances for discretionary return of a culpable homicide verdict. There appears, for example, to have been at least one case where a defence of necessity was successful in bringing about (complete) acquittal of the murder charge.[43] The decision to find guilt only of culpable homicide rather than murder in such cases may often recognise the justice of the situation, and the public interest, but it does not necessarily illuminate the law in these areas, nor is it clear why these areas, as opposed to others, are, apparently, recognised as ripe for this discretionary treatment. The case of *Gordon*,[44] then, is unusual in offering an insight into the underpinning legal principles and reasoning in one such case (a mercy killing) though it is an appeal only against sentence.

3. *Mercy Killings*

The facts of *Gordon* are as follows:

The appellant was a 67-year-old man of unblemished good character. He and his wife had been married for 43 years; they were a devoted couple. The appellant intentionally smothered his wife with a pillow. She was in extreme pain due to a terminal illness; the pain was intractable and had become intolerable. The deceased decided that she would end her life at home by taking an overdose of the pain relief medication she had been prescribed. The appellant knew that the deceased had decided to end her life in this way and he agreed to her doing so. The deceased had a terror of any intervention which involved hospital admission. In the early hours of the morning the appellant brought the deceased's medication to her and it is likely that he assisted in its administration. Sometime later he telephoned his children. They came to the house where the appellant explained that the tablets had not been working and that he had been unable to bear seeing his wife in such pain. When the police arrived, he said to them that he had put a pillow over her head to end her life.

The post mortem indicated that Mrs Gordon had taken sufficient quantities of her pain-relieving drugs potentially to bring about her own death. Had Mr Gordon not confessed,

[42] James Chalmers, "Partial Defences to Murder in Scotland: An Unlikely Tranquillity" in Alan Reed and Michael Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate, 2011), p.167 at pp.169–170 (footnotes omitted).

[43] *HM Advocate v Anderson* (2006) unreported. See Pamela R. Ferguson and Claire McDiarmid *Scots Criminal Law: A Critical Analysis*, 2nd edn (Edinburgh: Edinburgh University Press, 2014), p.555, para.21.4.6.

[44] *Gordon v HM Advocate*, 2018 S.C.C.R. 79.

> "the available medical evidence would not have led to the conclusion that he had [smothered her with a pillow]. The level of prescription drugs identified at post mortem would have been sufficient to explain her death."[45]

The Crown indicted the appellant on a charge of murder. A psychiatric report instructed by the Crown did not disclose a basis for a plea of diminished responsibility. In due course, the defence obtained a separate psychiatric report. This concluded that, at the time of the incident, the appellant had been suffering from a depressive episode that, in the opinion of the psychiatrist, constituted an abnormality of mind. In the report author's opinion, it would be appropriate to put to the jury whether the severity of the mental disturbance was sufficient to reduce the appellant's responsibility from full to partial and constitute diminished responsibility. This report did not alter the Crown's view of the case or, it would seem, the opinion of the psychiatric expert they had instructed.

The case accordingly went to trial on the original charge of murder. The Advocate Depute changed his view once he had led the evidence of the appellant's daughter. He then accepted the previously tendered plea of guilty to the offence of culpable homicide.

In his judgment, Lord Brodie stated that:

> "what the appellant pled guilty to was what is often described as a "mercy killing", in other words the termination of a life motivated by the wish to spare the deceased further suffering."[46]

Two other mercy killing cases are referred to in the judgment: *HM Advocate v Susanne Wilson*[47] and *HM Advocate v Paul Brady*[48] in each of which the Crown accepted a plea of guilty to culpable homicide and the accused was admonished.[49] In *Gordon*, the advocate depute only accepted this plea following evidence in the murder trial given by the accused's daughter and both he, and the court, emphasised that this course of action had been taken on the grounds of diminished responsibility—as opposed to for unspecified reasons of policy.[50]

The initial charge of murder was supported as correct in law by the appeal court because, they stated, murder is characterised by an intention to kill.[51] As noted previously, however, *Drury* states that an intention to kill is not sufficient and a wicked intention is required.[52] In addition, in *Drury*, Lord Cameron of Lochbroom, in discussing provocation, states, more generally, that "wickedness of heart", to use Hume's phrase, … is [a] necessary element for murder."[53] Lord Nimmo Smith affirms this statement.[54] A key site of incompatibility between *Drury* and *Gordon* is this issue of actuation by wickedness of heart. Manifestly, this is lacking in mercy killings, which are motivated by compassion. It would be hard to find a clearer example of this than the facts of *Gordon*. The view in *Gordon* (intention

[45] *Gordon v HM Advocate*, 2018 S.C.C.R. 79, at 85, at [22] (Lord Brodie).
[46] *Gordon v HM Advocate*, 2018 S.C.C.R. 79 at 90, at [36].
[47] *HM Advocate v Susanne Wilson* Lady Rae/Glasgow High Court, 9 January 2018, unreported.
[48] *HM Advocate v Paul Brady*, Lord McFadyen/High Court, 14 October 1996, unreported.
[49] See *Gordon v HM Advocate*, 2018 S.C.C.R. 79 at 89, at [32] and at 95–96, at [54].
[50] *Gordon v HM Advocate*, 2018 S.C.C.R. 79, particularly at 90–91, at [38] and [39].
[51] *Gordon v HM Advocate*, 2018 S.C.C.R. 79 at 90, at [37].
[52] *Drury v HM Advocate*, 2001 S.L.T. 1013 at 1016, at [11] (Lord Rodger); at 1029, at [18] (Lord Johnston); and at 1030–1031, at [3] (Lord Nimmo Smith).
[53] *Drury v HM Advocate*, 2001 S.L.T. 1013 at 1025, at [6].
[54] *Drury v HM Advocate*, 2001 S.L.T. 1013 at 1030–1031, at [3].

to kill is necessary and sufficient) has the benefit of clarity; by contrast *Drury* (wicked intention—actuation by wickedness of heart—is needed), has presented a number of conceptual challenges. On the other hand, *Gordon* is an appeal against sentence decided by two judges;[55] *Drury* is a full bench decision of five judges.[56] It has been suggested that the only crimes in relation to which the addition of the word "wicked" to the *mens rea* of murder may assist are so-called "mercy killings" where the accused clearly does intend to kill, but for benign reasons.[57]

Gordon indicates that killing to relieve suffering constitutes murder because the intention to kill is so plain. The moral and cultural questions raised are complex and deeply rooted in individual values and the Scottish Parliament has declined to legislate specifically in this area twice in recent years.[58] Questions arising here are whether the position in relation to assisted dying in its various forms fits appropriately into the overarching common law framework of homicide and, if not, what bespoke legislation might be put in place. The area is of such sensitivity that it would require intensive investigation and consultation in its own right.[59] The tension between the decisions in *Drury* and in *Gordon* suggests, however, that the current position is not clear. At the very least, this should be resolved. Consideration should be given to whether mercy killing can be appropriately accommodated within the general common law scheme for homicide and, if not, what should be done about it.

4. *Other forms of Discretionary Voluntary Culpable Homicide*

In *Gordon*, the High Court took a definite view on the constituent elements of murder—that any killing characterised by intention to kill constituted murder unless a recognised partial defence applied. It is unclear how this somewhat "hardline" approach might affect other cases where the justice of the situation could be said to operate in favour of a culpable homicide verdict. For example, both James Chalmers[60] and Clare Connelly[61] have documented a tendency to accept a plea of culpable homicide where there is evidence that the accused has been the victim of long-term abuse at the hands of the deceased.[62] The ways in which a life

[55] Lord Brodie and Lord Turnbull.

[56] LJ-G Rodger, Lord Cameron of Lochbroom, Lord Johnston, Lord Nimmo Smith and Lord Mackay of Drumadoon.

[57] Pamela R. Ferguson and Claire McDiarmid *Scots Criminal Law: A Critical Analysis*, 2nd edn (Edinburgh: Edinburgh University Press, 2014), p.262, para.9.11.6.

[58] End of Life Assistance (Scotland) Bill introduced by Margo Macdonald MSP in January 2010 and defeated in December of that year. (See Scottish Parliament website: https://www.parliament.scot/bills-and-laws/bills/end-of-life-assistance-scotland-bill *f*) (last visited 2 March 2023). Assisted Suicide (Scotland) Bill introduced by Margo Macdonald MSP in 2013 and defeated in May 2015 (see Scottish Parliament website: *https://www.parliament.scot/bills-and-laws/bills/assisted-suicide-scotland-bill) (last visited 2 March 2023)*[59] Indeed, as flagged in fn.38 above, mercy killings, assisted dying, and assisted suicide are excluded from the scope of the Scottish Law Commission's Discussion Paper on the Mental Element in Homicide (see para.1.24 of Discussion Paper No.172, 2021).

[60] James Chalmers, "Partial Defences to Murder in Scotland: An Unlikely Tranquillity" in Alan Reed and Michael Bohlander (eds) *Loss of Control and Diminished Responsibility: Domestic, Comparative and International Perspectives* (Ashgate, 2011), p 167 at pp.171–172.

[61] Clare Connelly, "Women who Kill Violent Men", 1996 Jur. Rev. 215.

[62] This issue is often subsumed in discussions of provocation, being a considered a form of "cumulative provocation". Some commentators have suggested the need for a bespoke defence in such circumstances. For relevant discussions see Ilona C. M. Cairns, "'Feminising' Provocation in Scotland: the Expansion Dilemma" 2014 Jur. Rev. 237; Claire McDiarmid "Don't Look Back in Anger: The Partial Defence of Provocation in Scots Criminal Law" in James Chalmers, Fiona Leverick and Lindsay Farmer (eds) *Essays in Criminal Law in Honour of Sir Gerald Gordon* (Edinburgh: Edinburgh University Press, 2010) p.195. The issue is perhaps most appropriately considered in relation to the content of the partial defences and will not be discussed further here.

can be destroyed are so numerous that it seems likely that there will always be cases which fall on the borderline between murder and culpable homicide where circumstances would suggest that the lesser verdict was indicated. The Crown's discretion can allow for a compassionate, morally grounded response. In his commentary on the case of *Gordon* in the *Scottish Criminal Case Reports*,[63] Sir Gerald Gordon notes that:

> "it is to be hoped that the idea of voluntary culpable homicide as killing in any mitigatory circumstances, including circumstances which meet with sympathy in the eyes of the court, does not disappear".

A number of issues arise from this including whether it is valuable for there to continue to be an ability to return a culpable homicide verdict where, strictly, the crime of murder is made out, but where the justice of the situation seems to require this. Assuming this is accepted, the view might be taken that the law should, nonetheless, specify some broad parameters within which this can be done making it necessary to define these. A more overarching question is whether voluntary culpable homicide should be specifically defined (and, thereby, recognised as a formal legal category) and, if so, how this should be done.

5. Involuntary Culpable Homicide

If voluntary culpable homicide frequently straddles the liability line with murder, its involuntary form tends to operate at a level of lesser seriousness, ensuring that the law properly reflects the basic fact of having caused death (arguably the most serious possible consequence) in a (criminally) blameworthy way. It arises where the accused, in the course of some other activity (sometimes a completely legal one), causes the death of another person. The level of blameworthiness may be quite low and, in fact, as will be discussed below, the *mens rea* element makes no reference at all to the causing of death or the accused's attitude to this. The *actus reus* then—the destruction of life—does the work of acknowledging that the accused's liability is for killing.

6. *Unlawful Act Type*

In principle, involuntary unlawful act culpable homicide arises where, in the course of committing another crime, the accused causes death. It is a form of constructive liability in that the accused engages voluntarily in one crime (the underlying unlawful act) and then, by virtue simply of the death being caused by him/her whilst so engaged, liability for culpable homicide arises.

Hume identifies two sets of circumstances in which culpable homicide arose from an unlawful act:

> "if death ensue on the doing of some unlawful and prohibited thing; such as the discharging of fire-arms, or the throwing of stones or fire-works in the streets of a city, or the whipping of a horse there, so that it springs forward and kills a passenger."[64]

[63] *Gordon v HM Advocate*, 2018 S.C.C.R. 79 at 97.
[64] David Hume, *Commentaries on the Law of Scotland Respecting Crimes*, 2nd edn (Edinburgh: Bell & Bradfute, 1819), Vol.I, p.228.

and

> "where death ensues by misadventure, without any intention to kill, and in an unforseen and unlikely way; but withal in pursuance of a purpose to do some sort of bodily harm."[65]

His first set of examples all relate to the accused doing an act which is, manifestly, dangerous as well as illegal. It is likely that these would be subsumed into lawful act type culpable homicide (which requires recklessness) in today's law. Nonetheless, Macdonald derives from Hume's statements, a category of:

> "homicide by the doing of *any* unlawful act, or any rash and careless act, from which death results, though not foreseen or probable"[66]

The modern law has examined the question of whether death resulting from any offence whatsoever could be culpable homicide. In *Lord Advocate's Reference (No.1 of 1994)*[67] the death arose from supply of a controlled drug which the deceased voluntarily ingested. The trial judge found that the accused had no case to answer and the Lord Advocate raised a Reference as to whether this decision was correct and, thereby, for clarity on the law of culpable homicide. The indictment libelled supply of the drugs, which the deceased (and others) ingested, as a consequence of which it said that the deceased died and the accused killed her.[68] The accused had purchased amphetamines, at the request of the deceased, and supplied these to the deceased and others. The deceased herself decided the quantity which she ingested, which proved fatal. The key issue was whether these acts amounted to culpable homicide. In determining that such acts could constitute the crime, Lord Justice Clerk Ross said:

> "we recognise that … there is in [the culpable homicide] charge … no express averment of culpable and reckless conduct. However in [that] charge … it is libelled that the supply was unlawful, and that the supply was of a controlled and potentially lethal drug. It is also libelled that the drug was supplied in a lethal quantity. It is clear from what is said in the reference and in the trial judge's report that X [the accused] supplied a quantity of the controlled drug to a number of people including the deceased, and that the purpose of that supply was so that the deceased and others could take doses of the drug. In our opinion such conduct on the part of X is the equivalent of culpable and reckless conduct. No doubt the extent of any injurious consequences would depend upon the quantity of the drug which the deceased ingested, but since the purpose of the supply was obviously for the drug to be ingested by those to whom it was given by X, it does not appear to us that this affects the matter. … [T]he causal link is not broken merely because a voluntary act on the part of the recipient of the drugs was required in order to produce the injurious consequences."[69]

[65] David Hume, *Commentaries on the Law of Scotland Respecting Crimes*, 2nd edn (Edinburgh: Bell & Bradfute, 1819), Vol. I, p.229.
[66] Sir John H.A. Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 1st edn (Edinburgh: W. Paterson, 1867), p.150 (emphasis added).
[67] *Lord Advocate's Reference (No.1 of 1994)* 1996 J.C. 76.
[68] *Lord Advocate's Reference (No.1 of 1994)* 1996 J.C. 76.
[69] *Lord Advocate's Reference (No.1 of 1994)* 1996 J.C. 76 at 81.

When this issue was considered again, more than a decade later, this decision in the *Lord Advocate's Reference* was said to be "open to interpretation" by the five-judge bench in *MacAngus v HM Advocate*,[70] one of the leading cases on culpable homicide. *MacAngus* was constituted by two separate conjoined cases where the death arose, from supply (in the first) and administration (in the second) of a lethal quantity of a controlled drug. It was noted in *MacAngus* that the dictum quoted above, from the *Lord Advocate's Reference*, had led to the perception that a statutory contravention leading to death was sufficient for conviction of unlawful act culpable homicide:

> "an issue debated before us was whether, on the assumption that recklessness was not proved, the commission of an unlawful act (… a contravention in these cases, … of s 4(3)(b) of the Misuse of Drugs Act 1971) resulting in death would entitle a jury to return a verdict of culpable homicide. It was suggested that there was a perception in the profession that the decision and reasoning of the court in Lord Advocate's Reference (No 1 of 1994) carried the implication that a verdict of culpable homicide could be returned on that basis."[71]

A similar point was made by James Chalmers in his commentary (written five years before *MacAngus*) on *Transco*, a leading case on *lawful* act culpable homicide, which arose from a fatal gas explosion. The Crown attempted, in the end unsuccessfully at least for this homicide offence, to prosecute Transco Plc, the company supplying the gas. Chalmers said:

> "The indictment served on Transco was quite clearly based on an allegation of lawful act culpable homicide. However, there is arguably an alternative route to succeeding in a prosecution for corporate culpable homicide, which is this. If Transco was guilty of conduct amounting to an offence under the [Health and Safety at Work etc Act] 1974 …, and this conduct caused four deaths, then is this not arguably *unlawful* act culpable homicide? The scope of unlawful act culpable homicide in Scots law is less than clear, but it seems that the High Court has been prepared to accept that a theft which causes a death may be unlawful act culpable homicide (without, therefore, the need to prove the *mens rea* required for lawful act culpable homicide).[72] It is difficult, therefore, to see why a breach of sections 3 and 33(1) of the 1974 Act, which carry with them a much greater risk of personal injury or death than does theft, should not also provide a foundation for the offence. It may be, of course, that a charge of unlawful act culpable homicide cannot be based on conduct which is an offence under statute rather than common law, but this is a question which has yet to be determined by the courts."[73]

While the law lacked certainty, as Chalmers says, it is clear that there was at least an argument at this time (1990s-2000s) that *any* unlawful act was sufficient.

[70] *MacAngus v HM Advocate*, 2009 S.L.T. 137 at 145, at [29] (LJ-G Hamilton).
[71] *MacAngus v HM Advocate*, 2009 S.L.T. 137 at 143, at [23].
[72] Citing *Lourie v HM Advocate* 1988 S.C.C.R. 634.
[73] James Chalmers, "Corporate Culpable Homicide: Transco Plc v HM Advocate" (2004) 8 *Edinburgh Law Review* 262 at 265 (footnotes omitted).

The application of the law in this way—such that death resulting from any unlawful act was automatically culpable homicide—could, potentially, draw a very broad range of actors into the position of being convicted of a homicide offence. If the act causing death is clearly an accident, but it occurs while the accused is technically committing an unrelated criminal offence, it might be thought to incur too much blame to convict of culpable homicide. If, for example, the accused is sitting in a tree in order to commit voyeurism, and the branch breaks so that s/he falls onto, and kills, a passer-by, his/her culpability *for the death* is, arguably, no different than if s/he had been sitting in the tree to read a book. The only *animus* was directed towards the voyeurism victim. Similar considerations might apply if the accused is in a building to hide goods for the purposes of reset and the floor gives way so that s/he falls through and kills someone below. This interpretation of unlawful act type seems over-inclusive. It does, however, focus attention on the question of whether it is, indeed, *in*appropriate for the law to recognise conduct taking place during the commission of *any* offence which causes death as culpable homicide. If it is accepted that some, but only some, criminal conduct causing death should constitute culpable homicide, then which offences should be regarded as appropriate unlawful acts for this purpose? Most radically of all, is there a case for excising the unlawful act form altogether from the law?

In the event, the court in *MacAngus* held that the possible, very broad, reading of the *Lord Advocate's Reference* allowing any offence whatsoever to constitute the basis for unlawful act type was incorrect. Lord Justice-General Hamilton said:

> "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. In particular, there seems no basis for such a charge founded simply on a statutory contravention resulting in death. If, of course, the contravention is reckless, such a charge will be well founded".[74]

Following *MacAngus*, then, the boundaries of unlawful act culpable homicide were somewhat clarified in that it is now specified that the unlawful conduct must be directed against the victim "as in assault or analogous cases". It seems that no subsequent case has provided further definition of this phrase. In an assault, there is an "attack upon the person of another"[75] with the "evil intention"[76] of causing immediate bodily harm or the fear of immediate bodily harm.[77] It is not clear which (if any) other offences are obviously analogous (though causing reckless injury will be discussed below in relation to lawful act culpable homicide). Nonetheless, this dictum confirms that death arising from assault, without any other element, continues to constitute culpable homicide.

[74] *MacAngus v HM Advocate*, 2009 S.L.T. 137 at 145, at [29].
[75] Sir John H.A. Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 1st edn (Edinburgh: W. Paterson, 1867), p.176.
[76] Sir John H.A. Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 1st edn (Edinburgh: W. Paterson, 1867), p.177.
[77] See *Smart v HM Advocate*, 1975 J.C. 30.

7. *"One-punch" homicides*

A particular issue arises around so-called "one-punch" homicides. In relation to causation, Scots law adheres to the "thin skull" rule—or the rule that the accused must take the victim as s/he finds him/her.[78] This, combined with the principle that the accused is responsible for the consequences of his/her initial wrongful act, and the constructive nature of liability for unlawful act culpable homicide, can mean that even an almost negligible level of intended violence, directed against the victim, may result in a culpable homicide conviction if it can be proved to have caused death.[79] Thus, the blameworthiness of the accused specifically for his/her intended act (albeit of violence against another person) may be considered to be rather less than the consequence—death. In other words, "there is a wide disparity between the culpability of the offender and the harm that he [sic] has caused".[80]

Conviction of a homicide offence is a response to the harm (death). While the legal principles lead to that outcome, it may, on occasion, seem to be (too) extreme. There is also the possibility that a jury will take that view and, effectively, "nullify" the law by returning a verdict of not guilty or guilty of a lesser offence.[81] In *Gay v HM Advocate*,[82] the accused punched the deceased, who suffered from a number of other underlying medical conditions, once, fracturing his jaw and he later died in hospital. The jury returned a verdict of guilty of assault to the severe injury on the culpable homicide charge. It should be noted that the case is reported only as an appeal against sentence so it is possible that the jury did not feel that causation of death was proved. Equally, it may have determined that culpable homicide was too extreme an outcome.[83]

This form of culpable homicide has not generated a high volume of commentary or, indeed, criticism in Scotland though it has been discussed elsewhere.[84] In relation to the law in New Zealand, another view of the possible seriousness of the conduct has been put forward:

> "Where a defendant kills a victim by deliberately assaulting them, not intending to kill but nonetheless intending them some harm that is more than merely transitory and trifling, some might consider the killing more morally blameworthy than manslaughter cases constituted by criminal negligence. The higher degree of moral blame is attributed to the *intention to cause harm* by assaulting someone."[85]

To some extent, this merely demonstrates, again, the fluidity of the categories in homicide law and the difficulty of drawing the necessary "fine lines and distinctions".[86] In Scotland, an initial question would be whether such an act met

[78] See Pamela R. Ferguson and Claire McDiarmid *Scots Criminal Law: A Critical Analysis*, 2nd edn (Edinburgh: Edinburgh University Press, 2014), pp.181–182, para.7.3.4. Also, *Bird v HM Advocate*, 1952 J.C. 23.

[79] *Bird v HM Advocate*, 1952 J.C. 23—though it appears that the accused had initially terrified the victim prior to the violence (which consisted of trying to pull the deceased out of a car).

[80] *R v Furby* [2006] 2 Cr. App. R. (S) 8 at 69, at [11] (Lord Phillips CJ).

[81] For a discussion, see Michael Huemer, "The Duty to Disregard the Law" (2018) 12 *Criminal Law and Philosophy* 1.

[82] *Gay v HM Advocate*, 2017 S.C.L. 913.

[83] The case is also discussed above—see text accompanying fn.20.

[84] In relation to England and Wales, see, for example, Barry Mitchell, "Minding the Gap in Unlawful and Dangerous Act Manslaughter: A Moral Defence for One-Punch Killers" (2008) 72 *Journal of Criminal Law* 537.

[85] D. Tan, "One-Punch Killers" 2018 *New Zealand Law Journal* 225, at 256 (emphasis in original).

[86] This is the title of a book on homicide in English law (subtitled) *Murder Manslaughter and the Unlawful Taking of Human Life* by Terence Morris and Louis Blom-Cooper (Waterside Press, 2011).

the standard of wicked recklessness for murder. It is true that the range of sentencing options available on a culpable homicide conviction does mean that it is possible to respond in a calibrated way to the perceived blameworthiness of the accused. The sentencing judge has available to him or her the full range of sentencing options for a common law offence, from an absolute discharge at one end of the scale to the imposition of a discretionary life sentence at the other. This is, however, at the level of punishment only and not guilt.

It is important, then, to consider, whether further principles are needed in Scots law for fairly balancing culpability (the accused's actual blameworthiness for the fatal incident) with the harm (death) and if so what these should be? Specifically with so-called "one punch" homicides in mind, should these generally continue always to be charged as culpable homicide—indeed, is it appropriate that death arising from any act of intentional violence, however minor, should always constitute culpable homicide?

Overall then, the law may need to develop criteria to apply in determining which forms of personal violence causing death should be prosecuted as an offence of homicide. If these were to be calibrated in terms of seriousness how might this be done and what roles might intention (to cause bodily harm) and / or foreseeability (of death) play?

In addition, the way in which the mental element of the underlying assault is simply transferred to ground the homicide charge will be considered further below, following discussion of lawful act type culpable homicide.

8. *Lawful Act Type*

Involuntary lawful act type culpable homicide arises where, whilst carrying out an activity which is lawful, the accused causes the death of another person. The Crown must also prove the accused's recklessness. Hume notes:

> "that it is culpable homicide, where slaughter follows in the doing even of a lawful act; if it is done without that caution and circumspection, which may serve to prevent harm to others."[87]

Similarly, Macdonald states that a form of culpable homicide is:

> "homicide resulting from negligence or rashness in the performance of lawful duty"[88]

In the modern law, because, as noted above, *MacAngus* has restricted *un*lawful act type to behaviour analogous to assault and directed against the accused, lawful act type also encompasses death arising in the course of *offences* which are not directed against the accused in this way. Indeed, in *MacAngus*, Lord Justice General Hamilton stated that committing a mere "statutory contravention" which resulted in death could *not* (without recklessness) constitute culpable homicide. [89]

[87] David Hume, *Commentaries on the Law of Scotland Respecting Crimes*, 2nd edn (Edinburgh: Bell & Bradfute, 1819), Vol.I, p.228.

[88] Sir John H.A. Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, 1st edn (Edinburgh: W. Paterson, 1867), p.150.

[89] See text accompanying fn.74 above.

This is also apparent, in relation to the common law, in the case of *Sutherland v HM Advocate*,[90] where the trial judge advised the jury that wilful fire-raising to defraud insurers,

> "would not do [as the basis of unlawful act culpable homicide] in the circumstances of this case, because an intention to defraud the insurers was not an offence against the person"[91]

He went on to

> "emphasise[…] that this [the act having been "done with a wicked disregard for the safety of other people"][92] was the only test for culpable homicide in this case, and that if they were not satisfied that the fireraising was reckless as he had defined it they would require to find the appellant not guilty of culpable homicide."[93]

The appeal court apparently had no issue with these directions.

Thus, while unlawful act type is a form of constructive liability arising from the assault, lawful act type could be said to offer the accused some greater degree of protection because, to achieve a conviction, the Crown must prove this further fault element of recklessness. Given that this form incorporates some killings arising from acts which are, technically, criminal offences, it may not be appropriate to continue to refer to the category as "lawful act" type.

9. *The role of recklessness*

It is clear from all of these statements—historical and contemporary—that the transformative element—the concept which, death having been caused, turns otherwise lawful behaviour into an offence of homicide—is the accused's lack of caution, or rashness, or disregard for consequences in carrying it out. In Scots law, this concept is recklessness. In *MacAngus*[94] (albeit specifically in the context of the supply / administration of controlled drugs) it was made clear that the Crown had to prove recklessness for lawful act culpable homicide to be made out. This was also stated in *Transco*.[95] It is important, therefore, to understand the role played by recklessness and then to consider how it is defined in the law.

Recklessness constitutes the fault element in lawful act culpable homicide. It is the legal mechanism by which it is determined that the accused is sufficiently blameworthy to be held responsible in criminal law for causing death. Death is, self-evidently, a serious, irreversible, strongly censured harm. It is therefore important that the criminal law should not respond solely to that but should pay proper attention to the quality of the accused's actual agency in bringing it about. In other words, recklessness needs to be defined in a way which ensures that the accused *is* appropriately blameworthy to be convicted of killing.

[90] *Sutherland v HM Advocate*, 1994 J.C. 62.
[91] *Sutherland v HM Advocate*, 1994 J.C. 62 at 65 (LJ-G Hope).
[92] This form of words as a definition of recklessness does not seem to have been used in any other case.
[93] *Sutherland v HM Advocate*, 1994 J.C. 62 at 66.
[94] *MacAngus v HM Advocate*, 2009 S.L.T. 137 at 145, at [30] (LJ-G Hamilton).
[95] *Transco Plc v HM Advocate (No.1)* 2004 J.C. 29 at 32–34, at [4] (Lord Osborne); at 47–49, at [35]–[38] (Lord Hamilton).

It has been said that the criminal law should be a "last resort".[96] According to Douglas Husak:

> "The criminal law is different and must be evaluated by a higher standard of justification because it burdens interests not implicated when other modes of social control are employed. … Even when the state has a good reason to discourage a given type of behaviour, it may lack a good reason to subject those who engage in it to the hard treatment and reprobation inherent in punishment."[97]

Given the high level of condemnation to which a conviction for *killing* may give rise, the latter point has particular resonance in the lawful act culpable homicide context. The law must require a sufficient level of blameworthiness on the part of the accused properly to balance the serious harm which s/he has caused (though without necessarily having incurred a high level of fault—or, in other words without having done anything too terribly wrong) so that conviction is fair. Equally, it must not lose sight of the harm of a death. This is the role of recklessness. A question arising is whether recklessness does, indeed, constitute the appropriate fault element for involuntary lawful act culpable homicide or, if not, how this element might instead be constituted.

10. *The development of the fault element in Scots law*

It is necessary, therefore, to look at the role and meaning of recklessness in Scots law. A dictum in *Paton v HM Advocate*[98] indicates that, at one time, the law was weighted towards punishing the death and that a shift to a recklessness requirement began to take more account of the accused's actual blameworthiness. *Paton* was an early case of culpable homicide arising from driving a car. In it, Lord Justice-Clerk Aitchison stated:

> "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 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."[99]

The older case of *HM Advocate v Paton and McNab*[100] suggests that the accused was, at that time (1845), responsible for culpable homicide if a death resulted where s/he had not guarded against any risk at all arising from the activity in which

[96] Douglas Husak, "The Criminal Law as Last Resort" (2004) 24 *Oxford Journal of Legal Studies* 207.
[97] Douglas Husak, "The Criminal Law as Last Resort" (2004) 24 *Oxford Journal of Legal Studies* 207 at 234.
[98] *Paton v HM Advocate*, 1936 J.C. 19.
[99] *Paton v HM Advocate*, 1936 J.C. 19 at 22.
[100] *HM Advocate v Paton and McNab* (1845) 2 Broun 525.

s/he was engaged. In this case, the deceased, Thomas Cooley, had missed the scheduled Glasgow to Edinburgh train and had, effectively, chartered a "special train" either to take him to Edinburgh or to catch up with the scheduled one. The rolling stock from which this special train was made up had been ear-marked, some days previously, as in need of maintenance by the accused, William Paton, a superintendent of locomotives and he was indicted for allowing it to be used in its poor state, for this journey. Richard McNab, the second accused, was the engineman who had failed to check the condition of the engine before setting off and, specifically, had failed to ensure that it carried a warning light. The death arose when the next scheduled train did not see the special one (which had ground to a standstill) and crashed into the back of it, an outcome which might have been averted had the special train been showing a warning light.

In his charge to the jury, the Lord-Justice Clerk (Hope) made the following points:

> "The general rule is, that every person, placed in a situation in which his acts may affect the safety of others, must take all precautions to guard against the risk to them arising from what he is doing."[101]

…

> "Directors to the lowest officer concerned in the matter, are bound to provide for and attend to the safety of those whom they convey. [After itemising certain common risks,] … Now, all risks from such causes may be avoided, and must be guarded against by a stern and vigorous enforcement of the criminal responsibility of one and all concerned, by whom, in whatever situation, anything is neglected or omitted, by which the safety of others is endangered. Every person connected with a railway must perform his functions regularly and systematically. The safety of the railway system depends entirely on the regularity and punctuality and attention with which each and every person performs his own duties at the right time, and in the right manner. Each must depend on the other being at his post, and performing his duties. The neglect of any one officer in any one particular, renders useless the exertions of others. The system can only go on safely when all do their duty. And hence neglect of duty by any one officer, must be deemed to be most criminal, since he cannot tell to what extent the safety of hundreds may be endangered by his neglect."[102]

It seems, therefore, that simply taking a risk which resulted in death (a standard closer to that of (simple) negligence in the civil law) sufficed at this time.[103] The law has, then, shifted to require greater blameworthiness on the part of the accused through the doctrine of recklessness. The commentary on the *Draft Criminal Code* sees this as correct:

> "There is a danger … that punishing those who fail to appreciate risks places the threshold of criminal liability too low. It comes close to holding persons

[101] *HM Advocate v Paton and McNab* (1845) 2 Broun 525 at 533 (LJ-C Hope).
[102] *HM Advocate v Paton and McNab* (1845) 2 Broun 525 at 534, 535 (LJ-C Hope).
[103] See Findlay Stark "Rethinking Recklessness" (2011) Jur. Rev. 163 at 177–178. Also Peter Ferguson, "Legislative Comment: Corporate Manslaughter and Corporate Homicide Act 2007" 2007 SLT (News) 251 at 255.

> criminally responsible for negligent conduct. For that reason, [the *Draft Code*'s] section 10[104] refers to a failure to appreciate "an obvious and serious risk". This is intended to demonstrate that a person is not reckless merely because of a failure to meet the standard of care that can be expected of ordinary reasonable people."[105]

This raises the question of whether recklessness does strike the correct balance between the serious harm caused (death) and the accused's actual level of blameworthiness.

11. *Recklessness generally in the modern law*

It is important to consider how recklessness is defined. There are a number of definitions in Scots law. Indeed, Findlay Stark identifies five separate "understandings of [the concept] in the jurisprudence of the appeal court".[106] Some of these serve specialised purposes such as "wicked recklessness" in murder.[107] Beyond these general categories, some crimes have evolved definitions for their own purposes.

Vandalism,[108] for example, defines recklessness as: "conduct … [which] create[s] an obvious and material risk of damage".[109] For culpable and reckless fire-raising, Lord Coulsfield stated that: "[m]ere negligence is not enough: the property must have been set on fire due to an act of the accused displaying a reckless disregard as to what the result of his act would be."[110] For malicious mischief, the definition is: "a deliberate disregard of, or even indifference to, the property or possessory rights of others".[111] Even from these specific, offence-bound statements, a sense of risk-taking and/or disregard of consequences is apparent.

Culpable homicide has tended to apply a more general concept of recklessness which it shares with other non-fatal crimes of recklessness such as culpable and reckless conduct[112] and causing reckless injury.[113] *Quinn v Cunningham* (though specifically related to the context of road traffic accidents) states that: "[t]he standard of culpability must be the same, whether its consequences are death or not",[114] a view endorsed by Stark.[115]

12. *Recklessness in culpable homicide*

The definition of recklessness from *Paton* (quoted above, viz: "gross, or wicked, or criminal negligence, something amounting, or at any rate analogous, to a criminal indifference to consequences") has been influential in subsequent cases.[116] In *Dunn*

[104] See below, text accompanying fn.135.
[105] Eric Clive, Pamela Ferguson, Christopher Gane and Alexander McCall Smith, *A Draft Criminal Code for Scotland with Commentary*, (Edinburgh: TSSO, 2003) p.33.
[106] Findlay Stark "Rethinking Recklessness" (2011) Jur. Rev. 163 at 163.
[107] Findlay Stark "Rethinking Recklessness" (2011) Jur. Rev. 163 at 193–197.
[108] Set down in s.52 of the Criminal Law (Consolidation) (Scotland) Act 1995.
[109] *Black v Allan*, 1985 S.C.C.R. 11 at 13 (LJ-G Emslie).
[110] *Byrne v HM Advocate*, 2000 J.C. 155 at 163.
[111] *Ward v Robertson*, 1938 J.C. 32 at 36 (LJ-C Aitchison).
[112] See *Cameron v Maguire*, 1999 J.C. 63.
[113] See *HM Advocate v Harris*, 1993 J.C. 150.
[114] *Quinn v Cunningham*, 1956 J.C. 22 at 25 (LJ-G Clyde).
[115] Findlay Stark "Rethinking Recklessness" (2011) Jur. Rev. 163 at 180.
[116] For example, *MacPhail v Clark* 1983 S.L.T. (Sh Ct) 37 at 38 (Sheriff JC McInnes); *HM Advocate v Harris*, 1993 J.C. 150 at 162 (Lord Morison).

v HM Advocate,[117] a case considering the distinction between culpable homicide and the then statutory offence of causing death by reckless or dangerous driving of motor vehicles,[118] it was noted that *Paton*: "sets a high standard of proof."[119] The *Paton* definition was also taken up in *Quinn v Cunningham*,[120] where non-fatal injury was caused by a pedal cycle. Lord Justice-General Clyde stated that:

> "[t]his [the test from *Paton*] represents the standard of culpability which must be established in such cases in order to constitute a crime at common law, based not upon intent, but upon reckless disregard of consequences."[121]

Nonetheless, *Quinn* offered further discussion of the degree of culpability required, stating that: "[m]ere *culpa*[122] plus a death resulting from it does not constitute culpable homicide."[123] Instead, "an utter disregard of what the consequences of the act in question may be so far as the public are concerned"[124] is required or "a recklessness so high as to involve an indifference to the consequences for the public generally"[125]

Other cases have used similar forms of words. In *McDowall v HM Advocate*, a case where culpable homicide was charged in preference to causing death by dangerous driving to recognise the seriousness of the offence, Lord Justice-General Rodger looked for:

> "a complete disregard for any potential dangers and for the consequences for the public"[126]

In *W v HM Advocate*,[127] a case of (non-fatal) culpable and reckless conduct where the accused dropped a bottle out of the window of a flat on the 15th floor of a tower block, this was said:

> "the degree of culpability and recklessness which is required to constitute the necessary mental element is high, and … it is of the essence that there should be criminal recklessness in the sense of a total indifference to and disregard for the safety of the public"[128]

Sutherland, the fire-raising case mentioned above, asked:

> "was the fireraising something which was done in the face of obvious risks which were or should have been appreciated and guarded against, or in circumstances which showed a complete disregard for any potential dangers which might result?"[129]

[117] *Dunn v HM Advocate*, 1960 J.C. 55.
[118] Under s.8(1) of the Road Traffic Act 1956.
[119] *Dunn v HM Advocate*, 1960 J.C. 55 at 59 (LJ-C Thomson).
[120] *Quinn v Cunningham*, 1956 J.C. 22 at 24 (LJ-G Clyde).
[121] *Quinn v Cunningham*, 1956 J.C. 22 at 24–25 (LJ-G Clyde).
[122] "Culpa" can mean negligence (as in the civil law) or fault See G.MacCormack, "Culpa in the Scots Law of Reparation" (1974) *Juridical Review* 13 at 13; also *Bird v HM Advocate*, 1952 J.C. 23 at 24 (quote from Lord Jamieson's charge to the jury). It can mean (simple) blame—see *HM Advocate v Ritchie*, 1926 J.C. 45 at p.48 (submissions on behalf of the accused).
[123] *Quinn v Cunningham*, 1956 J.C. 22 at 24 (LJ-G Clyde).
[124] *Quinn v Cunningham*, 1956 J.C. 22 at 24 (LJ-G Clyde).
[125] *Quinn v Cunningham*, 1956 J.C. 22 at 25 (LJ-G Clyde).
[126] *McDowall v HM Advocate*, 1999 S.L.T. 243 at 247 (LJ-G Rodger).
[127] *W v HM Advocate*, 1982 S.L.T. 420.
[128] *W v HM Advocate*, 1982 S.L.T. 420 at 420.
[129] *Sutherland v HM Advocate*, 1994 J.C. 62 at 66 (LJ-G Hope (quoting the trial judge)). This formulation was accepted by the appeal court.

Finally, *Transco*, which was partly concerned with defining lawful act culpable homicide generally, offered: "gross or wicked … indifference to consequences'"[130] and "a degree of want of care which is grave but also … a state of mind on the part of the accused which is "wicked" or amounts, or is equivalent, to a complete indifference to the consequences of his conduct".[131]

The fact that there appears to be no single formulation of the definition of recklessness may point to the difficulty of setting it down in words. The judgments in *Transco* were critical of the circularity in the *Paton* definition (see above) inherent in the repeated use of the word "criminal" to try to "define what is in fact involved in a particular crime".[132] A similar criticism could be made of *Quinn v Cunningham* for defining recklessness *as* recklessness ("a recklessness so high …"—see above).[133] Lord Osborne, again in *Transco*, also took the view that the word "negligence" had more than one meaning, thus rendering it inexact.[134]

Though the exact wording is, thus, not perhaps as clear as it might be, each of the definitions of recklessness given above is concerned with a high level of indifference to, or disregard for, the consequences of the behaviour. *McDowall* and *Sutherland* make reference to the accused's attitude to the inherent risks, or dangers of the conduct. The *Draft Criminal Code*'s proposed definition is also concerned with risk-taking:

> "a person acts recklessly if the person is, or ought to be, aware of an obvious and serious risk of dangers or of possible harmful results in so acting but nonetheless acts where no reasonable person would do so."[135]

Stark has suggested that: "the [appeal] court has not addressed the issue of what recklessness requires in sufficient detail."[136] He identifies a need to: "concentrate more carefully on what the notions of "utter disregard" and "indifference" might mean, and how they fit into a more general theory of culpability."[137]

It seems, therefore, that a definition of recklessness should engage with the accused's unacceptable—or culpable—risk-taking[138] and the way in which this demonstrates his/her utter disregard for and/or indifference to, the consequences of his/her act. The *Jury Manual* offers this: "Recklessness or gross carelessness means acting in the face of obvious risks which were or should have been appreciated and guarded against or acting in a way which shows a complete disregard for any potential dangers which might arise. It's immaterial whether death was a foreseeable result or not."[139]

The key question is, then, how should recklessness be defined? Probably, however, this cannot be fully answered without some consideration of the,

[130] *Transco Plc v HM Advocate (No.1)* 2004 J.C. 29 at 33, at [4] (Lord Osborne).
[131] *Transco Plc v HM Advocate (No.1)* 2004 J.C. 29 at 48–49, at [37] (Lord Hamilton).
[132] *Transco Plc v HM Advocate (No.1)* 2004 J.C. 29 at 33, at [4] (Lord Osborne). Lord Hamilton also criticised the "circularity which arises from the use (twice) of the adjective 'criminal' in the definition of the crime" at 48, at [37].
[133] See text accompanying fn.125 above.
[134] *Transco Plc v HM Advocate (No.1)* 2004 J.C. 29 at 33, at [4].
[135] Eric Clive, Pamela Ferguson, Christopher Gane and Alexander McCall Smith, *A Draft Criminal Code for Scotland with Commentary*, (Edinburgh: TSSO, 2003), p.32, s.10(c).
[136] Findlay Stark "Rethinking Recklessness" (2011) Jur. Rev. 163 at 183.
[137] Findlay Stark "Rethinking Recklessness" (2011) Jur. Rev. 163 at 184.
[138] Findlay Stark "Rethinking Recklessness" (2011) Jur. Rev. 163 at 164.
[139] e.g. *Jury Manual* (2022), p.49.2.

somewhat vexed, question of whether recklessness should be subjective or objective.

13. *Subjective or objective recklessness*

Subjective recklessness arises where the accused recognised that a risk existed and acted anyway in the face of that risk. Objective recklessness arises where a reasonable person would have foreseen the risk and it is largely irrelevant whether or not the accused did so. It is fair to say that, apart from *Transco*, it has not been clear from the *dicta* in Scottish cases defining recklessness (quoted above) which form was being applied. In the context of some statutory offences, following *Allan v Patterson*,[140] the view had been taken that the recklessness was a way of behaving—therefore an objective standard - since the accused's attitude to the risk was not in issue. Lord Justice-General Emslie said:

> "Judges and juries will readily understand, and juries might well be reminded, that before they can apply the adverb "recklessly" to the driving in question they must find that it fell far below the standard of driving expected of the competent and careful driver"[141]

Nonetheless, it is *Transco*'s analysis which has perhaps the greatest resonance though it also reflects its context as a prosecution of a corporation for causing death. In such cases, the *mens rea* is likely to be problematic because a company cannot carry out mental processes in the way that a human person does. Thus, the question of whether recklessness has to be a state of mind, as opposed to a quality of behaviour, was particularly significant in *Transco*. If recklessness was a quality of behaviour, it would have made it easier to convict the company which could, crudely, act but not think. In reaching the conclusion that recklessness did specifically constitute a mental element, both Lord Osborne[142] and Lord Hamilton[143] drew on the presumption, from *Duguid v Fraser*,[144] that it is a: "normal and salutary rule of our law that *mens rea* is an indispensable ingredient of a criminal or quasi-criminal act".[145]

They also referred to the discussion in the automatism case of *Ross v HM Advocate*[146] to the effect that, where the Crown cannot prove *mens rea*, (in *Ross* this was because the accused's reason was, at the time, totally alienated by non-self-induced drugs and he could not "intend") then no crime is committed. This led them to express the following views:

Lord Osborne stated:

> "What emerges … is that the crime [lawful act culpable homicide] is one involving, not only an actus reus, but also mens rea, as one would expect having regard to the fundamental principles of the criminal law. Thus, in any determination of whether the crime has or has not been committed, the state of mind of the alleged perpetrator must necessarily be examined. It would

[140] *Allan v Patterson*, 1980 J.C. 57.
[141] *Allan v Patterson*,1980 J.C. 57 at 60.
[142] *Transco Plc v HM Advocate (No.1)* 2004 J.C. 29 at 31–32, at [3].
[143] *Transco Plc v HM Advocate (No.1)* 2004 J.C. 29 at 51, at [42].
[144] *Duguid v Fraser*, 1942 J.C. 1.
[145] *Duguid v Fraser*, 1942 J.C. 1 at 5 (LJ-C Cooper).
[146] *Ross v HM Advocate*, 1991 J.C. 210.

> not be sufficient simply to assess the conduct for which that person has been responsible and to draw a conclusion as to guilt or otherwise from that conduct alone."[147]

Lord Hamilton affirmed this:

> "it is, in my view, erroneous to suppose that the actual state of mind of a person accused of culpable homicide of this kind can be ignored and guilt or innocence determined solely on the basis of proof that the conduct in question fell below an objectively set standard."[148]

Stark comments:

> "Taken together, Lord Osborne and Lord Hamilton's statements in *Transco* suggest that the Crown must prove (from the circumstances, usually) that the accused possessed some level of awareness of a risk of death. … To show "utter disregard" of or "indifference" towards a risk—and thus be reckless as to it—the accused must be aware of that risk. … In other words, *Quinn v Cunningham* sets out a form of "subjective" recklessness."[149]

Subjective recklessness is, in certain respects, fairer to the accused (because s/he can only be found criminally liable where s/he has considered, and still decided to act in the face of, the risk) but it also makes him/her more blameworthy *because* s/he has taken on this risk voluntarily.[150] At the extreme, an objective concept of recklessness fails to take account of the possibility that the accused was simply incapable of recognising the risk; it is concerned only with the perspective of the reasonable person.[151] Objective recklessness, then, may be considered to protect the public better because it criminalises all dangerous behaviour reaching the relevant, very poor, standard regardless of the accused's recognition of the risk but this may allow criminalisation of an accused who had acceptable reasons for not realising, and guarding against, the risk taken. Leaving to one side *Transco*'s view that subjective recklessness is required, the concepts of "utter disregard" and "complete indifference" to the consequences of an act, which appear in many of the other formulations of recklessness from the case law discussed above do not clearly identify who it is who should demonstrate these qualities—the accused or the reasonable person.

It is, therefore necessary to consider whether Scots criminal law should adopt a subjective or an objective approach to recklessness? Alternatively, is there some other way of expressing the concept of recklessness which is not reliant on this issue and, if so, would this be preferable?[152]

The *Draft Criminal Code*, quoted above,[153] sets up both subjective and objective forms as alternatives. The *Jury Manual*, similarly, makes reference to "risks which were …" (subjective) or should have been" (objective)

[147] *Transco Plc v HM Advocate (No.1)* 2004 J.C. 29 at 36, at [8].
[148] *Transco Plc v HM Advocate (No.1)* 2004 J.C. 29 at 49, at [38].
[149] Findlay Stark "Rethinking Recklessness" (2011) Jur. Rev. 163 at 179 (footnotes omitted).
[150] For a discussion, see Findlay Stark "Reckless Manslaughter" [2017] Crim. L.R. 763, especially 779–782.
[151] See the English case of *Elliott v C (a Minor)* [1983] 1 W.L.R. 939.
[152] Stark has suggested that "the "'[s]ubjective' or 'objective'?" question is the wrong one to ask. It cannot and will not produce a fruitful answer" (Findlay Stark "Rethinking Recklessness" (2011) Jur. Rev. 163 at 164).
[153] See above fn.135 and accompanying text.

"appreciated and guarded against".[154] One possible effect of this would be that no accused who ever takes any serious risk whether knowingly or unknowingly would escape criminal liability. Accordingly, it is also worth considering whether it would be beneficial or disadvantageous to apply both a subjective and an objective concept of recklessness.

As noted, recklessness is here serving the function of establishing that the accused is sufficiently blameworthy to be held criminally responsible for an offence of homicide *at all*. An issue also arises at the other end of the seriousness spectrum on the border with murder—how to differentiate (simple) recklessness from wicked recklessness. This was problematic for the Crown in *HM Advocate v Purcell*:[155]

> "when asked how the jury could meaningfully and usefully be directed by the presiding judge as to the distinction between 'utter disregard' for culpable homicide purposes and 'wicked recklessness amounting to utter disregard' for murder purposes the Advocate-depute was at some very evident difficulty in providing any answer. His very evident difficulty may be attributable to a confusion respecting the distinction between the concept of wicked recklessness as to consequences in the commission of an assault and offences which themselves are defined by the notion of recklessness."[156]

It is, nonetheless, arguable that the distinction *is* clear, resting on wicked recklessness's requirement that the accused should display what might be termed a "mortal indifference" or, in other words, an utter indifference *as to whether the victim lives or dies*. Further questions are, however, raised such as whether lawful act culpable homicide needs its own form of recklessness, or indeed a bespoke *mens rea* not necessarily limited to recklessness? A key issue is whether this would assist in marking out the greater blameworthiness attaching to culpable homicide than to non-fatal crimes of recklessness on the one hand and its lesser culpability than for wicked recklessness in murder?

14. The Distinction Between Unlawful Act and Lawful Act Type

The titles of the categories of lawful and unlawful act culpable homicide do not describe particularly well their content—in that lawful act can encompass offences and unlawful act, which sounds general, is restricted to criminal behaviour directed against the accused. The offence of causing reckless injury, as in *HM Advocate v Harris*,[157] may also point to a difficulty with the boundary between them. Harris, a nightclub bouncer, ejected a woman from the club by seizing hold of her and pushing her. This caused her to fall down a flight of stairs and onto the road outside, where she was hit by a car. The accused did not intend to injure her so had not committed assault but it was held that reckless behaviour causing injury was a relevant crime. While the victim survived, it could be argued that Harris's conduct was "directed against" her and, in that assault was libelled as an alternative, this offence might be said to be "analogous" to it. This is not, however, clear cut. In the event of a similar crime in the future, which did cause death, it would be difficult

[154] e-*Jury Manual* (2022), p.49.2.
[155] *HM Advocate v Purcell*, 2008 J.C. 131.
[156] *HM Advocate v Purcell*, 2008 J.C. 131 at 139, at [12] (Lord Eassie).
[157] *HM Advocate v Harris*, 1993 J.C. 150.

to determine whether the culpable homicide was unlawful act (the crime of causing reckless injury occasioning death) or lawful act (because of the underlying crime not *clearly* falling into the unlawful category) with the freestanding *mens rea* of recklessness. In fact, the answer would not matter in practice because, since the *mens rea* is recklessness in both cases, the accused would incur a culpable homicide conviction no matter what. If this interpretation is possible, however, then the boundary between lawful and unlawful types is, in this respect, unclear.

The *Jury Manual* recognises, in its discussion of the legal principles of culpable homicide, that ""lawful act" culpable homicide" exists[158] but in its "Possible Form of Direction" this is not mentioned. Instead it says:

> "Culpable homicide is causing someone's death by an unlawful act which is culpable or blameworthy.
>
> **In assault cases:**
>
> It is killing someone where the accused assaulted the person but did not have the wicked intention to kill, and did not act with such wicked recklessness as to make him guilty of murder. A deliberate and not a reckless or grossly careless act is required before there can be an assault.
>
> **In other cases**
>
> The unlawful act must be intentional or at least reckless or grossly careless.
> … For the Crown to prove this charge, you would need to be satisfied:
> (1) that the accused committed an assault
> [or as appropriate] an unlawful act
> (2) that act must have been intentional,
> [or, as appropriate], that act must have been reckless or grossly careless in the sense I've defined it
> (3) that death was a direct result of the unlawful act"[159]

This is a recent update to the Jury Manual to ensure that culpable homicide directions recognise that assault is a crime of intent only and cannot be committed recklessly. Where the death follows on an assault, the jury must be directed so that it is clear that only intention to cause immediate bodily harm can constitute the *mens rea*. The previous version of the *Manual* ran the risk that a jury would think that recklessness or gross carelessness was sufficient.[160]

A question thus arises about the usefulness of the existing categories of lawful and unlawful act. It might be easier simply to state that there are two categories of involuntary culpable homicide: (1) death arising as an unintended consequence of an assault; and (2) death arising from other acts where the accused has the *mens rea* of recklessness. In this respect, Lindsay Farmer has gone further and suggested that a single category of reckless culpable homicide might be sufficient: In his commentary on *MacAngus* he said:

[158] e-*Jury Manual* (2022), p.49.1, para.3.
[159] e-*Jury Manual*(2022), p.49.2.
[160] The *Manual* cites *Green and others* [2019] HCJAC 76, at [66] to provide further explanation. See also *Ditchburn v HM Advocate* 2021, S.L.T. 170, at [10] (Postscript).

> "the position adopted by the court on reckless acts as the basis for a charge of culpable homicide has clear implications for the structure of the law of culpable homicide. It is not clear that this leaves worthwhile grounds for distinguishing between lawful and unlawful act culpable homicide. It is hard to envisage an unlawful act "directed against" a victim that is not also reckless. … It may be that we are coming to the point that constructive liability for culpable homicide can finally be abandoned and that we can discard the unhelpful distinctions between lawful and unlawful act culpable homicide, and the further subdivisions between death caused by assault and other unlawful acts in favour of a single category of reckless culpable homicide."[161]

There may, nonetheless, be merit in retaining the assault-type category to avoid any possibility that all injuries inflicted with the intention to cause bodily harm move closer to being categorised as murder. While the fact of causing death through a minor assault is likely to imply recklessness, this may not always be the case. If involuntary culpable homicide is, effectively, restricted to a single *mens rea* of recklessness, killings arising from an intentional attack may be more likely to upgraded to murder (because of the existence of this intention) even where the level of violence used is very minor.

Thus a question arising here is whether there should continue to be separate categories of lawful act and unlawful act culpable homicide—does this remain a useful distinction for the law to draw? This leads on to a consideration of whether there are better ways to define the crime arising where an accused has destroyed the life of another without intending to or, indeed, even necessarily recognising that this might be a consequence of his/her initial act.

15. *Mens Rea* in Involuntary Culpable Homicide more generally

As already discussed, unlawful act culpable homicide relies on the fact of assault having been committed to create a form of constructive liability for the death. Lawful act type uses the same mental element—recklessness—as for non-fatal crimes of recklessness. Thus, involuntary culpable homicide is always committed through a mental element which takes no account whatsoever of the accused's attitude to the desirability of, likelihood of, or potential for bringing about, the victim's death. If the accused is utterly indifferent to the possibility of death, or s/he acts in the knowledge that death is a distinct possibility but not caring about this then it is likely that s/he moves close to the *wicked* recklessness which characterises murder. If s/he acts *desiring* the victim's death, this is, again entering the territory of murder's (wicked) intention to kill. Accordingly, the fact that the accused, in an involuntary culpable homicide case is liable for an offence *of homicide* rests on the *actus reus*—that the accused has, as a matter of fact, destroyed the victim's life. By contrast, in *voluntary* culpable homicide, the accused will have intended or at least foreseen or contemplated or not cared about the death of the victim. The issue is what, if any, significance to attach to this.

The matter assumes particular importance in relation to art and part cases where the common criminal purpose arose spontaneously. Art and part liability arises

[161] Lindsay Farmer, "MacAngus (Kevin) v HM Advocate: "Practical, but nonetheless principled"?", (2009) 13 *Edinburgh Law Review* 502 at 506.

where more than one co-accused has participated in the commission of an offence, even if only to a minimal extent, and each shared a common criminal purpose. A test is provided for art and part murder where there is antecedent concert, or a pre-arranged common plan:

> "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."[162]

There is no corresponding bespoke *mens rea* where the group carrying out the killing comes together spontaneously. Thus, where the circumstances constitute a fight, or attack or brawl, arising spontaneously and without pre-planning, and a death results, the co-accused may have shared any of three common criminal purposes: for assault; culpable homicide; or murder. Equally, each may have acted independently so that there is no concerted liability at all. How then is the criminal liability of each co-accused to be determined? If the accused did not inflict the fatal blow then s/he cannot be liable, on an individual basis, for culpable homicide, since s/he lacks the *actus reus*. If s/he continued to participate in an attack with a co-accused who did inflict the fatal injury and s/he did so either specifically desiring the death or not caring whether death resulted then, arguably, s/he shared a common *murderous* purpose. If not, however, how is the court to determine if his/her art and part liability is for culpable homicide or only for assault? Is it the case that participating in an assault, from which death results, is sufficient for a culpable homicide conviction (since this is, in principle, the way in which the system operates for individual cases)? The concern is that this may come too close to suggesting almost a form of bystander liability which art and part eschews more generally.[163] The matter was raised by Lord Justice-Clerk Carloway in *Carey v HM Advocate*:[164]

> "There 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 (see also *Hopkinson v HM Advocate*; and more generally Leverick, The (art and) parting of the ways: joint criminal liability for homicide, 2012 S.L.T. (News) 227). Upon that basis, which may well require to be reviewed again by the court or Parliament, if the appellant had engaged in a joint attack on the deceased, even if there was no objective basis for concluding that he ought to have had the use of a weapon in mind, he could still be convicted of culpable homicide if non-lethal violence (which by definition could not have killed the deceased) was used by him in a joint attack."[165]

In an earlier piece on culpable homicide, the author of this paper commented:

[162] *McKinnon v HM Advocate*, 2003 J.C. 29 at 40, at [32] (LJ-G Cullen).
[163] *HM Advocate v George Kerr and others*, (1872) 2 Coup 334.
[164] *Carey v HM Advocate*, 2016 S.L.T. 377.
[165] *Carey v HM Advocate*, 2016 S.L.T. 377, at 383, at [29].

> "It is hard to think of a common criminal purpose to commit culpable homicide *per se*. In … cases [such as *Carey*], 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."[166]

This analysis of the *mens rea* for involuntary culpable homicide raises a number of issues. Clearly, it is worth considering whether the *mens rea* of involuntary culpable homicide should make reference to the accused's attitude to the death. If this is regarded as desirable, how should this be done and should it be part of an attempt to create degrees of culpable homicide? In art and part killings, is there a need to draw a clearer line between assault and culpable homicide on an art and part basis and, if so, how could the law frame this distinction?

V. Conclusion

As a crime, culpable homicide encompasses a very broad range of behaviour, of varying seriousness, united by the fact that it has caused death. Overall, this paper asks, primarily, whether there is a need to define it with more precision with the concomitant possible loss of some of the moral flexibility which it currently allows. Some of the questions and issues which the paper has raised include:

- Whether creating degrees of culpable homicide allows for clearer calibration of seriousness and, if so, how these should be drawn;
- Whether the current terminology (voluntary; involuntary lawful act; involuntary unlawful act) is properly descriptive of its content or could be improved;
- The lack of recognition of the accused's attitude to the victim's death in the *mens rea*; and
- The purpose, definition and significance of recklessness in drawing a line between accidental death and culpable homicide.

Ultimately, the crime should balance the singularly serious harm caused (death) with the accused's actual agency and culpability in occasioning this. The legal principles currently performing this function should be carefully considered and their efficacy examined as part of the overarching reform exercise in which the Scottish Law Commission is currently engaged.

[166] Claire McDiarmid "Killings Short of Murder: Examining Culpable Homicide in Scots Law" in Alan Reed and Michael Bohlander (eds) *Homicide in Criminal Law: A Research Companion* (Routledge, 2019) 21 at 29.