# SCOTTISH LAW COMMISSION

## HOMICIDE SEMINAR

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UNIVERSITY OF STRATHCLYDE

# CULPABLE HOMICIDE

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# Residual nature

- "sweeping" or "mopping" up killings which are "not murder"

In England and Wales manslaughter has been "*used to **mop up** killings which are not perceived, for one reason or another, as sufficiently serious to deserve the label 'murder*"'

(Lacey, Wells and Quick, *Reconstructing Criminal Law: Text and Materials* (Cambridge University Press, 2010) at p 796)

# Defining culpable homicide

- relatively vague
- description rather than definition

# *Drury*

- "*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.*"

(*Drury v HMA* 2001 SLT 1013 per LJ-G Rodger at 1017, para [13])

# *Transco*

- 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.*"

(*Transco plc v HMA (No 1)* 2004 JC 29 per Lord Hamilton at 47, para [35])

# Macdonald

- *culpable homicide is "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"*

(Sir J H A Macdonald, *A Practical Treatise on the Criminal Law of Scotland*, p 150)

# CULPABLE HOMICIDE CHARACTERISTICS

- accused has killed someone in a way to which some blame attaches
- less serious than murder
- full range of sentencing options from absolute discharge to life imprisonment

# Scope of culpable homicide

- borderline with murder
- borderline with non-criminal deaths
- regarded as more serious than statutory offences such as causing death by dangerous driving

Very broad territory

# General Culpable homicide questions

- Value of breadth and flexibility?

- Degrees of culpable homicide?

How would these be drawn?

  - seriousness?
  - blameworthiness?
  - proximity to murder?

# Voluntary form: partial defences

- accused *prima facie* meets criteria for murder conviction but a partial defence (provocation or diminished responsibility) applies

- possibility of "lack of wickedness" defence (following *Drury*) curtailed following *Elsherkisi v HMA* 2012 SCL 181, *Meikle v HMA* 2014 SLT 1062 and *Gordon v HMA* 2018 SLT 278

# Partial defences reform

- Are provocation and diminished responsibility, as drafted, the most suitable partial defences for a 21st century society?
  - Retain intact
  - Retain but reform
  - Start with clean slate and consider when murder should be mitigated to culpable homicide generally in a 21st century society

# Voluntary form: crown discretion

- Crown charges culpable homicide or accepts plea

"*unofficial factors*" may include "*euthanasia*" and *"[t]he killing of a violent partner in circumstances which do not give rise to a recognised defence*"

(Gordon, *Criminal Law of Scotland* (4th ed) by Chalmers and Leverick, 31-01)

# Voluntary: question

- in what circumstances should a culpable homicide verdict be returned on a murder charge?

"*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; and indeed that the Crown's power to accept a plea of culpable homicide in such cases (which was approved by the court in this case) remains undiminished.*" (commentary on *Gordon v HMA* 2018 SCCR 79 at p 97)

# Involuntary unlawful act culpable homicide

- where death has been caused by an assault but was not intended

"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 "

(*MacAngus v HMA* 2009 SLT 137 per LJ-G Hamilton at p 145, para [29])

- includes "one punch homicides"

Reconciling any disparity between culpability (for one punch) and harm (death)

# Involuntary lawful act culpable homicide

- Either death in the course of an otherwise lawful act or death in the course of an **un**lawful act which is not "directed against" the victim

- Possible unlawful acts:
  - supply of a controlled drug (Misuse of Drugs Act 1971, s 4(1)(b): *MacAngus v HMA* 2009 SLT 137);
  - fire-raising to defraud insurers (*Sutherland v HMA* 1994 JC 62)

- *mens rea* is recklessness

# Defining recklessness

- many definitions in Scots law:

"*gross, or wicked, or criminal negligence, something amounting, or at any rate analogous, to a criminal indifference to consequences*" (*Paton v HMA* 1936 JC 19 per LJ-C Aitchison at p 22)

"*an utter disregard of what the consequences of the act in question may be so far as the public are concerned*"; and

"*a recklessness so high as to involve an indifference to the consequences for the public generally*" (*Quinn v Cunningham* 1956 JC 22 per LJ-G Clyde at p 24 and p 25)

"'*gross or wicked … indifference to consequences*'" (*Transco* per Lord Osborne at 33, paragraph [4])

# Defining recklessness

- "*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*"

(*W v HMA* 1982 SLT 420 at 420)

- "*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?*""

(*Sutherland v HMA* 1994 JC 62 at p 66)

# Defining recklessness

- "*a complete disregard for any potential dangers and for the consequences for the public*"

(*McDowall v HMA* 1998 JC 194 per LJ-G Rodger at p 197)

- "*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*"

(*Transco* per Lord Hamilton at pp 48 – 49)

# Recklessness – mental element

- Must be a "*state of mind*"

(*Transco* per Lord Hamilton at 49, paragraph 8)

- "*the crime is one involving, not only an actus reus, but also mens rea, … 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 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.*"

(*Transco* per Lord Osborne at 36)

# Recklessness

- Is recklessness the appropriate dividing line between non-criminal and culpable homicide arising from a lawful act?
- If so, how is it to be defined?

*"the "'Subjective' or 'objective'?" question is not likely to elicit a meaningful answer. It would be far more profitable to do away with that question and 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."*

(Findlay Stark "Rethinking Recklessness" 2011 Jur Rev 163 at p 184)

# *Mens rea* - art & part

- Involuntary culpable homicide uses *mens rea* of non-fatal crimes (assault – unlawful act; recklessness – lawful act)
- where a co-accused did not inflict the fatal blow and the attack was not murderous, how is the dividing line between conviction for assault and conviction for culpable homicide to be drawn? What was the common criminal purpose?

# Ways forward

- residual status ties any reform in with murder

Possibilities:

- retain status quo
- restructure into degrees of culpable homicide;
- Single involuntary form applying recklessness standard to all cases (Lindsay Farmer *MacAngus (Kevin) v HMA*): 'Practical, but nonetheless Principled'?" [2009] 13 Edin LR 502);
- reformed / more / different partial defences