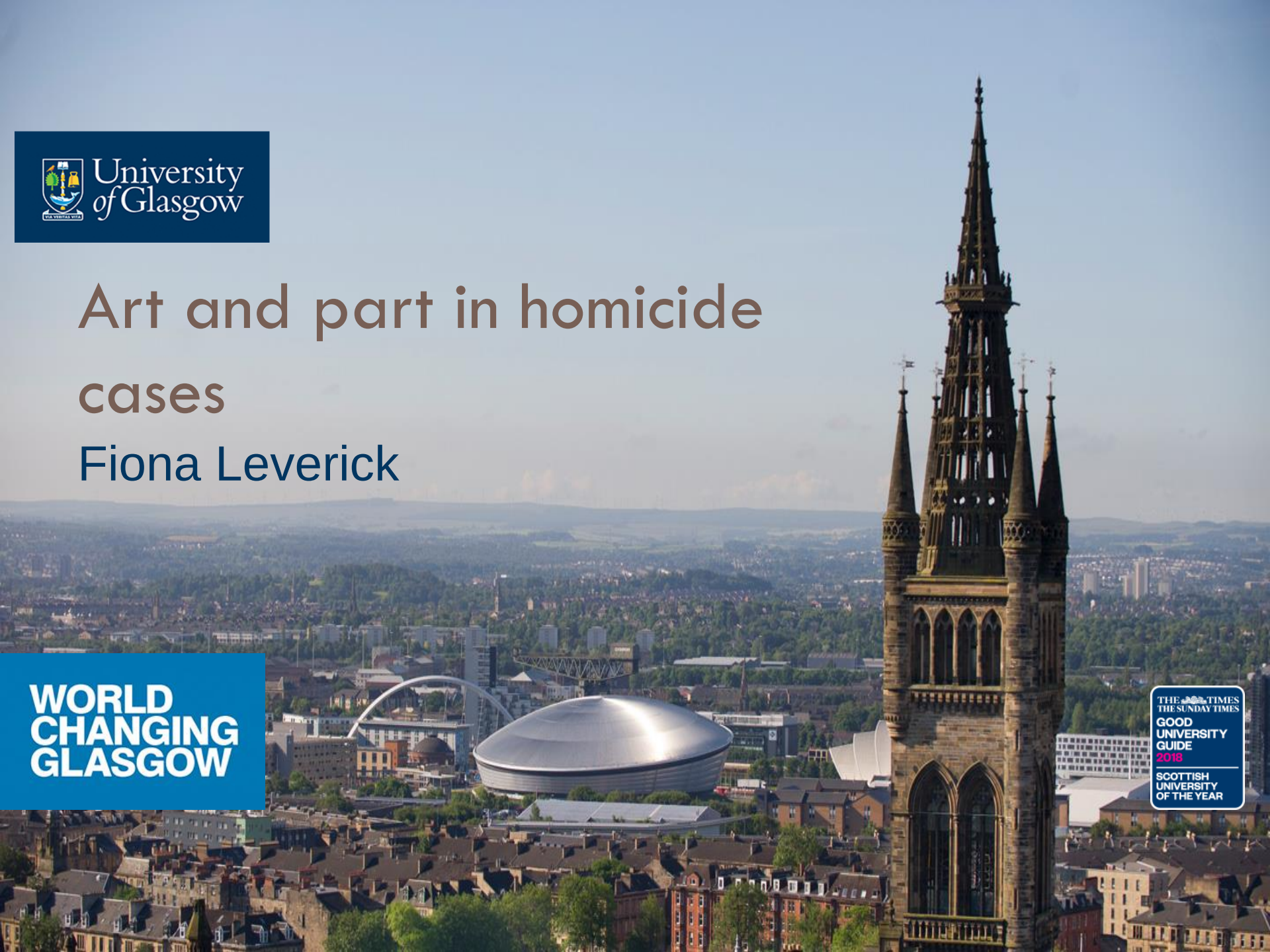

Art and part in homicide cases

Fiona Leverick

Art and part: a quick refresher

- All who participate in a criminal enterprise are equally liable
- No doctrine of "aiding and abetting" (save limited statutory provisions irrelevant to homicide)
- For A2 to be liable for an offence perpetrated by A1:
  - Participation in the offence
  - A shared "common purpose" with A1 (*McKinnon v HM Advocate* 2003 JC 29)
- If test not satisfied – A2 liable only for own contribution
- Particularly useful where can't prove who was A1/A2
  - See e.g. *Fee v HM Advocate* 2017 SLT 469
- A2 can be guilty of murder without a.r. or m.r. of murder

Antecedent and spontaneous concert

- Basic test of participation + common purpose *always* applies
- Further direction depends on facts and circumstances: *Rehman v HM Advocate* HCJAC 172
- Antecedent concert – criminal enterprise was (at least in part) planned
  - A1 and A2 agree to a robbery, A1 produces a knife and kills V
- Spontaneous concert – no element of prior agreement
  - A1 and A2 become involved in a fight, A1 stabs V1 while A2 is kicking V1 (or is attacking V2)
- Not always easy to classify
- Some cases do not fit easily into either category e.g. *Fee v HM Advocate*

A brief excursion into history

- *Docherty v HM Advocate* 1945 JC 89
  - Where a group participates in a criminal enterprise and one member of that group commits murder, the other members "become guilty of murder" if they had "**reason to expect** that a lethal weapon [would] be used"
- *Brown v HM Advocate* 1993 SCCR 382
  - Trial judge mis-directed jury when he said that, for (an a&p) murder conviction, death or serious injury must have been a foreseeable consequence of an attack
  - Instead - accused must have had "**in contemplation**, as part of [the] joint purpose, an act of the necessary degree of wicked recklessness such as that the deceased would be stabbed by plunging a knife into his heart"

Antecedent concert – the present position

- *McKinnon v HM Advocate* 2003 SLT 281:
  - Approach taken in *Brown* is "unwarranted" in cases of antecedent concert
  - "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"
- *Poole v HM Advocate* 2009 SCCR 577:
  - Was it "**objectively foreseeable** to the appellant that such violence was liable to be used as carried an **obvious risk of life being taken**?"

Murder or culpable homicide?

Hopkinson v HM Advocate [2009] HCJAC 9 - need to consider whether any agreement between A1 and A2 relating to use of knives:

1. Was restricted to limited purpose of scaring V, without there being any foreseeable risk of injury being inflicted → **NOT murder or c.h.**
2. Involved foreseeable risk that a knife might be used to inflict some form of non-fatal injury to V → **could be murder or c.h.**
3. Involved foreseeable risk of the infliction of life threatening injury to V → **could be murder or c.h.**

- Difficult to reconcile with *McKinnon*
- No further guidance on how to choose between murder/c.h.

Does the *Brown* test still apply to spontaneous concert cases?

- *Brown*: murder requires A2 to have had "**in contemplation**, as part of [the] joint purpose, an act of the necessary degree of wicked recklessness"
- *Crawford v HM Advocate* [2012] HCJAC 40
  - If A2 "did not appreciate fully the use of a knife and thought it was only going be used to inflict a less serious injury", he "lack[s] the intent necessary for murder, but could be convicted of culpable homicide"
- *Paterson v HM Advocate* [2013] HCJAC 156
  - Need to consider case against each accused – whether wicked recklessness has been proved against each of them or whether should be convicted of c.h.
- *Rehman v HM Advocate* [2013] HCJAC 172
  - No separate question of individual intent arises – a direction that A2's subjective mental state at point of attack should be taken into account was too favourable to A2

Where to next?

- Basic question – is a&p liability appropriate or should we formally distinguish between A1 and A2?
- Particular unfairness of antecedent concert test?
  - In favour: assumption of risk, increased dangerousness of group activity
  - But is A2 morally equivalent to A1? (Murder label)
  - Similar doctrine abolished in E&W (*Jogee*)
- Inconsistencies/vagueness in the law
  - But maybe vagueness = flexibility = a good thing?
- Complicated issue for juries
  - A case for written directions/routes to verdict ☺
- The "solution" will depend on what the structure of homicide law ends up looking like