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Farmer, L. (2009) "*Practical, but nonetheless principled*"? *MacAngus and Kane*. Edinburgh Law Review, 13 (3). pp. 502-507. ISSN 1364-9809

<http://eprints.gla.ac.uk/37844/>

Deposited on: 03 April 2012

D. CONCLUSION

It has been argued that at least some psychopaths seem to suffer cognitive deficiencies that ought to excuse them completely from responsibility. This raises the following important question: if dangerous psychopaths were to be considered inappropriate candidates for punishment, how could society be protected from their destructive behaviour? One possibility would be detaining such psychopaths in mental hospitals³² until they were no longer dangerous.³³ This solution is controversial since conventional treatments (including those aimed at increasing patients' empathy for their victims) have failed to improve psychopaths' behaviour.³⁴ Indeed, such treatments may even make psychopaths more dangerous.³⁵ However, Robert Hare has argued that "rather than being discouraged we should mount a concerted effort to develop innovative procedures designed specifically for psychopath[s]".³⁶ It seems that programmes aimed at channelling psychopaths' impulses into non-destructive activities may prove more successful than attempts to bring about a fundamental change in personality.³⁷

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EdinLR Vol 13 pp 502-507
DOI: 10.3366/E1364980909000651

"Practical, but nonetheless principled"? *MacAngus* and *Kane*

The Scots law of criminal homicide has been in a state of considerable flux since the decision in *Drury v HM Advocate*.¹ In a number of cases the appeal court has had

is instead to be convicted of culpable homicide on grounds of diminished responsibility if the person's ability to determine or control the conduct for which the person would otherwise be convicted of murder was, at the time of the conduct, substantially impaired by reason of abnormality of mind".

32 Under ss 57, 57A and 59 of the Criminal Procedure (Scotland) Act 1995 an accused person acquitted on the basis of insanity can be detained indefinitely in a mental hospital. (Schedule 5 of the Bill will amend the 1995 Act by replacing the term "insanity" with terms such as "not criminally responsible".)

33 It is often difficult to be certain whether someone is no longer dangerous. This problem is discussed by e.g. N Walker, "Dangerousness and mental disorder", in P Griffiths (ed), *Philosophy, Psychology and Psychiatry* (1994) 179.

34 However, article 5(1)(e) of the European Convention on Human Rights permits lawful detention of persons of "unsound mind" in a mental hospital, even if their condition is not amenable to treatment. See *Reid v United Kingdom* (2003) 37 EHRR 9 (which involved an applicant with psychopathy).

35 See e.g. M Seto and H Barbaree, "Psychopathy, treatment behaviour, and sex offender recidivism" (1999) 14 *Journal of Interpersonal Violence* 1235.

36 R Hare, "Psychopathy and risk for recidivism and violence", in N S Gray, J M Laing and L Noaks (eds), *Criminal Justice, Mental Health and the Politics of Risk* (2002) 27 at 46.

37 S Wong and R Hare, *Guidelines for a Psychopathy Treatment Program* (2005).

1 2001 SLT 1013.

to struggle with issues which have an impact on the scope of the crimes of murder and culpable homicide and on the structure of homicide more generally.² The latest decision to raise such issues is *MacAngus v HM Advocate; Kane v HM Advocate*,³ where the court considered jointly two separate cases, in each of which the accused had been charged with culpable homicide by the supply of drugs.

A. THE FACTS

In the first case, Kevin MacAngus was charged with the unlawful supply of ketamine to a group of five friends, as a consequence of which one of them died. The five had visited MacAngus at his flat in Glasgow and given him money to buy the drug. On his return to the flat, some of the group, including MacAngus himself, nasally ingested the drug. The deceased man was found in the flat the following morning, having died from ketamine intoxication, possibly as the result of repeated snorting. Forensic analysis established that he had ingested ketamine on previous occasions.

The facts in the second case were slightly different. Michael Kane, a heroin user, had been drinking with the deceased, Sheila MacMillan, and her partner, William Smillie, at their home. The deceased and Smillie expressed an interest in trying heroin, and gave money to Kane to purchase the drug. Kane then prepared the drug for injection, and injected first the deceased and then Smillie, with their consent, when they were unable to do so on their own. Both subsequently passed out. MacMillan had died by the time paramedics arrived, and Smillie was close to death. Kane was later charged with unlawful supply and injection of heroin as a consequence of which MacMillan died.

Both appellants raised pleas as to the relevancy of the indictments with respect to the charge of culpable homicide. The specific question raised was whether the approach to cases involving death following the supply of drugs adopted in *Lord Advocate's Reference (No 1 of 1994)*⁴ was correct in the light of the House of Lords decision in *R v Kennedy (No 2)*.⁵ Although the decision in *Kennedy* had turned on the interpretation of section 23 of the Offences Against the Person Act 1861 (administration of a noxious thing to any other person),⁶ the House of Lords had stressed the general principle that the freely chosen actions of autonomous individuals should normally be regarded as breaking the chain of causation.

Notwithstanding minor factual differences between the two cases in the appeal (the second involved administration rather than supply alone), the challenges to the plea to the relevancy fell under two broad heads.⁷ First, it was argued that, even in cases of unlawful act homicide such as this, it was necessary for the Crown to establish that there had been recklessness on the part of the accused. More specifically, it was

² See also *Transco plc v HM Advocate* 2004 JC 29; *HM Advocate v Purcell* 2008 JC 131.

³ [2009] HCJAC 8, 2009 SLT 137. The opinion of the court was delivered by Lord Justice General Hamilton.

⁴ 1996 JC 76.

⁵ [2007] UKHL 38, [2008] 1 AC 269.

⁶ Which does not apply to Scotland: see s 78 of the 1861 Act.

⁷ *MacAngus* and *Kane* at paras 8-17.

asserted that the Crown should have to both libel and prove recklessness and that, contrary to the statement of Lord Justice-Clerk Ross in *Lord Advocate's Reference (No 1 of 1994)*, the supply of a controlled drug could not be treated as "the equivalent" of reckless conduct.⁸ Secondly, it was claimed that the ingestion of the drugs was an autonomous act on the part of the victim and, as such, broke the chain of causation. This, it was argued, was so even in the case of Kane, who had administered the drugs to the deceased, because the deceased "was a consenting adult of sound mind, who made the decision about how the drugs were to be administered to her without suggestion, persuasion or instigation by the accused".⁹

B. THE DECISION

In rejecting the appeals, court addressed each of these heads. Dealing first with the scope and requirements of unlawful act culpable homicide, the court was concerned to address the "perception in the profession"¹⁰ that, following *Lord Advocate's Reference (No 1 of 1994)*, the commission of an unlawful act causing death, but unattended by recklessness, could amount to culpable homicide. Here the view of the court was that unlawful conduct on its own, without the averment of something more, such as any relevant knowledge on the part of the accused, would not be a sufficient basis for a charge of culpable homicide.¹¹ The court concluded that the relevant authorities held the conduct must be in some way "directed against" the victim, unless the contravention was reckless.¹² More specifically, it was held that the supply or administration of controlled drugs cannot be regarded as an offence against the person supplied without further proof that the supply or administration was reckless in the circumstances.¹³ In addition, the court held that in cases such as this it is not enough for the Crown to rely on the rule in the Criminal Procedure (Scotland) Act 1995¹⁴ to the effect that terms such as "culpably and recklessly" might be read into an indictment. The Crown, it was held, should make its position clear in express terms.¹⁵

On the issue of causation, the court expressed a certain reluctance to follow the position adopted by the House of Lords in *Kennedy (No 2)*, maintaining that this was not consistent with the approach adopted by the Scottish courts. This position was said to be supported by two distinct lines of authority. First, drawing on the decision

8 *Lord Advocate's Reference* at 81. See also Lord Hamilton in *Transco* at para 36, referring to a "state of mind on the part of the accused which is 'wicked'... or is *equivalent*, to a complete indifference to the consequences of his conduct" (emphasis added). On the narrow point of the wording of the indictment, the advocate-depute in *MacAngus* and *Kane* successfully moved to amend the charges against each accused to include the word "recklessly": see para 18.

9 *MacAngus* and *Kane* at para 17.

10 Para 23. See also paras 9-10.

11 Para 26.

12 Para 29, citing the unreported case of *HM Advocate v Finnegan* (High Court of Justiciary, March 1958).

On the requirement that conduct should be directed at the victim, see *R v Dalby* [1982] 1 WLR 425.

13 Para 30.

14 Sch 3 para 3.

15 *MacAngus* and *Kane* at para 31.

in *Khaliq v HM Advocate*,¹⁶ and the review of authorities undertaken there by Lord Justice-General Emslie, it was held that, depending on the circumstances of the case, supply could be regarded as equivalent to administration and thus could be taken as a cause of injury or harm. Secondly, the court discussed cases where it has been held the act of the victim could leave the legal chain of causation unbroken, a line of authority culminating in the recent case of *McDonald v HM Advocate*.¹⁷ In *McDonald* the appeal court approved the directions of the trial judge that set out a three-stage test for causation: first, “but for” the assault would the victim have died?; secondly, was the cause direct or indirect?; and thirdly, if the victim acted in a wholly unforeseeable or unreasonable way, that would break the causal link and make the attack an indirect cause of death. The crucial issue was less the foreseeability of the outcome, which was not relevant to the measure of directness, than the foreseeability of the actions of the victim. Thus, the Scottish position, it was held, was that the actions of victims do not necessarily break the chain of causation.¹⁸

what was required is a judgement (essentially one of fact) as to whether, in the whole circumstances, including the inter-personal relations of the victim and the accused and the latter’s conduct, that conduct [i.e. the actions of the accused] can be said to be an immediate cause of death.

On this basis the pleas were held to be relevant and the cases remitted for trial.

C. DISCUSSION: PRINCIPLED PRACTICE?

To the extent that the decision represents a qualification of the very broad form of liability established in the *Lord Advocate’s Reference (No 1 of 1994)* it is to be welcomed – whether or not this broad position was a matter of perception or reality.¹⁹ However, the extent of this welcome depends on precisely what it is that is to be taking its place. Here, notwithstanding that the judgment in *MacAngus* and *Kane* is a lucid discussion of authorities, and is informed by reference to cases from other jurisdictions and to academic commentary, it is difficult to determine what exactly the position now is in Scots law and to what extent principle and the practical have been reconciled, as claimed by the court.²⁰

Although it is now clear that it is not *any* unlawful act that can provide the basis for a charge of culpable homicide, the further remark by the court that the supply of

16 1984 JC 23.

17 2007 SCCR 10 at para 11.

18 *MacAngus* and *Kane* at para 42.

19 And those who had been prosecuted for culpable homicide caused by the supply of drugs would almost certainly be inclined to see it as more than a perception. See e.g. *HM Advocate v LC* [2007] HCJ 10. See also various cases reported on *BBC News Online*, 29 Aug 2006, 18 Oct 2006 and 7 Apr 2009 (available at http://news.bbc.co.uk/1/hi/scotland/edinburgh_and_east/5296158.stm, http://news.bbc.co.uk/1/hi/scotland/highlands_and_islands/6062720.stm and http://news.bbc.co.uk/1/hi/scotland/tayside_and_central/7987662.stm).

20 See *MacAngus* and *Kane* at para 48 where it is argued that Scots law follows a “practical, but nonetheless principled, approach”. See also paras 43-44, discussing T H Jones, “Causation, homicide and the supply of drugs” (2006) 26 LS 139.

drugs can nonetheless provide a basis for the charge where it was reckless in the circumstances may leave the law in a position that is practically indistinguishable from the *Lord Advocate's Reference (No 1 of 1994)*. While this seems to leave open the possibility that there may not be responsibility where an adult person acts voluntarily,²¹ it is hard to envisage a situation where the supply of class A drugs would not be considered as reckless.²² These cases involve situations where it is not just the supply of drugs that is at issue but their use in dangerous quantities – and which quantities of lethal drugs are not? – frequently in circumstances where both the supplier and the victim are already intoxicated in one way or another. This strictness of the test can be reinforced by a reading of the remarks of the court on the issue of recklessness:²³

[T]he law can with justification more readily treat the reckless, as against the merely unlawful, actor as responsible for the consequences of his actions, including consequences in the form of acting by those to whom he directs such recklessness.

This allows for the penalising of all reckless conduct irrespective of the actions of victims.

I would make three further comments. First, the ruling that in cases such as this the Crown must expressly include in the indictment, and so offer to prove, the *mens rea* terms that are the basis of the case is a welcome development. This is so both because, as counsel for Kane pointed out, their omission raises issues of compatibility with article 6 of the European Convention on Human Rights, but also because it may lead to some necessary clarification as to the meaning of terms such as “culpable” and “reckless”.

Secondly, 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. Equally, as Gordon has pointed out, the test of gross negligence in lawful act culpable homicide is practically indistinguishable from a test of recklessness.²⁴ 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.

Third, the decision of *Kennedy* is perhaps less far-reaching than might appear from the discussion of the case in the appeal court. It should not be read as holding that any act of the victim will break the chain of causation, but only an autonomous act,

²¹ See para 48.

²² See e.g. the recent case of *Richard Sedgwick* (after *MacAngus* and *Kane*) where a conviction for culpable homicide was obtained: “Fatal heroin injection man jailed”, *BBC News Online* 9 Jun 2009 (available at http://news.bbc.co.uk/1/hi/scotland/south_of_scotland/8092011.stm).

²³ Para 45.

²⁴ G H Gordon, *The Criminal Law of Scotland*, 3rd edn by M G A Christie, vol 2 (2001) para 26.12.

that is to say one which is fully informed and voluntary—a position which leaves considerable scope for interpretation. That said, the principle of causation, and its basis, have been clearly set out by the House of Lords and they have the potential to exclude liability in certain cases. But what is the “principle” of causation defended by the appeal court? If it is not respect for autonomy, neither does it seem to be a defence of a more limited position where an act of informed consent might break the causal chain. Administration, it seems, will not break the chain of causation, and supply for immediate consumption will be treated as equivalent to administration—if not also reckless in the circumstances.²⁵ Causation, it appears, is not really playing any effective role here, as everything will in practice be based on the judgment of recklessness. This is unquestionably a practical approach, but it is hard to see what remains of the principles of causation.

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EdinLR Vol 13 pp 507-511
DOI: 10.3366/E1364980909000663

Unincorporated Associations Reform

“All our law is about persons, things and actions. Let us first consider persons”. From Gaius,¹ through Justinian,² to the Scotland Act 1998,³ the tripartite distinction of private law has had an enduring influence. Yet it is a curious fact that the first pillar of the Gaian scheme has, in Scotland, with the important exception of child and family law, been all but ignored. It is not taught at university. There is no book on the subject. And outside academia the law of persons is perhaps not even widely recognised as a subject. In daily practice, however, there are a myriad of problems. The law of persons might be broken down into various sub-categories: persons and non-persons; natural persons and legal persons; persons and patrimonies. It is in the law of persons that concepts on legal personality and legal capacity need to be studied. The law of persons, though core, is too often ignored.

The law of clubs and unincorporated associations may be regarded as falling within what Rudolf von Jhering termed *Die Jurisprudenz des täglichen Lebens* (Law in Daily Life).⁴ If the law of unincorporated associations does not sound like a

²⁵ *MacAngus* and *Kane* at paras 50-51.

¹ Gaius, *Inst.* 1. 8: *omnia autem ius quo utimur vel ad personas pertinet vel ad res vel ad actiones. [sed] prius videamus de personis.*

² Justinian, *Inst.* 1.2.12 is taken from Gaius.

³ Scotland Act 1998 s 126(4).

⁴ Cf A I Phillips, “Rating relief: miscellaneous organisations and associations” (1958) 1 *Conveyancing Review* 80: “The majority of solicitors represent one or more among the hundreds of clubs and non-commercial organisations whose objects exclude profit-making or use it only as a means to an end;