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first strand of the reference the timetabling of this project may be more problematic. Double jeopardy was subject to review by the Law Commission in England following a reference from the Home Secretary on 2 July 1999. The Law Commission reported in January 2001,³⁴ with publication two months later.

Twenty months from reference to publication is as long as (or longer than) the timetable that appears to have been given to the Commission to report on double jeopardy in Scots law. At the time when this project was being completed by the Law Commission there were five full-time members of the Government Legal Service, three research assistants, and the Chairman of the Commission working on criminal law projects.³⁵ By contrast, the Scottish Law Commission has two Commissioners (the part-time chairman, Lord Drummond Young, and Professor Maher),³⁶ one full-time member of the legal service and two research assistants working on the *World's End* reference. This team of half the size is working to a similar timetable. While this may demonstrate a touching faith in the efficiency and cost-effectiveness of work within the Scottish Law Commission, it is important that those holding the purse strings realise that, if it is to work on time-pressured references as well as on other areas of social and legal importance, the Commission can only maintain the high quality of its recent work if it is properly resourced.

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The True Meaning of “Wicked Recklessness”: *HM Advocate v Purcell*

For at least forty years, English criminal lawyers have been remarkably concerned with a persistent, but thankfully hypothetical, insurance fraudster. This villain, the story runs, has some valuable cargo on board an aeroplane, on which he places a time-bomb, with the aim of collecting the insurance on his cargo. Should this bomb go off, the passengers and crew of the plane will inevitably die.¹

The difficulty here is that under English law, a person can only be guilty of murder if he intended either to kill or do grievous bodily harm.² The insurance fraudster, it is

34 *Double Jeopardy and Prosecution Appeals* (Law Com No 267, 2001) leading to the Criminal Justice Act 2003, Part 10.

35 *Thirty-Sixth Annual Report 2001: A Year of Achievement* (Law Com No 275, 2002) Part V.

36 Professor Maher is scheduled to leave the Commission in August 2008 and at the time of writing there has been no advertisement for his replacement.

1 See, e.g., *Imputed Criminal Intent* (Law Com No 10, 1967) para 18; A Ashworth, *Principles of Criminal Law*, 5th edn (2006) 177.

2 See, e.g., *R v Woollin* [1999] 1 AC 82.

thought, certainly *ought* to be guilty of murder, but can he be said to intend to kill? Is he not simply indifferent to the fate of those on board the plane?

Haunted by hypotheticals such as this,³ the history of “intention” in English criminal law has been a tortured one.⁴ The current position seems to be that if death or serious bodily harm was a virtual certainty as a result of the defendant’s action, and the defendant realised this was the case, the jury are “entitled to find” intention established.⁵ This is, however, hardly satisfactory. In particular, if the jury is merely *entitled* (and not bound) to find intention established in such cases, how is it to decide whether or not to do so?⁶

Scots lawyers have watched these debates with detached amusement. Because the *mens rea* of murder is different in this jurisdiction – constituted either by a wicked intention to kill or wicked recklessness⁷ – the debate has been treated as irrelevant:⁸ the insurance fraudster, it has been said, can be convicted on the basis that his actions demonstrate wicked recklessness.⁹ English lawyers have sometimes used the insurance fraudster hypothetical in order to argue that the *mens rea* of murder in English law should be altered along the lines found in Scotland.¹⁰

Thanks to a recent decision of the High Court, however – a decision reached in rather unusual circumstances – it seems that all this was wrong, and that the true meaning of “intention” is, in principle, just as important to the Scots law of murder as the English. The case is *HM Advocate v Purcell*.¹¹

A. PURCELL: FACTS AND PROCEDURE

The charge against Mr Purcell was that he had committed murder by driving a car so recklessly that he hit and killed a young boy. Such a charge is exceptional, because it is normally expected that a death resulting from the use of a motor vehicle – except,

3 For an alternative, see G Williams, *The Mental Element in Crime* (1965) 13.

4 For an overview, see Ashworth, *Principles* (n 1) 174-181.

5 *R v Woollin* [1999] 1 AC 82, adopting the test formulated in *R v Nedrick* [1986] 1 WLR 1025 but replacing “infer” with “find” “in the interests of clarity” (per Lord Hope of Craighead at 97).

6 See M C Kaveny, “Inferring intention from foresight” (2004) 120 LQR 81.

7 *Drury v HM Advocate* 2001 SLT 1013.

8 Of course, the correct meaning of “intention” could arise in the context of other criminal offences, but the English experience suggests it is overwhelmingly more likely to arise in respect of murder than elsewhere.

9 G H Gordon, *The Criminal Law of Scotland*, 3rd edn, by M G A Christie, vol 1 (2000) para 7.18. (This view is not reconcilable with the position taken in vol 2 of Gordon’s *Criminal Law* and endorsed by the court in *Purcell*: for which see B. below.) To similar effect, although not concerned with this particular hypothetical, see R A A McCall Smith and D Sheldon, *Scots Criminal Law*, 2nd edn (1997) 178-180. McCall Smith and Sheldon’s position, however, depends on rather doubtful interpretations of the Scottish authorities which the authors cite: the better analysis, reaching a contrary conclusion, is that of T H Jones and M G A Christie, *Criminal Law*, 3rd edn (2003) 9-46-9-47.

10 See, in particular, Lord Goff, “The mental element in the crime of murder” (1988) 104 LQR 30 at 56.

11 [2007] HCJ 13, 2008 SLT 44.

perhaps, where a vehicle has been used deliberately as a weapon¹² – will at most be charged as the statutory offence of causing death by dangerous driving.¹³

This statutory offence derives from the offence of causing death by reckless or dangerous driving, introduced both north and south of the Border in 1956 because it was believed that “juries had been unwilling to convict of manslaughter in cases of death caused by car drivers”.¹⁴ As recently as 1983, it was judicially suggested that a prosecution for manslaughter as a result of reckless driving would only be brought “in a very grave case”,¹⁵ and in 2001 Michael Christie wrote that prosecutions for culpable homicide by grossly negligent driving were in a “process of disappearing” now that the penalty for causing death by dangerous driving was a maximum of ten years’ imprisonment.¹⁶

Against that background, the murder charge against Mr Purcell was wholly exceptional, but then his conduct was extreme: in eventually sentencing him to twelve years’ imprisonment for culpable homicide, Lord Uist said that the “course of wild and reckless driving in which you engaged before, during and after this fatal accident was wholly atrocious in nature and placed the lives of everyone in your wake in serious danger”.¹⁷

For whatever reason, Mr Purcell’s counsel did not take a plea to the relevancy of the charge against him,¹⁸ or even a statutory submission of no case to answer, but instead chose to submit after both the Crown and defence evidence had been led that there was no basis on which the jury could return a verdict of guilt of murder.¹⁹ This procedure was technically competent but wholly undesirable. Nothing turned on the evidence which had been led in court: counsel’s submission was simply that some form of “wilful act” (probably an assault) was required as a basis for a conviction of murder, and no such act had been alleged in the indictment.

It is, for obvious reasons, undesirable to have to deal with complex submissions of law after a jury has been empanelled.²⁰ Had counsel’s submission been raised as a preliminary plea,²¹ there would have been no question of impeding the proper course of a jury trial: instead, the matter could have been decided by a single judge and an

12 As in *Brian Venuti*, High Court at Glasgow, September 2004 (convictions for murder and attempted murder by driving into a group of persons). See also *Kelly v HM Advocate* 2006 SCCR 9 (attempted murder).

13 Road Traffic Act 1988 s 1, as amended.

14 *Government of the United States of America v Jennings* [1983] 1 AC 624, at 629 per Lord Roskill, discussing s 8 of the Road Traffic Act 1956.

15 *Government of the United States of America v Jennings* at 644 per Lord Roskill.

16 G H Gordon, *The Criminal Law of Scotland*, 3rd edn, by M G A Christie, vol 2 (2001) para 26.09 n 44. The maximum penalty for the offence created in 1956 was five years’ imprisonment: Road Traffic Act 1956 s 8(1).

17 See http://news.bbc.co.uk/1/shared/bsp/hi/pdfs/05_10_07_purcell.pdf.

18 As to whether the court could have raised the issue of relevancy *ex proprio motu*, see *Cartwright v HM Advocate* 2001 SLT 1163; *Heywood v McLennan* 1994 SCCR 1.

19 See *Purcell* at para 2.

20 Cf *HM Advocate v Mowat* 2001 SLT 738.

21 As it plainly could have been: see *Purcell* at para 19. In theory, it might have been open to the court to refuse to entertain counsel’s submission on the basis that it was in substance a preliminary plea in terms

appeal taken if necessary. As it was, the trial judge was put in the unenviable position of being asked to determine the correct answer to a hugely important but uncertain legal question.

Perhaps mindful of the media and parliamentary storm which had surrounded the recent decision of another judge, sitting alone, to uphold a no case to answer submission in another high profile murder trial,²² Lord Uist decided that the issue should be dealt with by a bench of three judges, which was promptly convened.

This approach – almost certainly the least worst option available – may seem to replicate an appeal court hearing, but it has significant disadvantages. In particular, appellate courts are more likely to produce “correct” decisions not just because of the increased number of judges sitting on them, but because of the opportunities for refinement of argument: they have a previous reasoned decision to consider and counsel can reconsider and refine their arguments on the basis of that decision.²³ As it was, the opinion of the court, while careful and thoughtful, is open to criticisms which might have been avoided had a different procedure been followed at the outset.

B. *PURCELL*: THE DECISION

In summary, the decision in *Purcell* is clear and simple: murder requires that death be caused either “with wicked intention to kill or by an act intended to cause physical injury and displaying a wicked disregard of fatal consequences”.²⁴ Scots law can no longer rely on wicked recklessness to sidestep the problem of “intention”. There are two obvious problems with this approach, however.²⁵

First, a problem of doctrine: the decision is not as easily reconciled with precedent as the *Purcell* court seems to think. Although the review of the authorities conducted by Lord Eassie is careful and thorough, there is one surprising omission: the decision of a court of seven judges in *Brennan v HM Advocate*.²⁶ There, the court rejected an argument that a person who had suffered a “total alienation of reason” as a result of voluntary intoxication could be acquitted of murder. The court’s reasoning appears to have been as follows: even if Brennan had been so drunk as to be incapable of forming any intention, becoming grossly intoxicated was *itself* wickedly reckless.²⁷ It is not easy to see how this approach can be reconciled with the decision in *Purcell*.²⁸

of s 72 of the Criminal Procedure (Scotland) Act 1995 and no cause had been shown for dealing with the point at such a late stage. The potential objections to such a course in this context will be obvious.

²² See H L MacQueen and S Wortley, “*World’s End* murder trial” (2008) 12 EdinLR 3.

²³ As is implicitly recognised in *McPhelim v HM Advocate* 1996 JC 203 and *HM Advocate v Al-Megrahi* (No 5) 2002 JC 38. See further J Chalmers, “Scottish appeals and the proposed Supreme Court” (2004) 8 EdinLR 4 at 7-8.

²⁴ *Purcell* at para 16, quoting with approval from Gordon, *Criminal Law* (n 9) para 23.33.

²⁵ Space precludes a fuller aspect of the substantive aspects of *Purcell* here: they are discussed in more detail in M Plaxton, “Foreseeing the consequences of *Purcell*” 2008 SLT (News) 21.

²⁶ 1977 JC 38.

²⁷ *Brennan* at 50-51 per the Lord Justice-General (Emslie).

²⁸ It may not need to be reconciled given the approach of “presuming” *mens rea* in cases of voluntary intoxication advocated in *Ross v HM Advocate* 1991 JC 210 but that approach has serious

Second, a problem of principle: is this outcome desirable? Scots lawyers have tended to argue that it should be possible for purely reckless killings to be treated as murder,²⁹ although this might make it difficult to “sustain a morally defensible boundary” between murder and culpable homicide.³⁰ But even if that is accepted, the approach taken by the *Purcell* court may be overly narrow: should murder not also encompass a person who intends to create a risk or fear of injury and demonstrates wicked recklessness in so doing?³¹ Is it really desirable that a person who fires a gun at another to scare them, intending to miss but perhaps not caring too much about whether he does, should be guilty merely of culpable homicide and not murder?³²

However, part one of a familiar refrain applies: these are not questions for the courts, but instead matters for Parliamentary law reform. Regrettably, part two of the refrain – refer it to the Scottish Law Commission! – is inapposite on this occasion: the Commission has more than enough criminal law to occupy itself with right now.³³

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Reforming Rape and Other Sexual Offences

Rape was redefined by the High Court in *Lord Advocate's Reference (No 1 of 2001)*¹ as sexual intercourse (that is, penile penetration of the vagina) without the consent of the complainer. Subsequent cases highlighted deficiencies in the law, particularly the difficulties faced by the Crown in establishing that the accused was aware that the complainer had not consented to intercourse,² and led to growing recognition that the law did not reflect current attitudes towards certain sexual behaviours. This prompted the Scottish Executive to invite the Scottish Law Commission to review the law relating to rape and other sexual offences.³

problems itself: see J Chalmers and F Leverick, *Criminal Defences and Pleas in Bar of Trial* (2006) paras 8.10-8.13.

29 See e.g. McCall Smith and Sheldon, *Scots Criminal Law* (n 9) 178-180.

30 The quote is from the Law Commission's consideration of this question in respect of English law: *Murder, Manslaughter and Infanticide* (Law Com No 304, 2006) para 2.13.

31 Under the Law Commission's proposals, this would be second degree murder: *Murder, Manslaughter and Infanticide* para 1.36.

32 See the unreported case of *Patrick McCarron* (1964), noted in Gordon, *Criminal Law* (n 16) para 23.17.

33 See S Wortley, “Law reform after *World's End*” (2008) 12 EdinLR 293.

1 2002 SLT 466.

2 For example, *Cinci v HM Advocate* 2004 JC 103 and *McKearney v HM Advocate* 2004 JC 87.

3 Under s 3(1)(e) of the Law Commissions Act 1965. The reference to the Commission was made in June 2004.