



CHIEF CORONER

LAW SHEET No.1

UNLAWFUL KILLING¹

1. Following the decision of the High Court in *R (Wilkinson) v HM Coroner for Greater Manchester South District* [2012] EWHC 2755 (Admin) the conclusion² of unlawful killing is restricted to the criminal offences of -
 - (1) **Murder**,
 - (2) **Manslaughter** (including corporate manslaughter), and
 - (3) **Infanticide**.³
2. The conclusion of unlawful killing does not extend to the criminal offences of causing death by dangerous driving or causing death by careless driving: *ibid*. By analogy it does not extend to Health and Safety Act offences where death results. No reference should be made in an inquest to any of these offences or the elements of the offences (except occasionally where it is necessary to acknowledge their existence and to dismiss them as irrelevant).
3. Bad driving cases causing death may, therefore, only be regarded as unlawful killing for inquest purposes if they satisfy the ingredients for manslaughter (gross negligence manslaughter) or where a vehicle is used as a weapon of assault and deliberately driven at a person who dies (murder or manslaughter depending on the intent).
4. All elements of manslaughter must be proved to the criminal standard for a conclusion of unlawful killing: see *R v West London Coroner, ex parte Gray* [1988] 1 QB 467, 477-478; *R v Wolverhampton Coroner, ex parte McCurbin* [1990] 1 WLR 719; *R (O'Connor) v HM Coroner for District of Avon* [2009] EWHC 854 (Admin). If unlawful killing is left to a jury with any other possible conclusion, unlawful killing must be considered by the jury first: *McCurbin*, above. If unlawful killing and suicide (each of which must be proved to the criminal standard) are both left to a jury there is no order of precedence, although, sensibly, unlawful killing should be considered first.

¹ I am indebted to the coroners who have provided valuable input into this Law Sheet.

² See Chief Coroner's Guidance No.17 *Conclusions: Short-Form and Narrative*.

³ It may possibly extend to the offence of causing or allowing the death of a child contrary to section 5 of the Domestic Violence, Crime and Victims Act 2004, but this is a difficult offence to prove and, as far as I know, its validity has not yet been tested in the European Court of Human Rights.

5. No conclusion of unlawful killing may name the person responsible: see *Gray* above, cited in *R (Anderson) v HM Coroner for Inner North Greater London* [2004] EWHC 2729 (Admin). Otherwise there will be a breach of section 10(2), Coroners and Justice Act 2009. But that person must still be capable of being identified (in the mind of the decision maker), whether by name, description or otherwise, as the person who caused the death.
6. Before any conclusion (including unlawful killing) is left to a jury for consideration the coroner must apply the so-called 'Galbraith plus' test: see *R (Secretary of State for Justice) v HM Deputy Coroner for the Eastern District of West Yorkshire* [2012] EWHC 1634 (Admin) and the Chief Coroner's Law Sheet No.2. The coroner must first be satisfied that there is enough evidence, in the familiar *Galbraith* sense that there is sufficient evidence upon which a jury properly directed could properly reach a particular conclusion. In addition ('the modest gloss or addition') the coroner must also be satisfied that it is safe to leave the conclusion to the jury: *ibid*, paras. 17-25. The two questions for the coroner therefore are: Is there enough evidence to leave this conclusion to the jury? And, if so, would it be safe on the evidence for the jury to reach this conclusion? Failure to ask and answer either question may render the conclusion vulnerable to challenge by way of judicial review (as in the *West Yorkshire* case).
7. In the summing up the coroner should direct the jury clearly as to what needs to be proved, ie all the ingredients of the criminal offence. Since a conclusion of unlawful killing involves a decision that a criminal offence has caused death, a jury must know clearly from the summing up what they have to find as facts (Box 3) in order to justify the conclusion (Box 4): see *Anderson* above. In any event every summing up must be tailored to the facts of the case and not just a recital of the necessary ingredients of the conclusion in question: see *R (Brown) v HM Coroner for Neath and Port Talbot* [2006] EWHC 2019 (Admin) at [22].

(1) MURDER

8. A person is guilty of murder if he/she kills a person unlawfully (ie not in self-defence or defence of another or accidentally, each of which provides an absolute defence) and at the time intended either to kill him or cause him some really serious bodily harm (murderous intent).

(2) MANSLAUGHTER

9. The offence of manslaughter in the criminal law comes in a number of forms. Its most common form for coroners is gross negligence manslaughter, below. There is also unlawful act manslaughter, below.
10. Manslaughter also occurs where the offence of murder is reduced to manslaughter by reason of lack of intent, the failure of the prosecution to prove murderous intent. Murder may also be reduced to manslaughter by reason of the statutory partial defences of diminished responsibility or loss of control (formerly provocation): sections 52-56, Coroners and Justice Act 2009. See also suicide pacts, below.
11. It is unhelpful for a coroner when summing up to refer to the technical expressions voluntary or involuntary manslaughter, which may be confusing.

Gross negligence manslaughter

12. The authorities, particularly *R v Adomako* [1995] 1 AC 171 (HL) (see *Archbold 2016* at 19-111 and 19-122), show that a person commits the offence of gross negligence manslaughter (at common law) where the following elements are proved -
- (1) The existence of a duty of care (based on ordinary principles of negligence) owed to the deceased,
 - (2) a breach of that duty of care,
 - (3) the risk of death (not just the risk of serious injury: *R v Misra* [2005] 1 CrAppR 21 [25] (CA)) was a reasonably foreseeable consequence of the misconduct: *Reeves v Commissioner of Police for the Metropolis* [2001] 1 AC 360, 393 (HL),
 - (4) the breach caused the death, and
 - (5) having regard to the risk of death involved, the misconduct was grossly negligent so as to be condemned as the serious crime of manslaughter.
13. All elements must be proved to the criminal standard: *Gray*, above. All must be proved to relate to one identifiable person (but who shall not be named), and not be aggregated through the actions of a number of people: see the *West Yorkshire* case, above, which illustrates the sort of directions required in a gross negligence manslaughter case.
14. For causation of death to be proved (as with all homicide offences), the actions or omissions of the identifiable person must cause death but need not be the sole or main cause provided that they contribute significantly to it: *R v Cheshire* [1991] 1 WLR 844.
15. *Adomako* indicates that a breach of duty should only be categorised as gross when it involves 'such disregard for the life and safety of others as to amount to a crime against the state and conduct deserving punishment'. In a medical context 'Mistakes, even very serious mistakes, and errors of judgment, even very serious errors of judgment, and the like, are nowhere near enough for a crime as serious as manslaughter to be committed': *R v Misra*, above.
16. Although Lord Mackay LC said in *Adomako* that the word 'reckless' could be used in the explanation of gross negligence manslaughter, experience suggests that the word 'reckless' may be difficult and confusing and should usually be avoided.
17. Summing up in such cases is not without difficulty. In the case of *Brown*, above, it was described as 'a very difficult task for any judge, let alone a coroner'. *Brown* is a helpful illustration of the law and its application in inquests (it concerned the death of a 16 year old who drowned while on an outward bound course).

Corporate manslaughter

18. Corporate manslaughter contrary to section 1 of the Corporate Manslaughter and Corporate Homicide Act 2007 is a similar offence. It is committed by an organisation (or other body listed in the Act) if the way in which its activities are managed or organised causes a person's death and amounts to a gross breach of a relevant duty of care owed to the deceased. [See *Archbold* 19-138]

19. Relevant duties of care under the law of negligence, such as a duty owed to the organisation's employees or as occupier of premises, are listed in section 2. A breach of a duty of care is gross 'if the conduct ... falls far below what can reasonably be expected of the organisation in the circumstances': section 1(4)(b).
20. There are exceptions for particular organisations responding in emergency circumstances: section 6.

Unlawful act manslaughter

21. The authorities show that the elements of unlawful act manslaughter (at common law) are -
- (1) A deliberate act which is unlawful (eg an assault).
 - (2) The act is a dangerous act in that it is, from an objective standpoint, one which a sober, reasonable and responsible person of the perpetrator's age and gender, would inevitably realise is an act which is likely to cause the deceased some physical harm, albeit not serious harm, and
 - (3) The unlawful, dangerous act causes death (even though death or harm of any kind is not intended). [See *Archbold* 19-112 and *DPP v Newbury* [1977] AC 500]
22. There are many differing circumstances in which death is caused and unlawful act manslaughter may arise. Actual examples include the one-punch scenario where the victim is struck or pushed and falls and strikes his head; throwing a non-swimmer off a bridge into the river below; shooting at an intruding burglar to scare him intending to miss; threatening immediate violence to a girl who jumps out of a window to escape. [See *Archbold* 19-113]
23. In a fatal drugs context it is unlawful act manslaughter if the defendant injects another, having unlawfully taken heroin into his possession for that purpose: *R v Cato* 62 Cr.App.R. 41. By contrast the House of Lords has held that a person is not guilty of manslaughter if he supplies a class A controlled drug to a fully informed and responsible adult who then, freely and voluntarily, self-administers the drug and dies from it: *R v Kennedy (No.2)* [2008] 1 AC 269 (not followed in Scotland). The act of supplying the drug (even in a syringe), without more, cannot cause harm; and the chain of causation is broken by the informed voluntary choice of the deceased: *ibid*.

(3) INFANTICIDE

24. The offence of infanticide is rarely prosecuted; there have been four cases in the last seven years. It may be charged as a specific offence or it may be found by the jury as a lesser alternative offence when a woman is charged with the murder or manslaughter of her child. It is limited to circumstances which would otherwise amount to murder or manslaughter: section 1 of the Infanticide Act 1938 (as amended by section 57, Coroners and Justice Act 2009).
25. Where a woman deliberately or by omission causes the death of her child (under the age of 12 months), and the circumstances are such that the offence would otherwise have amounted to murder or manslaughter, she is guilty of the lesser offence of infanticide if at the time of the act or omission the balance of her mind was disturbed by reason of her not having fully recovered from the effect of giving

birth to the child or by reason of the effect of lactation consequent upon the birth.
[See *Archbold* 19-189]

Adjournment

26. If during the course of an inquest, it appears to the coroner that the death of the deceased is likely to have been due to a homicide offence and that a person may be charged in relation to the offence, the coroner must adjourn the inquest and notify the Director of Public Prosecutions: Rule 25, Coroners (Inquests) Rules 2013.

Suicide

27. Although suicide has not been a crime since its repeal by the Suicide Act 1961, the survivor of a suicide pact who killed the other commits the crime of manslaughter: section 4, Homicide Act 1957 (there have been no prosecutions for at least 10 years). Although the decision in *Wilkinson* above makes no reference to suicide pacts, the inquest conclusion in such a case should, sensibly, still be suicide, not unlawful killing, suicide being the object and intention (if so proved) of the deceased, however achieved.
28. Encouraging or assisting suicide is also a crime (sections 2, 2A and 2B, Suicide Act 1961, as amended by section 59, Coroners and Justice Act 2009), but this does not alter the conclusion of suicide.
29. There is no known criminal or coroner case involving a finding of gross negligence causing suicide: see the *West Yorkshire* case, above, at para.43. Nevertheless, the possibility of a conclusion of unlawful killing in this context was envisaged 'in theory' in the *West Yorkshire* case at paras.43-45, 47 (a death in prison case). And in the earlier case of *R v D* [2006] EWCA Crim 1139, [32], the Court of Appeal confirmed that it could be manslaughter if a husband's unlawful conduct causes his wife to suffer a recognisable psychiatric illness which results in her suicide, 'subject always to issues of causation'. See also the civil case of *Corr v IBC Vehicles* [2008] UKHL (13) (company's negligence 'caused' deceased to take his own life).

Standard of proof

30. For the purposes of a conclusion of unlawful killing, whether murder, manslaughter or infanticide, all elements must be proved to the criminal standard of proof (see paragraph 4 above).
31. The criminal standard of proof means that the coroner/jury must be sure that the conclusion of unlawful killing is proved on the evidence. If, for example, a jury is considering unlawful killing as a result of gross negligence manslaughter, the jury must be sure that all elements of the crime of gross negligence manslaughter are proved.
32. Being 'sure' is the modern equivalent of 'beyond reasonable doubt'; they mean the same thing. The former is simpler and easier to understand, being an ordinary English word. The latter may tend to raise more queries as to what it means precisely. Percentages of certainty, such as '100% sure' or 'almost 100% sure', are sometimes raised in a jury question. They have no relevance to 'being sure' and should be disregarded. Juries should be told just that they must be sure, or

that they must be satisfied beyond reasonable doubt (which means the same thing). No other words should be used.

33. A conclusion of suicide must also be proved to the criminal standard⁴. All other conclusions must be proved to the civil standard, on a balance of probabilities: see Notes to Schedule 2, Coroners (Inquests) Rules 2013.

Insanity

34. The conclusion of unlawful killing may not, however, be available if there is evidence that the person who carried out the act which led to death was insane at the time and therefore lacked the necessary *mens rea* for the offence. The test is as follows: Is the coroner (or the jury) sure that the person was not legally insane at the time of the killing? (*R (O'Connor) v HM Coroner for District of Avon* [2009] EWHC 854 (Admin).)
[*Archbold* 17-74 *et seq.* and *M'Naghten's case* (1843) 10 Cl. & Fin. 200]

Driving cases

35. Where the case involves a road death no reference should normally be made to the offences of causing death by dangerous driving or causing death by careless driving or any other driving offence (see paragraph 2 above).
36. A driving case may however amount to gross negligence manslaughter if the driving is sufficiently bad. If, and only if, there is sufficient evidence for the proof of all elements of gross negligence manslaughter it may be left to the jury in the terms of the elements set out above (without reference to any other offences).
37. Where a vehicle is used as a weapon of assault and driven deliberately at a person who dies, it is murder if the intent is to kill or cause grievous bodily harm, or manslaughter if the intent is to cause some lesser harm. In both cases the appropriate conclusion at inquest, if there is an inquest, would be unlawful killing. A driving assault of this kind is usually charged in a criminal court as a single charge of murder with manslaughter as a lesser alternative depending on the intent, rather than the lesser used unlawful act manslaughter.
38. So it can be seen that the offence of manslaughter may arise in different ways in a driving context. A so-called 'hit and run' driving case, for example, depending on the particular facts, could be (a) deliberate and intentional and therefore an assault, and therefore potentially murder or manslaughter depending on the driver's intent, or (b) deliberate in the sense that the driver wanted to scare a pedestrian with a near miss but did not miss, which could be unlawful act manslaughter, or (c) not deliberate but accidental (in the legal sense), but still gross negligence manslaughter if the evidence supports it.
39. It should be noted that driving a vehicle, which is in itself normally lawful, does not become unlawful for the purposes of unlawful act manslaughter if it contravenes the criminal law merely by the manner of its execution, for example by driving dangerously or carelessly: see *Andrews v DPP* [1937] AC 576.

⁴ See *Ex parte McCurbin*, above, at 729; *Jenkins v HM Coroner for Bridgend and Glamorgan Valleys* [2012] EWHC 3175 (Admin) at [19], [23], [26]; *R (Lagos) v HM Coroner for City of London* [2013] EWHC 423 (Admin) at [36].

40. If the road death case did not, under the old law, involve manslaughter, the normal verdict in an inquest, should have been *accident* (see *Wilkinson* above). *Misadventure* might at times have felt more appropriate. However, Schedule 2 of the Coroners (Inquests) Rules 2013 includes for the first time a short-form conclusion of *road traffic collision*, which for most families may sound better than accident. In addition to the findings of fact in Box 3 of the Record of Inquest and the recording of a short-form conclusion in Box 4, or as an alternative to a short-form conclusion, a brief narrative conclusion may be entered in Box 4, if appropriate.
41. Where a short-form conclusion is used in cases of bad driving falling short of manslaughter, coroners may feel that some words should be used in addition to *accident* or *road traffic collision* in order to alleviate any bereaved family's feeling that the outcome is disproportionate to the incident. Coroners will choose their own words. The use of clear, brief, neutral, findings of fact (in Box 3) may be helpful. For example, 'The unknown driver left the scene without stopping. He had been travelling at high speed down an ill-lit narrow street, knocking into parked cars, before he struck and knocked down the deceased who was walking along the side of the road, causing the injuries from which he died. Those are my findings of fact. I shall therefore record the formal conclusion [under the law/as required by law] as *accident* or *road traffic collision*.' (Box 4)
42. Where there has been a prosecution for manslaughter or causing death by dangerous or careless driving, there will normally be no need to resume the inquest. The criminal proceedings will have been sufficient inquiry, whatever the outcome, particularly if there has been a full trial and the evidence has been tested. Occasionally, there may be some additional element relating to the death, such as the medical care provided, which will require further examination by the coroner. In any event the conclusion of the inquest must not be inconsistent with the outcome of the criminal proceedings: para.8(5), Schedule 1, Coroners and Justice Act 2009.

HH JUDGE PETER THORNTON QC
CHIEF CORONER

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