



## CHIEF CORONER

### LAW SHEET No.1

#### UNLAWFUL KILLING<sup>1</sup>

1. On 13 November 2020, the Supreme Court gave judgment in the case of *Maughan*<sup>2</sup>. By a majority of three to two, the Supreme Court ruled that all conclusions in coronial inquests, whether narrative or short form, are to be determined on what is known as the civil standard of proof: the balance of probabilities.
2. This means that a conclusion of unlawful killing may only be reached, following an inquest, when the Coroner or jury is satisfied on the balance of probabilities (so that it is more likely than not) that a death was caused by one of the following criminal offences<sup>3</sup>:
  - (1) **Murder**,
  - (2) **Manslaughter** (including corporate manslaughter), and
  - (3) **Infanticide**<sup>4</sup>.
3. A conclusion of unlawful killing may not be reached in respect of the criminal offences of causing death by dangerous driving or causing death by careless driving<sup>5</sup>. By analogy it does not extend to Health and Safety Act offences where death results.
4. Bad driving cases causing death may 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).
5. Each of the elements of the relevant offence needs to be established to the civil standard<sup>6</sup>. The elements of the offences are discussed in more detail below.

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<sup>1</sup> I am indebted to those who have provided valuable input into this Law Sheet.

<sup>2</sup> *R (on the application of Maughan) v HM Senior Coroner for Oxfordshire* [2020] UKSC 46.

<sup>3</sup> *R (Wilkinson) v HM Coroner for Greater Manchester South District* [2012] EWHC 2755 (Admin) at [70].

<sup>4</sup> 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.

<sup>5</sup> *R (Wilkinson) v HM Coroner for Greater Manchester South District* [2012] EWHC 2755 (Admin) at [64].

<sup>6</sup> *R (on the application of Maughan) v HM Senior Coroner for Oxfordshire* [2020] UKSC 46.

6. For a Coroner sitting with a jury, after all the evidence has been heard, it is necessary for the Coroner to decide what potential conclusions to leave to the jury. In doing so, the coroner must apply the 'Galbraith plus' test<sup>7</sup>. This is dealt with in more detail in the Chief Coroner's Law Sheet No.2. Where unlawful killing is a potential conclusion on the facts, the coroner will need to consider whether a jury, properly directed, could find that all the elements of the relevant offence are made out on the balance of probabilities and whether such a conclusion could be safely reached.
7. Before the *Maughan* case, if there was more than one possible short form conclusion, unlawful killing had to be considered by the jury before other short form conclusions.<sup>8</sup> This was because unlawful killing (like suicide) had to be established to the same standard as in criminal proceedings ("beyond reasonable doubt"). Now that all possible conclusions in inquests must be established to the civil standard ("on the balance of probabilities"), the order of precedence is no longer as important. Because of their intrinsic gravity, however, it will usually remain sensible to consider unlawful killing before suicide (if applicable) and either or both of those short form conclusions before any other potential short form conclusions.
8. In the summing up in an inquest where unlawful killing is a potential conclusion, the coroner should direct the jury clearly as to what needs to be established (each element of the criminal offence or offences on which the conclusion might be founded) and what they have to find as facts to justify the conclusion. A reasoned decision will equally be expected of the coroner if unlawful killing has been raised but is not, in the coroner's judgment, a conclusion properly open to the jury on the facts of the case.
9. 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.<sup>9</sup>
10. No conclusion of unlawful killing may name the person responsible. This is because a determination may not be framed in such a way as to appear to determine any question of criminal liability on the part of a named person, or civil liability<sup>10</sup>. However, it may be obvious from the circumstances, evidence and summing-up who is regarded as responsible.<sup>11</sup> Indeed, a person must 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. It is also legitimate, and often necessary, for the Coroner's directions to the jury to tell them that they need to be satisfied that a specific (identified) individual was responsible for particular acts or omissions and/or held a particular mindset before the conclusion can be returned.
11. There is debate within the legal community over whether gross negligence and corporate homicide cases may infringe s10(2) of the Coroners and Justice Act

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<sup>7</sup> *R (Secretary of State for Justice) v HM Deputy Coroner for the Eastern District of West Yorkshire* [2012] EWHC 1634 (Admin).

<sup>8</sup> *R v Wolverhampton Coroner, ex parte McCurbin* [1990] 1 WLR 719.

<sup>9</sup> *R (Brown) v HM Coroner for Neath and Port Talbot* [2006] EWHC 2019 (Admin) at [22].

<sup>10</sup> Section 10(2) of the Coroners and Justice Act 2009.

<sup>11</sup> *R (Evans) v HM Coroner for Cardiff and Glamorgan* [2010] EWHC 3478 (Admin) (upheld on appeal: [2011] EWCA Civ 719).

2009. The Chief Coroner's view is that a finding of unlawful killing which happens to be based on gross negligence manslaughter or corporate homicide is not a conclusion which appears 'to determine any question of criminal liability on the part of a named person, or civil liability', merely because one ingredient is the breach of a duty of care. It is well-established that s10(2) is consistent with an unlawful killing conclusion that could be considered to determine criminal liability of a named person, as even where it is clear which person is considered to have caused a death, no express finding is made against that person<sup>12</sup>. By the same reasoning, an unlawful killing conclusion based on gross negligence manslaughter or corporate homicide should not breach s10(2) because there will be no express determination that a civil wrong has been committed. It is, however, for each individual coroner to come to his or her own conclusion, having heard any relevant submissions from interested persons.

## **(1) MURDER**

12. A person is guilty of murder if he/she kills a person unlawfully (i.e. 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 the person or cause him/her some really serious bodily harm (murderous intent).

## **(2) MANSLAUGHTER**

13. The offence of manslaughter in the criminal law comes in a number of forms. The most common form for coroners is gross negligence manslaughter (see below). There is also unlawful act manslaughter (see below).

14. Manslaughter also occurs where the offence of murder is reduced to manslaughter by reason of lack of intent, the failure of the prosecution in criminal proceedings 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)<sup>13</sup>. (See also suicide pacts, in the Suicide section below).

15. It is unhelpful for a coroner when summing up to refer to the technical expressions voluntary or involuntary manslaughter, which may be confusing.

### **Unlawful act manslaughter**

16. The elements of unlawful act manslaughter (at common law) are:

- (1) A deliberate act which is unlawful (e.g. 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).<sup>14</sup>

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<sup>12</sup> See for example *Jordan v Lord Chancellor* [2007] 2 AC 226 at [38], [49] and [56] (in relation to the equivalent provisions in rule 42 of the Coroners Rules 1984).

<sup>13</sup> Sections 52-56 of the Coroners and Justice Act 2009.

<sup>14</sup> *DPP v Newbury* [1977] AC 500.

17. There are many differing circumstances in which death is caused and unlawful act manslaughter may arise. Examples include a one-punch killing, where the victim is struck or pushed and falls and strikes his head; throwing a non-swimmer off a bridge into the river; shooting at an intruding burglar to scare him intending to miss; threatening immediate violence to someone who jumps out of a window to escape.
18. In a fatal drug context, it is unlawful act manslaughter if the defendant injects another, having unlawfully taken heroin into his possession for that purpose, and death results.<sup>15</sup> 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.<sup>16</sup> 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.<sup>17</sup>

### **Gross negligence manslaughter**

19. *Adomako*,<sup>18</sup> *Rose*,<sup>19</sup> *Kuddus*,<sup>20</sup> and *Misra*<sup>21</sup> are the key authorities of which coroners should be aware.

20. *Rose* summarised the six elements of the offence as follows:

- (1) The defendant owed an existing duty of care to the victim.
- (2) The defendant negligently breached that duty of care.
- (3) That breach of duty gave rise to an obvious and serious risk of death.
- (4) It was also reasonably foreseeable that the breach of that duty gave rise to a serious and obvious risk of death.
- (5) The breach of that duty caused the death of the victim.
- (6) The circumstances of the breach were truly exceptionally bad and so reprehensible as to justify the conclusion that it amounted to gross negligence and required criminal sanction.

21. Each of these elements must be established on the balance of probabilities before a coroner or jury may return a conclusion of unlawful killing. All of the elements must relate to one identifiable person (who must not be named), and may not be aggregated through the actions of a number of people.

22. Some legal commentators have suggested that there may be a conceptual difficulty in applying the 'balance of probabilities' to the sixth element of the test. Coroners are independent and must make their own decisions on how to apply the case law. However, coroners may wish to consider that, as the court explained in *Misra*: 'The question for the jury is not whether the defendant's negligence was gross, and whether, *additionally*, it was a crime, but whether his behaviour was grossly negligent and *consequently* criminal. This is not a question

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<sup>15</sup> *R v Cato* 62 Cr.App.R. 41.

<sup>16</sup> *R v Kennedy (No.2)* [2008] 1 AC 269 (not followed in Scotland).

<sup>17</sup> *Ibid.*

<sup>18</sup> *R v Adomako* [1995] 1 AC 171 (HL).

<sup>19</sup> *R v Rose* [2017] EWCA Crim 1168.

<sup>20</sup> *R v Kuddus* [2019] EWCA Crim 837.

<sup>21</sup> *Misra and Srivastava* [2004] EWCA Crim 2375.

of law, but one of fact, for decision in the individual case'.<sup>22</sup> Since the sixth element of the offence thus raises an issue of fact, the decision in *Maughan* would appear to indicate that, like other factual questions in coroners' courts, it is to be resolved according to the civil standard of proof.

### **Corporate manslaughter**

23. Corporate manslaughter contrary to section 1 of the Corporate Manslaughter and Corporate Homicide Act 2007 (the 2007 Act) 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.
24. 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 of the 2007 Act. 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) of the 2007 Act.
25. There are exceptions for particular organisations responding in emergency circumstances: section 6 of the 2007 Act.

### **(3) INFANTICIDE**

26. The offence of infanticide is very rarely prosecuted. 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.<sup>23</sup>
27. 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.

### **ADJOURNMENT**

28. 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.<sup>24</sup> In practice, a coroner who is conducting an investigation which may raise an issue of unlawful killing should usually contact the Crown Prosecution Service as soon as possible and ask for their views on the inquest proceeding as planned, in order to avoid the situation where an inquest starts and has to be adjourned part-heard.

### **SUICIDE**

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<sup>22</sup> Ibid at [62].

<sup>23</sup> Section 1 of the Infanticide Act 1938 (as amended by section 57, Coroners and Justice Act 2009).

<sup>24</sup> Rule 25 of the Coroners (Inquests) Rules 2013.

29. 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 is guilty of the crime of manslaughter.<sup>25</sup> Although the decision in *Wilkinson* 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.
30. Encouraging or assisting suicide is also a crime<sup>26</sup>, but this does not alter the conclusion of suicide.
31. There is no known criminal or coroner case involving a finding of gross negligence causing suicide.<sup>27</sup> Nevertheless, the possibility of a conclusion of unlawful killing in this context has been envisaged 'in theory'.<sup>28</sup> The Court of Appeal has 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'<sup>29</sup>. In a civil case, a company's negligence was found to have 'caused' the deceased to take his own life.<sup>30</sup>

## **INSANITY**

32. 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) satisfied that the person was not legally insane at the time of the killing?<sup>31</sup>

## **DRIVING CASES**

33. 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.
34. A driving case may however amount to gross negligence manslaughter if death has been caused by driving which 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).
35. 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

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<sup>25</sup> Section 4 of the Homicide Act 1957, though there have been no recent prosecutions.

<sup>26</sup> Sections 2, 2A and 2B, Suicide Act 1961, as amended by section 59, Coroners and Justice Act 2009

<sup>27</sup> *R (Secretary of State for Justice) v HM Deputy Coroner for the Eastern District of West Yorkshire* [2012] EWHC 1634 (Admin) at [43].

<sup>28</sup> *Ibid* at [43-45] and [47].

<sup>29</sup> *R v D* [2006] EWCA Crim 1139 at [32].

<sup>30</sup> *Corr v IBC Vehicles* [2008] UKHL (13)

<sup>31</sup> *R (O'Connor) v HM Coroner for District of Avon* [2009] EWHC 854 (Admin). *M'Naghten's case* (1843) 10 Cl. & Fin. 200

charge of murder with manslaughter as a lesser alternative depending on the intent, rather than the lesser used unlawful act manslaughter.

36. 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, therefore an assault, and so 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.
37. 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.<sup>32</sup>
38. Schedule 2 of the Coroners (Inquests) Rules 2013 includes a short-form conclusion of *road traffic collision*, which is an alternative to a conclusion of *accident*, and may be more satisfactory on the facts of the case. 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.
39. 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)
40. 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.<sup>33</sup>

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<sup>32</sup> *Andrews v DPP* [1937] AC 576.

<sup>33</sup> Paragraph 8(5), Schedule 1, Coroners and Justice Act 2009.