



Scottish Law Commission

CONSULTATIVE MEMORANDUM NO. 61

Attempted Homicide

SEPTEMBER 1984

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The Commission would be grateful if comments on this
Consultative Memorandum were submitted by 1st March 1985.
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ACQUISITIONS

SCOTTISH LAW COMMISSION

CONSULTATIVE MEMORANDUM NO.61

ATTEMPTED HOMICIDE

PART I - INTRODUCTION

1.1 In January 1980 the Crown Agent wrote to the Secretary of the Scottish Law Commission enclosing a paper by Mr H D B Morton QC, who until shortly before that time had been Home Advocate Depute. That paper¹ considers problems that are said to arise as a result of the decision in the case of Cawthorne v. H.M.A.² In his letter the Crown Agent indicated that the Lord Advocate was inviting the Commission to consider Mr Morton's paper in connection with their study of the mental element in crime. Since the Commission's interest in the latter subject was the limited one of considering the implications for Scots law of proposals that had been made by the Law Commission for England and Wales rather than making any recommendations for the reform of Scots law, it was thought to be inopportune to consider at that stage the problems raised by Mr Morton. They were, however, left open for consideration at a later stage. Subsequently, in April 1984, the Crown Agent made a formal proposal, under section 3(1)(a) of the Law Commissions Act 1965, that this Commission should consider the proposals for the reform of the law relating to attempted homicide as set out in Mr Morton's paper. The Commission has accepted that proposal and has now prepared this Consultative Memorandum.

¹ Reproduced as an Appendix to this Memorandum.

² 1968 J.C. 32.

1.2 The purpose of the present Consultative Memorandum is to review the decision in the case of Cawthorne; to seek the views of consultees in order to determine whether it in fact gives rise, or is likely to give rise, to problems which would justify law reform measures; and, in the event that it does, to seek views on the nature of any reform that may be thought to be necessary.

PART II - THE CASE OF CAWTHORNE v. H.M.A.

2.1 The facts of Cawthorne v. H.M.A. are that the accused had been living in a lodge on a highland estate with his mistress, who was known as Mrs Cawthorne, and another lady, Barbara Brown. On the evening in question there was a quarrel between the accused and his mistress. He went outside and fired two shots from a .303 rifle, apparently with the purpose of frightening Barbara Brown. Mrs Cawthorne, Barbara Brown, and two men called Fraser who had been called to help them, then went into the study, where they closed the shutters and barricaded the door. The accused, knowing that these four were in the study, fired at least two shots into the room, one through the shutters and one through the door. Both shots travelled across the room low enough to strike a person. Although one of the occupants seems to have been slightly grazed, either directly by a bullet or by the result of a ricochet off the wall, in fact none of the occupants of the room was injured.

2.2 The accused was charged in an indictment which libelled that he had assaulted the four persons concerned and which went on to allege that he "did wilfully discharge several bullets from a loaded rifle at them to the danger of their lives and did thus attempt to murder them". At the conclusion of the trial the presiding judge (Lord Avonside) was asked to direct the jury that they could convict of attempted murder only if they were satisfied that the accused had intende

to kill the occupants of the study. He declined to give this direction and, in his charge to the jury, said:¹

"In our law the crime of murder is committed when the person who brings about the death of another acted deliberately with intent to kill, or acted with intent to do bodily harm, or, and this is the third leg, acted with utter and wicked recklessness as to the consequences of his act upon his victim Attempt to murder is a charge brought against a man who is alleged to have made an attack on another or other people in circumstances in which, had his victim or victims died as a result of the attack, his offence would have been murder. Thus in my view ... the law holds it to be murder if a man dies as a result of another acting with utter and wicked recklessness, and that because the very nature of the attack, the utter and wickedly reckless attack, displays a criminal intention. If such an act does not result in death, none the less the criminal intention has been displayed and is of a quality and nature which results in its properly being described as an attempt to murder."

2.3 The accused was found guilty as libelled and sentenced to imprisonment for nine years. He applied for leave to appeal against conviction, his main ground of appeal being:²

"That the trial judge misdirected the jury in respect that he equiparated the mens rea³ necessary for attempted murder with that

¹ pp.33, 34.

² p.34.

³ At the risk of some oversimplification, mens rea is the term used in Scots law to denote the state of mind, or mental element, that is required before a person can be convicted of a crime. By contrast the actus reus is the behaviour, actings or events constituting the crime itself.

necessary for murder and failed to direct the jury that they could only find the applicant guilty of the crime of attempted murder if they were satisfied beyond reasonable doubt that the applicant discharged the firearm at any of the persons named in the indictment with the deliberate intention of killing them."

2.4 The appeal was rejected. The reasons which the members of the court gave for doing so are not entirely consistent in matters of detail but are all broadly to the same effect. Dealing with the crime of murder Lord Justice-General Clyde said:¹

"The mens rea which is essential to the establishment of such a common law crime may be established by satisfactory evidence of a deliberate intention to kill or by satisfactory evidence of such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences The reason for this alternative being allowed in our law is that in many cases it may not be possible to prove what was in the accused's mind at the time, but the degree of recklessness in his actings, as proved by what he did, may be sufficient to establish proof of the wilful act on his part which caused the loss of life."

Turning to the question of attempted murder, the Lord Justice-General then continued:²

"In my opinion attempted murder is just the same as murder in the eyes of our law, but for the one vital distinction, that the killing has not been brought off and the victim of the attack has escaped with his

¹ pp.35, 36.

² p.36.

life. But there must be in each case the same mens rea, and that mens rea in each case can be proved by evidence of a deliberate intention to kill or by such recklessness as to show that the accused was regardless of the consequences of his act, whatever they may have been."

2.5 Lord Guthrie expressed some difficulty in understanding the ground of appeal. He said:¹

"Mens rea, or dole, in our criminal law is the wicked and felonious intention which impels the criminal to commit a crime. It is a state of mind which results in a criminal act, and I fail to see how there can be a distinction between the wickedness resulting in murder, and the wickedness resulting in an attempt to murder."

Dealing specifically with the trial judge's definition of the crime of murder, Lord Guthrie appears to have accepted this as accurate subject to the addition of the word "grievous" before "bodily harm" in the second leg as given by Lord Avonside.

2.6 Lord Cameron, speaking of the intent necessary for murder, said:²

"This intent can be established in the law of Scotland either by proof of deliberate intention to cause death, or by inference from the nature and quality of the acts themselves, as displaying, in the classic words of Macdonald, 'such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences'. Such reckless conduct, intentionally perpetrated, is in law the equivalent of a deliberate intent to kill and adequate legal proof of the requisite mens rea to constitute that form of homicide which is in law murder."

¹p.36.

²p.38.

Lord Cameron went on to consider the submission that had been made on behalf of the accused and, in relation to it, said:¹

"This contention, however, appears to me to seek to base a distinction in quality of the crime committed upon a difference in fact which is fortuitous and, in my opinion, irrelevant. ... It seems to me that on principle the quality of the mens rea in a case of attempt to commit the crime of murder is not affected by the consequences of the acts constituting the criminal conduct if the mens rea necessary to constitute the completed act can be established either by proof of deliberate intent to kill or by the nature of the acts themselves. It would seem both to be logical and to consist with common sense that if the intent to commit the crime of murder can be established in two ways, both should be equally available in proof of the requisite intent of an attempt to commit that crime."

2.7 As mentioned earlier there are some inconsistencies in the judgments in Cawthorne. Both the Lord Justice-General and Lord Cameron in effect adopt Macdonald's definition of murder,² namely:

"Murder is constituted by any wilful act causing the destruction of life, whether intended to kill, or displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences."

By contrast Lord Guthrie, like the trial judge, appears to add a third leg to the definition, namely an intent

¹pp.38, 39.

²Criminal Law of Scotland (5th edn) p.89.

to do bodily harm though, as noted, Lord Guthrie modifies this by the addition of the word "grievous".

2.8 A further inconsistency, which may be more apparent than real, arises from the fact that some of the judges seem at times to suggest that wicked recklessness is not a separate and distinct mens rea for murder but rather an evidential criterion from which intent, in the sense of desire, may be inferred. Thus, for example, Lord Guthrie said:¹

"The existence of the intention is a matter of the inference to be drawn from the accused's words, or acts, or both. The inference is easy when the accused has threatened his victim, or has stated his intention to third parties. Again, even in the absence of such statements, the intention may be deduced from the conduct of the accused. Admittedly this deduction will properly be drawn if he has been seen to aim a deadly blow at his victim. Thus it becomes a matter for the jury to decide whether the actions of the accused satisfy them that he intended to murder the victim. A reckless act may well be such as to lead to that inference."

A somewhat similar approach is to be found in the passage from the opinion of the Lord Justice-General quoted in paragraph 2.4 above. Sheriff Gordon has called this approach "evidential" as opposed to "substantive" and, in a detailed analysis² of the opinions, has concluded that in fact the court was confirming the substantive view, namely that wicked recklessness is a distinct form of the mens rea required for murder.

¹p.37.

²"Cawthorne and the Mens Rea of Murder" 1969 S.L.T. (News) 41; and see Brennan v. H.M.A. 1977 S.L.T. 151.

2.9 What does emerge clearly from all of the opinions in Cawthorne is that the mens rea of attempted murder is the same as the mens rea of murder. If a person commits an act which would have been murder had his victim died, he will be guilty of attempted murder if fortuitously his victim survives.

2.10 Since the date when it was decided the case of Cawthorne has rightly been regarded as an authoritative statement of what may constitute the crime of attempted murder. It is not entirely clear, however, whether that decision was in effect making new law or merely restating what had always been the law.

2.11 Alison,¹ in a passage quoted by the Lord Justice General in Cawthorne,² stated:

"In judging of the intention of an accused who has committed an aggravated assault, the same rules are to be followed as in judging of the intent in actual murder, viz. that a ruthless intent, and an obvious indifference as to the sufferer, whether he live or die, is to be held as equivalent to an actual attempt to inflict death."

While this passage lends strong support to the decision that was reached in Cawthorne, it is worth noting that Alison goes on to say:

"When a person stabs another in a vital part with a knife or sword, or when he discharges a loaded pistol at his head or body, it is impossible that he can be considered as actuated by anything short of a mortal intent."

¹Criminal Law of Scotland, i,163.
²p.36.

It is nothing to the purpose that the sufferer has not actually died: if the act has been such as might, and frequently does, produce fatal effects, and, in consequence thereof, the person assaulted has run the hazard of his life, the intentions of the assailant must be judged of, as if his violence had produced its full consequences."

This seems to suggest that Alison was approaching the matter from what Sheriff Gordon has called¹ the "evidential" rather than the "substantive" point of view, and was in effect saying that, for attempted murder, an intention to kill is required, but such intention can be inferred from acts of great violence or great potential danger. As has been seen, however, it appears that the court in Cawthorne preferred the substantive approach.

2.12 The older history of the crime of attempted murder may also have been affected by a statute passed in 1829.² Subsequently given the short title of "The Criminal Law (Scotland) Act, 1829",³ the long title of the statute describes it as "an Act for the more effectual Punishment of Attempts to murder in certain Cases in Scotland". While this Act is primarily designed to prescribe a mandatory death penalty for certain forms of attempted murder, it does so in a way that suggests support for the proposition that the crime of attempted murder may be committed without an intent to kill in the strict sense. Thus it provides, inter alia:⁴

¹See para.2.8 above.

²10 Geo.4.c.38.

³By the Short Titles Act 1896.

⁴s.1.

"If any person shall ... wilfully, maliciously, and unlawfully shoot at any of his Majesty's subjects, or shall wilfully, maliciously, and unlawfully present, point, or level, any kind of loaded fire arms at any of his Majesty's subjects, and attempt, by drawing a trigger or in any other manner, to discharge the same at or against his or their person or persons; or shall wilfully, maliciously, and unlawfully stab or cut any of his Majesty's subjects, with intent, in so doing, or by means thereof, to murder or to maim, disfigure or disable, such his Majesty's subject or subjects, or with intent to do some other grievous bodily harm ..., such person ... shall be held guilty of a capital crime, and shall receive sentence of death accordingly."¹

Since intent to murder is only one of several possible elements in all of the above, it seems that the legislature must have had in mind the possibility of attempted murder being found proved in the absence of such intent. Equally the legislature appears to have contemplated that some cases would not amount to attempted murder, even upon that wide view of what would suffice by way of mental element, since section 4 of the Act goes on to state:

"Provided always, that if it shall appear, upon the trial of any person accused of any of the several offences herein-before enumerated, that under the circumstances of the case, if death had ensued, the act or acts done would not have amounted to the crime of murder, such person shall not be held guilty of a capital crime, or be subject to the punishment aforesaid."

¹Imprisonment for life was substituted for sentence of death by the Homicide Act 1957, s.14.

There are considerable similarities between the approach to attempted murder in this statute and the approach which was ultimately enunciated in Cawthorne. It is not entirely clear, however, whether the 1829 Act was merely stipulating a mandatory penalty for certain classes of attempted murder which might be proved under the existing common law, or was instead an offence-creating statute containing its own particulars of what would amount to the crime of attempted murder so as to attract the death penalty. Although there could, it is thought, be arguments either way, it seems that the practice has always been to prosecute either under the statute or at common law, and not merely to regard the statute as regulating the penalty for certain common law crimes. According to Gordon, in the first edition of his work on Criminal Law,¹ the last prosecution under the Act took place in 1935, and the Act itself was finally repealed by the Statute Law (Repeals) Act 1973, the view apparently having been taken that it was no longer of practical utility. It is not mentioned anywhere in the report of the case of Cawthorne.

2.13 Notwithstanding the older law it would appear that in the years preceding Cawthorne there was some difference of judicial opinion about what mental element is necessary in a charge of attempted murder. This difference of opinion is exemplified in two unreported cases which were referred to in the argument for the appellant in Cawthorne.

¹p.769.

2.14 In the first of these cases¹ the accused was charged with attempting to murder a woman by assaulting her in various ways "all to the danger of her life". Lord Sorn directed the jury that they must be satisfied that there had been an intent to kill before they could convict of attempted murder. In the result the accused was found guilty of assault to the danger of life. By contrast, in the later case of H.M.A. v. Currie and Others,² where several men were charged with attempting to murder police officers during a car chase by, inter alia, swerving their car into the path of the pursuing police car and throwing objects into the path of the police car, Lord Walker, in charging the jury, said:³

"The law says that if the nature of the act is such as to show or infer an intention to do injury recklessly so as to be regardless of consequences to life that ... is murder. From that you get to attempted murder The only difference between murder and attempted murder is that in the murder case a man has killed, but in the attempt he has not killed."

In that case convictions of attempted murder were returned and upheld on appeal.

2.15 These cases seem to reflect quite different views about what may be required to constitute the crime of attempted murder. To understand clearly the implications of the approach which ultimately found favour in Cawthorne it may be helpful to take a brief look at the

¹H.M.A. v. McAdam, Glasgow High Court, July 1959 (reported on another point as McAdam v. H.M.A. 1960 J.C. 1).

²Glasgow High Court, December 1962.

³Transcript of charge, p.18.

law of murder in Scotland, and also at the way in which Scots law deals generally with attempted crimes.

PART III - THE LAW OF MURDER

3.1 The Scots law of murder is reasonably clear in relation to those cases where it is established that a person intended, in the strict and ordinary sense of that word, to bring about the death of his victim. Moreover, Scots law readily recognises that in many such cases that intent can never be proved directly but has to be inferred from the actings of those involved. Whatever the evidential problems in particular cases, however, the end result in all such cases is that a jury is able in effect to say that the accused person "wanted" or "desired" or "meant" to kill his victim. And, if in such cases the victim for one reason or another did not die, there is no conceptual or practical difficulty in saying that the accused person "attempted" to murder his victim.

3.2 Scots law also recognises, however, that murder may be committed when a killing takes place in circumstances where an intention to kill, in the sense just mentioned, cannot be established from the evidence. It is in this sort of case that the concept of wicked recklessness may be used. The difficulty, however, is that the limits of that concept have never been authoritatively defined. Sheriff Gordon puts it as follows:¹

"To say that 'A is guilty of murder when he kills with wicked recklessness' means only 'A is guilty of murder when he kills with such recklessness that he deserves to be treated as a murderer'. The main claim to acceptance which this circular formula

¹Criminal Law, 2nd edn., p.737.

has is that it recognises that when it comes to a choice between murder and culpable homicide the result does not depend on mathematical assessments of probability measured against the standard of reasonable foreseeability, but depends on a moral judgment which, so far as capital murder was concerned, and the law grew up when all murders were capital, could be summed up in the question 'Does A deserve hanging?'

Sheriff Gordon finds advantage in the considerable flexibility which this approach allows. He may well be right in relation to those cases where death has actually occurred but, standing the decision in Cawthorne, it may be that different considerations arise where the charge is one of attempted murder.

3.3 The problem, of course, arises from the need to distinguish between those sorts of culpable killing which ought to attract the fixed penalty of life imprisonment (formerly death) and those for which the court may be left a discretion to impose a determinate sentence of a fixed number of months or years. In other words the problem is not, as with most other kinds of anti-social behaviour, that of determining whether certain kinds of behaviour should be treated by the law as criminal, but rather of determining whether particular behaviour, which the law without hesitation regards as criminal, should be designated in a particular way. Probably most people would agree that the designation of murder is justified not only where there is an intent to kill in the strict sense but also in circumstances falling to some extent short of that. Certainly most legal systems take that view, but the ways in which they seek to achieve the desired result are often quite different. Thus, so far as

England and Wales are concerned, the necessary mental element for murder has recently been expressed¹ under four heads, viz:

- "1) An intention to kill any person.
- 2) An intention to do an act knowing that it is highly probable (or, perhaps, probable) that it will kill any person.
- 3) An intention to cause grievous bodily harm to any person.
- 4) An intention to do an act knowing that it is highly probable (or, perhaps, probable) that it will cause grievous bodily harm to any person."

3.4 We are not qualified to say whether or not the English approach to the problem is satisfactory. Certainly it appears to have provoked over the years a considerable number of appeals both to the Court of Criminal Appeal and to the House of Lords. By contrast the Scottish approach has led to very few appeals concerning the mental element required for murder, and generally seems to work well in practice. However, what is satisfactory for cases where death has been caused may not be so satisfactory in cases of attempt where arguably the focus of attention should be on the attempt rather than on the designation that would have been appropriate had the victim died.

¹ Smith and Hogan, Criminal Law, 5th edn., pp.291, 292; and see Hyam v. D.P.P. [1975] A.C. 55.

3.5 Various factors may be relevant in determining whether a particular killing has displayed such wicked recklessness as to amount to murder rather than culpable homicide. The use of a weapon may have a bearing on the question. In H.M.A. v. McGuinness¹ Lord Justice-Clerk Aitchison said:

"People who use knives and pokers and hatchets against a fellow citizen are not entitled to say 'we did not mean to kill', if death results. If people resort to the use of deadly weapons of this kind, they are guilty of murder, whether or not they intended to kill."

Similarly, in Kennedy v. H.M.A.,² Lord Carmont told the jury that, since a lethal weapon, namely a knife, had been used, they need not waste time considering the issue of murder or culpable homicide. Notwithstanding the apparently absolute terms in which these views were expressed, these cases are probably not authority for the view that it will always be murder where death results from the use of a weapon. Much will, of course, depend on the type of weapon involved and on the particular circumstances in which it came to be used. The use of a weapon is probably no more than a factor which may give rise to an inference of wicked recklessness, but it will probably be in all cases a question of degree.

3.6 An intention to commit an assault is common to a great many cases of murder but that in itself is insufficient to amount to murder in all cases. The nature

¹1937 J.C. 37 at 40.

²1944 J.C. 171 at 174.

and gravity of the assault will be all-important. Alison states¹ that there must be an intention to inflict an injury "of such a kind as indicates an utter recklessness as to the life of the sufferer, whether he live or die", and whether or not that criterion has been satisfied will of course, depend on the facts of each particular case. An echo of this statement is to be found in Macdonald² where it is stated that "wherever there is grievous harm manifestly intended, or at least known to be a likely result of the act done, the crime is murder". Possibly it was statements such as these which prompted Lord Avonside, in Cawthorne, to introduce the third possible form of mens rea for murder, namely an intent to do bodily harm (amended by Lord Guthrie to "grievous" bodily harm). It may be thought that an intent to do grievous bodily harm is not really a separate kind of mens rea at all but rather a factor from which wicked recklessness in the more general sense can be inferred.³

3.7 There is some authority for the view that, where a killing takes place in the course of the commission of another crime, it may for that reason be regarded as murder rather than culpable homicide. Macdonald, for example, says⁴ that "when death results from the perpetration of any serious and dangerous crime, murder may have been committed, although the specific intent to kill be absent". This approach seems particularly to

¹Criminal Law of Scotland, i.1.

²At p.90.

³cf. Gordon, 2nd edn., p.738.

⁴At p.91.

have been taken in cases where the associated crime is that of robbery. Hume says:¹

"If a person goes out armed, to rob on the highway, and he attacks a passenger, who resists, and in the struggle his pistol discharges, and the passenger is killed, this, without a doubt, is murder ... Nay further, though the robber do not carry out any mortal weapon, it seems still to be murder if a struggle takes place with the party assaulted, and in the course of this he falls and breaks his neck."

Macdonald states² that "... if, in a struggle with a robber, the victim is dashed against the wall, or to the ground, and has his skull fractured, and dies, the crime is murder".

3.8 There is some relatively modern support for this view,³ and it also appears to have been adopted by Lord Wheatley in the case of Miller and Denovan⁴ where, in charging the jury, he said:

"If in perpetrating this crime of robbery a person uses serious and reckless violence which may cause death without considering what the result may be, he is guilty of murder if the violence results in death although he had no intention to kill.
Ladies and gentlemen, in view of the evidence

¹Commentaries on the Law of Scotland respecting Crimes, i.24, 25.

²At pp.91, 92.

³H.M.A. v. Fraser and Rollins 1920 J.C. 60, per Lord Sands at 63.

⁴Glasgow High Court, November 1960, unreported.

in this case, and particularly the medical evidence as to the nature of the blow, if you came to the conclusion that that blow was delivered as the result of Miller hitting Cremin over the head with this large piece of wood in order to overcome his resistance in order that robbery might take place, then I direct you in law that there is no room for culpable homicide in this case. If it was homicide at all, in that situation it was murder."

3.9 Although the authorities that have just been referred to appear to lend some support to the view that it is murder to kill in the course of a robbery even if there is no other evidence of wicked recklessness, in fact these cases seem to have been ones where an inference of wicked recklessness could without much difficulty have been drawn by the jury. There may, however, be some uncertainty as to how far the courts would be prepared to go in this regard. Very recently the case of Melvin v. H.M.A.¹ may be thought to have cast some doubt on the proposition that homicide in the course of a robbery will always be murder. In that case two men had been jointly charged with robbery and murder. The evidence disclosed, firstly, that there had been no preconceived plan to assault and rob the victim, and, secondly, that the first accused (Melvin) had played a greater part in the assault than his co-accused. The jury convicted Melvin of murder and his co-accused of culpable homicide. On appeal on behalf of Melvin it was argued that these verdicts were inconsistent in that, since the two accused had been charged with acting art and part, a verdict of culpable

¹1984 S.C.C.R. 113.

homicide in respect of the co-accused must exclude a verdict of murder in respect of the appellant. In refusing the appeal the court held that the jury had been entitled to consider and assess the degree of recklessness displayed by each participant and to discriminate in their verdict as to the quality of the crime committed by each. Presumably if the victim had not died in this case then, on the authority of Cawthorne, the jury would have been entitled to find Melvin, but not his co-accused, guilty of attempted murder. Whatever the consequences of the decision in Melvin for the doctrine that homicide in the course of robbery will always be murder, it seems that such a doctrine is at least restricted to cases of robbery and does not extend to other cases where death occurs in the course of, or as a result of, the commission of another crime. It might be otherwise if constructive malice, as it is understood in England, were part of the law of Scotland; but, except perhaps for a trace of it in relation to robbery cases, it seems clear that such a doctrine does not feature in Scots law.¹

3.10 If Gordon is right in his suggestion that the definition of murder owes more to a moral judgment of an offender's behaviour than to any logical or rational analysis of the mental element that should characterise such a crime, the result is that a very fine and, according to Gordon, flexible line will separate the crime of murder from that of culpable homicide. Leaving aside for the

¹ See Brennan v. H.M.A. 1977 S.L.T. 151, and the views expressed therein on the English case of D.P.P. v. Beard [1920] A.C. 479 where it was held to be murder if a woman died as the result of a rape.

moment the special circumstances that may result in a verdict of culpable homicide (such as diminished responsibility or provocation) both murder and culpable homicide can result from a reckless act, and the only distinction between them may be in the degree of wickedness that the particular act is thought to display. So far as attempts are concerned, however, the case of Cawthorne has established, or at least confirmed, that, where there is wicked recklessness of a kind sufficient to amount to murder if death were the result, then the crime is one of attempted murder if, perhaps quite by chance, death does not result. It is not clear that the same approach to attempts has ever been taken, at least in practice, in relation to culpable homicide. Alison¹ states clearly that:

"An attempt to commit homicide, ..., does not necessarily infer an intent to murder because the circumstances may be such as render it only culpable or justifiable."

and further

"If the situation of the parties during the scuffle has been such that the pannel, had the wounded man died, would have been guilty of culpable homicide only, he is entitled to the benefit of the same extenuating circumstances in diminishing the extent of his punishment."

This line of argument would appear to support a contention for the existence of the crime of attempted culpable homicide. According to Gordon² there is no record of any such charge having been brought in Scotland

¹ i.165. .

² 2nd edn., p.267.

(Alison cites no authorities for his view) but, if Cawthorne is a supportable decision, there seems no good reason in logic why a reckless act which would have justified a charge of culpable homicide had a person died should not be charged as attempted culpable homicide where the person survived. To say that, however, is to beg the question which it is the purpose of this Memorandum to examine.

PART IV - ATTEMPTS IN SCOTS LAW

4.1 There are two elements in any attempted crime just as there are in relation to completed crimes, namely mens rea and actus reus. Although, in relation to attempted murder, the case of Cawthorne has focussed attention on the former, the latter deserves some consideration in order to determine all the possible consequences of that case.

4.2 Scots law is probably not entirely clear and consistent as to what actus reus is necessary before mere preliminary preparations can be regarded as amounting to an attempt to commit a crime. In H.M.A. v. Tannahill and Neilson¹ it was said² that for attempt there must be "some overt act, the consequences of which cannot be recalled by the accused", and this approach to attempts has been repeated in at least one subsequent case.³ These were both, however, cases where the evidence disclosed no more than a suggestion that a fraud might be committed and the views expressed not only went beyond what was necessary to dispose of these cases but also are at odds with other cases which suggest that an attempted crime may have been committed at a stage short of that at which the final chain of events is irrecoverable.

4.3 It has been held to be a relevant charge of attempted murder where a person placed poison in a tea-pot from which the intended victim was expected to drink

¹1943 J.C. 150.

²Per Lord Wark at 153.

³Morton v. Henderson 1956 J.C. 55.

her tea.¹ In that case the consequences of the act were not incapable of being recalled since the accused could have removed the teapot or warned the victim before the tea was consumed; but the accused had performed the last act necessary to bring about murder. Support for the last act theory of attempts is also to be found in other cases.²

4.4 A rather more flexible approach to the actus reus of attempts also has the support of some persuasive judicial authority. In H.M.A. v. Camerons³ Lord Justice-General Dunedin (who had consulted several other judges before directing the jury) said in his charge that the root of the whole matter was "to discover where preparation ends and where perpetration begins. In other words, it is a question of degree, and when it is a question of degree it is a jury question".⁴ In that case the accused were charged with attempting to defraud an insurance company. There was evidence of a simulated robbery but no evidence that a formal claim had been submitted (although this had been requested by the company). Thus the last act necessary for perpetration of the attempt had not, so far as the evidence disclosed, taken place and, on that same evidence, the accused could still have repented and proceeded no further with their scheme. Notwithstanding that, the accused were convicted.

¹ Janet Ramage (1825) Hume, i.28; and see Samuel Tumbleson (1863) 4 Irv. 426.

² See, e.g., H.M.A. v. Semple 1937 J.C. 41; Angus v. H.M.A. 1935 J.C. 1; Dalton v. H.M.A. 1951 J.C. 76.

³ (1911) 6 Adam 456.

⁴ p.485.

4.5 There is no recent Scottish authority on these matters but Sheriff Gordon¹ ventures the opinion that the Camerons line is more likely to be followed today than any of the other authorities. In relation to that case he says:

"It has one inestimable advantage as a working authority, and that is its vagueness. It offers an impressive-sounding and apparently precise rationalisation for doing justice in any particular case: if the jury think the accused should be punished for what he did they will characterise what he did as perpetration; if they do not, they will characterise it as preparation. What was a question of law related to ideas about how restricted the scope of criminal law should be, becomes a value-judgment related to the jury's assessment of blameworthiness. That such an approach is in line with that adopted in other areas of Scots law [murder, insanity and diminished responsibility], increases the likelihood that Camerons will be endorsed by the Criminal Appeal Court if and when the occasion arises."

4.6 Returning to the question of mens rea in attempts, Gordon² makes the general statement that "when it is said that A was guilty of an attempt to commit a particular crime what is usually meant is that he was trying to create the relevant actus reus. If this is the correct approach then only crimes of intent can be attempted". This view is of course at odds with the decision in Cawthorne, at least so far as attempted murder is concerned. The possible consequences of that decision will be examined in the next part of this Memorandum.

¹ pp.189, 190.

² 2nd edn., p.263.

PART V - THE CONSEQUENCES OF THE DECISION
IN CAWTHORNE

5.1 The first point to note in this connection is that murder and culpable homicide, and therefore attempted murder, are usually linked to some form of assault¹ and, by virtue of the cumulative method of libelling used in Scotland, are always dealt with in effect as an aggravation of any such assault. For that reason the actus reus of an attempt to murder will always be closely bound up with the actus reus of the assault; and indeed there may be a fundamental question as to whether attempted murder can even be considered by the court in circumstances where the accompanying assault has not itself been fully proved. Although it should in theory be possible to charge a person with attempted assault and attempted murder, it is thought that this is not done in practice so that a charge of attempted murder will normally have to be seen in the context of a completed assault. But, since an assault is not necessarily a single self-contained act and may consist of a series of acts, how is one to say that any assault is complete and how is one to regard an allegation of attempted murder that may be linked to a given incident?

5.2 Suppose that, with intent to effect a robbery, A presents a loaded gun at B. A is prepared to fire the gun if necessary but only for the purpose of frightening B. He has no intention or desire to cause B any physical harm. Standing the authorities on the use of firearms, and on death resulting from a robbery, there seems little

¹ Apart from exceptional cases, such as putting poison in a person's tea: see para.4.3 above.

doubt that if, contrary to A's intention, there was a struggle between him and B in the course of which the gun went off killing B, then A would probably be guilty of murder by virtue of an application of the test of wicked recklessness. Standing the case of Cawthorne that same wicked recklessness should justify a conviction of attempted murder if fortuitously B did not die, but there must be a question in such a case as to the stage that would require to be reached before such a charge would succeed. Merely to present a gun at someone is an assault and arguably that stage, in view of the case of Camerons on the one hand and Cawthorne on the other, should suffice for a relevant charge of attempted murder. In practice, however, it seems unlikely that such a course would be followed. Probably attempted murder would only be charged if the stage had been reached when the gun went off and, even then, perhaps only if the bullet actually struck and injured, but did not kill, B. While such an approach is likely, and seems on one view to accord with commonsense, it is not entirely logical if full expression were to be given to the decision in Cawthorne. Such a problem would not arise, of course, if "attempt" were to be given its natural meaning of an effort to bring about some desired result; but it should be added that in that event the fictitious incident postulated above could never result in a charge of attempted murder though, if death resulted, it could result in a charge of murder. While this may appear to be paradoxical it is only so if one seeks to determine the nature of an attempt by reference to the character of a completed crime: it is not so if one concentrates on the concept of attempt by itself.

5.3 A further problem that could arise from the decision in Cawthorne concerns diminished responsibility and provocation. These may be pleaded in response to a charge of murder, not as defences but as a means of reducing what would otherwise have been a conviction for murder to one for culpable homicide; and they may be pleaded both where the homicide was intentional in the strict sense and where it was the result of wicked recklessness. If attempted murder is satisfied by the same mens rea as murder itself, it would seem reasonable that diminished responsibility or provocation should be pleadable against the lesser charge just as much as they are against the greater.¹ There do not appear to be any reported cases where this has been done, and of course the consequence would have to be a conviction for attempted culpable homicide which, as has been seen, is a charge which appears never to have been used. That apart, it may be thought that it would be reasonable to allow diminished responsibility or provocation to mitigate a charge of attempted murder where the attempt involved, or was said to involve, an intent to kill. In practice such mitigation probably would arise in the sense that diminished responsibility on the part of the accused might render it impossible to prove an intention to kill and, if the act were committed under provocation, it would be open to the court to take account of that at the stage of sentence. But, where the mens rea is merely wicked recklessness, one at once encounters formidable conceptual difficulties in the notion that one can do something recklessly, but without full mental

¹See Alison, i.165 quoted at para.3.10 above.

responsibility, and yet be convicted of attempting to bring about the end result.¹

5.4 This of course is one of the major difficulties about the Cawthorne decision, and is the one on which Mr Morton has principally concentrated in his paper. The Scots definition of murder, in so far as it allows for a mens rea of recklessness as well as intention in the strict sense, may be open to theoretical criticism but can be justified on grounds of morality and public policy and on the basis that it does not appear to give rise to problems or difficulties in practice. When, however, the same approach is extended to the concept of attempts the conflict with the normal meaning of that word is strikingly obvious.

5.5 In his paper Mr Morton has drawn attention to some of the practical difficulties that can arise because of the effects of the Cawthorne decision, and in particular he suggests that it is Crown Office practice to charge attempted murder, notwithstanding Cawthorne, only in those cases where a wickedly reckless attack has resulted in extremely serious injuries. If this is right, it may be questionable whether there is any particular advantage from a public policy point of view in following such a course. Such cases will normally contain within the attempted murder charge allegations of assault to severe injury and danger of life and, assuming that these allegations are proved, an additional finding of guilt of attempted murder may make little or no difference to the

¹This has been described as "logically repugnant": see para.6.5 below.

sentence that is imposed. On the other hand a conviction of attempted murder appearing in a list of previous convictions is likely to be interpreted in the sense of "he has previously tried to murder someone" whereas in fact the conviction may have arisen rather from a "wicked recklessness" sort of incident. This is potentially misleading and could, in certain circumstances, be prejudicial. Mr Morton is probably right in saying that, if the Crown were to adopt the Cawthorne decision in all cases where there would have been a charge of murder had death ensued, juries would be most reluctant to follow that decision except perhaps in the most extreme cases, but there can be no guarantee that this would be so.

5.6 It could be argued that in Cawthorne the court made the mistake of equating an attempted crime with an uncompleted crime rather than concentrating on the concept of attempt itself, and recognising that this must involve some sense of purpose and intention which are, by definition, absent from crimes of recklessness. Reckless driving is a well-known crime of recklessness but, although it has been held relevant to charge an attempt to commit a statutory offence notwithstanding that the statute itself makes no provision for that,¹ it would presumably be regarded as rather absurd to charge attempted reckless driving. That, of course, is rather different from attempted murder since the crime in reckless driving is found in the driving itself without reference to any consequence. On the other hand section 1

¹Wilson and Forbes v. Morton, High Court on Appeal, July 1975, unreported.

of the Road Traffic Act 1972 (as amended) makes it a crime to cause a death by reckless driving. Since non-intentional murder could be described as causing a death by wickedly reckless conduct, the analogy here is much clearer. If a driver drove recklessly and struck a pedestrian but fortuitously did not kill him then, by an application of the Cawthorne principle, it should be possible to charge him with an attempt to cause death by reckless driving but, so far as is known, such a charge has never been brought against anyone and, even if it were, it may be doubted whether it would be readily accepted by a jury.

PART VI - OTHER JURISDICTIONS

6.1 In England and Wales the law of attempts has recently been given statutory form in the Criminal Attempts Act 1981. In relation to the actus reus necessary to amount to an attempt, the statute appears to adopt the approach that was taken by Lord Justice-General Dunedin in the case of Cameron,¹ and in relation to mens rea the statute restricts itself to the concept of intent. Section 1(1) is in the following terms:

"If, with intent to commit an offence to which this section applies, a person does an act which is more than merely preparatory to the commission of the offence, he is guilty of attempting to commit the offence."

6.2 This statute gave effect to recommendations made by the Law Commission for England and Wales² and gave statutory effect to the leading English decisions on the matter of mens rea. In R. v. Whybrow³ Lord Goddard C.J. had said that "if the charge is one of attempted murder, the intent becomes the principal ingredient of the crime",⁴ and in R. v. Mohan⁵ James L.J. said that there must be proved "... a decision to bring about, in so far as it lies within the accused's power, the commission of the offence which it is alleged the accused attempted to commit".

¹ See para.4.4 above.

² (1980) Law Com. No.102.

³ (1951) 35 Cr.App.R. 141.

⁴ At 147.

⁵ [1976] Q.B. 1 at 11.

6.3 A similar approach to the mens rea necessary for attempts under English law is to be found in Australia¹ and in Canada.² Smith and Hogan,³ in a previous edition of their work on Criminal Law written before the passing of the Criminal Attempts Act, suggested that South African law takes the same approach as Scots law, but the case relied on for that suggestion⁴ in fact indicates something slightly different. In that case a farmer, who suspected that a vehicle being driven near his farm was being used to steal his stock and other property, fired a rifle at the headlights of the vehicle. He apparently had no intention of injuring any of the occupants far less of killing any of them. In fact one of the occupants

¹Brett and Waller, Criminal Law, 4th edn., (1978) 411. The Law Reform Commission in Victoria has recommended in its Working Paper "Murder: Mental Element and Punishment" published in May 1984 that the definition of murder be amended, vis-a-vis mens rea, to read:

"A person shall be treated as having the requisite mental element for the crime of murder if but only if -

- (a) his purpose or one of his purposes was to cause the death of some person (whether the person killed or not); or
- (b) he knew or believed that his actions or omissions would cause the death of some person (whether the person killed or not); or
- (c) he knew or believed that there was a substantial risk that his actions or omissions would cause the death of some person (whether the person killed or not)."

²Canadian Criminal Code, s.24(1).

³Criminal Law, 4th edn., p.247, footnote 13.

⁴S. v. Fick 1970 (4) S.A. 510.

received slight grazes, and the farmer was charged with, and convicted of, attempted murder. In refusing the appeal against conviction the court seems to have relied largely on two matters. The first was the authoritative statement in an earlier case that:

"The expression 'intention to kill' does not, in law, necessarily require that the accused should have applied his will to compassing the death of the deceased. It is sufficient if the accused subjectively foresaw the possibility of his act causing death and was reckless of such result. ... The fact that objectively the accused ought reasonably to have foreseen such a possibility is not sufficient."

The second matter taken into account by the court was a passage in the cross-examination of the accused. In the report this is reproduced only in Afrikaans, but the effect of it appears to be that the accused acknowledged that he foresaw the possibility that the shots from his rifle might cause death. While this certainly involves an extension of the normal meaning of the word "intent" and therefore of the concept of attempt, the consequence is not perhaps so extreme as in Scots law where of course "wicked recklessness" is measured objectively and, in a sense, regardless of the actual thought processes, if any, of the accused. The Canadian Law Reform Commission in May 1984 published proposals for the reform of Canadian criminal laws¹ and have recommended that reckless homicide be dealt with as a lesser crime from intentional homicide although at the moment intentional

¹Law Reform Commission of Canada Working Paper No.33.

and reckless homicide are classed as murder. These proposals do not deal with attempted murder and homicide.

6.4 In the U.S.A. the position appears a little confusing. The Model Penal Code¹ defines murder as follows:

"... criminal homicide constitutes murder when:

- (a) it is committed purposely or knowingly; or
- (b) it is committed recklessly under circumstances manifesting extreme indifference to the value of human life."

This, it will be noticed, is not very different from the way in which the crime is described in Scotland. The Code also contains a definition of criminal attempt² which is as follows:

"A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he:

- (a) purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believed them to be; or
- (b) when causing a particular result is an element of the crime, does or omits to do anything with the purpose of causing or with the belief that it will cause such result without further conduct on his part; or

¹ S.210.2.

² S.5.01.

- (c) purposely does or omits to do anything which, under the circumstances as he believes them to be, is an act or omission constituting a substantial step in a course of conduct planned to culminate in his commission of the crime."

6.5 The effect of this is not entirely clear. On one view part (a) of the foregoing definition of attempt, taken with the definition of murder, could produce the same result as in Cawthorne. On the other hand if one applies part (b), it would appear to suggest that intent is necessary in relation to the particular result in question, and this would of course apply in a case of attempted murder. The case of People v. Brown¹ sheds some light on the reasoning applied in this area. In that case the defendant had been involved in an argument with his estranged wife, in the course of which he had wielded a knife and she had been cut. He was charged with attempted murder but convicted of attempted manslaughter. He appealed on the ground that there was no such crime and the Supreme Court reduced the verdict to one of assault in the second degree, stating that three elements went to make up an attempted crime: (1) the intent to commit the crime; (2) the performance of an act toward the commission of the crime; (3) failure to consummate the crime. "There must be an intent to commit a specific crime in order to constitute an attempt. An attempt to commit manslaughter is apparently a contradiction because the specific crime of manslaughter

¹ (Supreme Court) 1964, 21 AD 2d 738 quoted by Vorenberg Criminal Law and Procedure 2nd edn., p.412.

involves no intent and an attempt to commit a crime whose distinguishing element is lack of intent is logically repugnant." If that reasoning were applied to attempted murder it would seem to rule out the possibility of a finding of guilt in circumstances where the conduct was of such recklessness as would have amounted to murder if the victim had died but where death has not occurred. According to the Model Penal Code¹ recklessness is an alternative to intent, not a means of establishing intent; and logically, if intent is necessary to the commission of an attempted crime, it is not possible to be guilty of attempted murder by recklessness.

¹S.210.2.

PART VII - OPTIONS FOR REFORM

7.1 We have set out in the earlier parts of this Consultative Memorandum the present state of the law on attempted murder, and in Part V the problems which may be thought to arise from the decision in Cawthorne. We have also raised the question whether the libelling of attempted murder in cases of wicked recklessness in fact serves any useful purpose. We have also suggested that both substantive law and practice may give rise to apparent paradoxes and illogicalities. The views of consultees are sought on whether or not the present law of attempted homicide is satisfactory. In the event that the present law is thought to be unsatisfactory, possible options for change or reform are considered below.

Changes in practice

7.2 The most obvious practical way to avoid the difficulties of charging attempted murder in the case of reckless conduct is for the Crown to refrain from libelling attempted murder in such cases. It is most often the case that such charges contain narratives of completed assaults, to severe injury and/or permanent disfigurement or to the danger of life, and, where there is no evidence of actual intention to kill as opposed to recklessness as to the consequences of the assault, a charge of aggravated assault alone could be brought. The jury would then require to address its mind to an objective assessment of the harm caused or the risk caused to life, rather than to deciding whether the conduct of the accused was such that if the victim had

died the jury would have convicted him of murder. As has previously been suggested¹ it may be questionable whether the absence of the words "and you did attempt to murder him" in the indictments in such cases would have any consequences for the sentence imposed on conviction.

7.3 A possible alternative to a charge of attempted murder in some cases of recklessness is the common law crime of "culpable and reckless conduct". Such a charge is comparatively rarely used, perhaps because as Lord Hunter pointed out in W. v. H.M.A.:² the authorities are less than easy to rationalise, but it is nevertheless available to cover the situation where conduct which is highly culpable and reckless has caused danger to the lieges generally or injury to a particular individual. The most recently reported case³ dealt with a 14-year-old who was charged that he did "with wicked disregard for the consequences, culpably and recklessly drop or throw a bottle [from a fifteenth storey flat] which ... struck and severely injured [another]". The standard of mens rea required to establish this charge is on a par with that involved in culpable homicide. According to Lord Clyde⁴ reckless conduct requires "an utter disregard of what the consequences of the act in question may be so far as the public are concerned" and he refers with approval to the dictum of the Lord Justice-Clerk Aitchison in Paton v.

¹See para.5.5 above.

²1982 S.C.C.R. 152.

³W. v. H.M.A. op. cit.; and cf. Khalig v. H.M.A. 1984 S.L.T. 137.

⁴Quinn v. Cunningham 1956 J.C. 22 at 24.

H.M.A.¹ that "it is now necessary to show gross, or wicked, or criminal negligence, something amounting, or at any rate analogous, to a criminal indifference to consequences, before a jury can find culpable homicide proved". (The Lord Justice-Clerk was of opinion that this had not always been the case and that until it had been "modified by decisions of the court ... any blame was sufficient, where death resulted, to justify a verdict of guilty of culpable homicide".)² This charge, although it has its own problems, could usefully be libelled in situations which at present might fall under the Cawthorne reasoning and be charged as attempted murder on the basis of reckless conduct but where the facts of the case might make it inappropriate to charge assault to severe injury or danger of life. Reckless discharge of a firearm is perhaps the most commonly libelled form of reckless conduct and it is of interest to note that in David Smith and William McNeil³ the accused were charged with wickedly, recklessly and culpably discharging loaded firearms into a house, to the imminent danger of the lives of the persons in the house. The Lord Justice-Clerk (Hope) in his charge to the jury directed them that it was not necessary to constitute the crime that the pannel should have intended to injure any person or property. Discharging a loaded firearm into a house was sufficient per se to establish reckless conduct. McNeil was convicted as libelled. This case is obviously very close

¹1936 J.C. 19 at 22, a case in which causing death by reckless driving was libelled as a common law crime.

²Ibid.

³(1842) 1 Broun 240.

to the facts of Cawthorne and may be useful in emphasising the appropriateness of the use of the reckless conduct charge instead of attempted murder in such circumstances. These alternative charges are common law charges and therefore the penalties are unlimited, as are those for attempted murder.

Changes in substantive law

7.4 If it were thought that charges of serious assault or, in appropriate cases, culpable and reckless conduct would be adequate for those cases of recklessness which could at present be charged as attempted murder on the authority of Cawthorne, that result might be achieved simply, and without any legislative intervention, by the Crown charging attempted murder only in cases where there was an intent to kill, and relying on other charges in cases where there was no such intent. Having said that, it is to be noted that there could be practical difficulties if such a course were followed. Suppose that in a particular case the Crown had information to indicate that an assault had been carried out with an intent to kill. Upon that basis the Crown would be entitled to charge the accused person with attempted murder. But then suppose that, at the trial, the evidence did not establish an intent to kill, but merely proved that the accused had acted with a degree of recklessness which would have justified a conviction for murder had his victim died. In that event the jury would inevitably have to be instructed, upon the authority of Cawthorne, that they could still return a verdict of guilty of attempted murder. In short, while changes in practice might go some way to avoiding the problems arising from Cawthorne, any such

changes could not eliminate the problems altogether. In order to achieve that result it may be thought preferable to provide expressly by legislation that no person should be convicted of attempted murder in the absence of proof of an intent to kill. Such a provision would effectively reverse the decision in Cawthorne but would not prejudice the use of the alternative charges discussed above in cases where there was no intent to kill. The views of consultees are sought regarding the foregoing options.

PART VIII - QUESTIONS FOR CONSULTEES

1. Is the state of the law of attempted murder as expressed by the decision in Cawthorne v. H.M.A. acceptable to consultees?
2. If not, should any alteration be by changes in practice or by changes in the substantive law?
3. If changes in practice are to be preferred the possible alternatives to charges of attempted murder based on reckless conduct appear to be:
 - (a) aggravated assaults i.e. assault to severe injury or permanent disfigurement or danger of life,
 - (b) culpable and reckless conduct per se,
 - (c) simple assault (it is unlikely that at present an assault which did not give rise to serious injury, permanent disfigurement or danger of life would in fact be charged as attempted murder).Are these alternatives seen as sufficient?
4. What would be the advantages and disadvantages of confining change to matters of practice?
5. If alteration by legislation is seen as desirable would a simple provision that a person should not be convicted of attempted murder unless it is proved that he had an intent to kill suffice?

APPENDIX

PAPER BY MR H D B MORTON QC

KILLING AND ATTEMPTED KILLING

The purpose in writing this paper is to attempt to formulate the difficulties which in practice have arisen in deciding whether a particular assault should be charged as attempted murder. Frequent criticism has been expressed that assaults have been charged as attempted murder which do not justify so serious a charge and on occasion a decision to charge an assault as one to the danger of life or to severe injury has been criticised because the offence justified a conviction for attempt to murder.

Attempted murder is unique as an aggravation of assault in that it appears to deal with intent rather than result. The other aggravations of assault such as assault to severe injury or permanent disfigurement or to the danger of life deal quite explicitly with the result of the assault. The jury is directed to consider whether the injury sustained was in fact severe or whether the life of the victim was in fact in danger. The question of the intent of the assailant as to the extent of the injury is irrelevant to conviction but not of course to sentence.

Where death results from an assault the crime committed is either murder or culpable homicide. There is no room for a conviction for assault. [See McDermott v. HMA 1974 SLT 206.] There is however no practice of charging an attempt to commit culpable homicide, even where it is

clear that if death had resulted the crime charged would have been culpable homicide, for example by reason of the diminished responsibility of the assailant or the provocation of the victim.

If attempted culpable homicide were to be charged the charge would presumably end with the words "and you did attempt to kill" the victim in contrast with the words "and you did attempt to murder" in a charge of attempt to murder. In ordinary speech "attempt to kill" implies an intention to kill and it would be extremely difficult if not impossible to persuade a jury to convict of attempt to kill where there was no such intention. It is however clear from decided cases in relation to murder and attempted murder that intention to kill is not necessary and that conviction is proper both where there was no intention to kill and where there was a deliberate intention not to kill.

Murder apart from deliberate intended killing is committed where death results:

a. from an assault "displaying such wicked recklessness as to imply a disposition depraved enough to be regardless of consequences". [Hume 1. 254 quoted by Macdonald p 89.]

or

b. "from the perpetration of any serious and dangerous crime ... although the specific intent to kill be absent" [Macdonald p 91.]

In Cawthorne v. HMA 1968 JC 32 Lord Avonside in charging the jury said "Murder is committed when the person who brings about the death of another acted deliberately with intent to kill, or acted with intent to do bodily harm, or, and this is the third leg, acted with utter and wicked recklessness as to the consequences of his act upon his victim".

Lord Guthrie at page 37 specifically approved this definition subject to the addition of the word "grievous" before "bodily harm".

In HMA v. Larkin in the High Court at Glasgow on 15 May 1963 Lord Hunter stated "Murder is the taking of human life by a person who has a malicious and wilful intent to kill, or to do grievous bodily harm or who is wickedly reckless as to the consequences of his act on the victim".

In HMA v. Fraser and Rollins 1920 JC 60 Lord Sands in charging the jury said at page 62 "If a person attempts a crime of serious violence, although his object may not be murder, and if the result of that violence is death, then the jury are bound to convict of murder. A striking illustration of this is the case of criminal abortion. There the man has no intention or desire to injure or kill the woman, it is the last thing he wants to do, but if he uses instruments to bring about a criminal abortion and in result kills the woman, that, by our law, is murder".

In Cawthorne the following definition of attempted murder was approved: attempt to murder is a charge brought

against a man who is alleged to have made an attack on another or other people in circumstances in which had his victim or victims died as a result of the attack his offence would have been murder.

While this definition may be suitable to cover the facts which occurred in Cawthorne it is obviously not suitable for the grievous bodily harm type of case or for Lord Sands' abortion example. It would be absurd to argue that if in a case of criminal abortion if the woman did not die the man carrying out the criminal abortion was guilty of attempt to murder, merely because if she had died he would have been guilty of murder. In a robbery or housebreaking the criminals might decide that in a certain situation they would knock out or tie up a person who interfered with them. If death were to be the result of such action the crime would be murder but if the robber or housebreaker does exactly what he planned, eg knocked someone out in order to rob or escape and the person survived and possibly suffered no material lasting injury, it would be absurd to charge this assault as attempted murder.

It is almost self-evident that it should not be attempted murder to assault a person by causing grievous bodily harm although it is murder if in an assault only intending grievous bodily harm the victim dies. If the victim does not die the crime is assault to severe injury.

The remaining category of murder other than deliberate intentional killing is death as a result of an assault committed with wicked recklessness as to the consequences on the victim. This depends on what is meant by reckless

According to the English Law Commission¹ a person is reckless if

(a) knowing that there is a risk that an event may result from his conduct or that a circumstance may exist, he takes that risk, and

(b) it is unnecessary for him to take it having regard to the degree and nature of the risk which he knows to be present.

The test in (a) is subjective and the test in (b) is objective.

This definition was severely criticised by the High Court in Allan v. Patterson,² a case dealing with reckless driving, and was rejected as applicable to such a case. The Court said "Section 2, as its language plainly, we think, suggests, requires a judgment to be made quite objectively of a particular course of driving in proved circumstances, and what the court or a jury has to decide, using its commonsense, is whether that course of driving in these circumstances had the grave quality of recklessness."³

It is suggested that the same commonsense objective approach is the appropriate one for a jury to apply in

¹For a response to the Law Commission's proposals see our Report on the Mental Element in Crime (1983, Scot. Law Com. No.80). The Law Commission's own proposals, as finally formulated, are to be found in their Report on the Mental Element in Crime (1978, Law Com. No.89)

²1980 S.L.T. 77.

³p.80.

assessing whether the quality of the assault justified the category of wicked recklessness. It has certainly not been a general habit of Advocates Depute to seek to establish head (a) of the Law Commission definition which clearly envisages proof of what the accused thought as well as proof that the accused appreciated and measured the risk before electing to take it.

The Law Commission definition omits one type of conduct which is commonly described as reckless. This is acting without considering the consequence, or as Lord Atkin suggested in Andrews v. DPP 1937 AC 576 an indifference to risk. This is a type of reckless conduct which, if the evidence given in many cases in the High Court is true, is far more frequent than the reckless person who before setting out on a course of conduct carefully measures and assesses the risk, if reckless is appropriate at all to describe that person.

If recklessness is equivalent to indifference as to the consequences, as I submit it is, there are many cases when it appears that the assailant was totally indifferent as to the result of using a knife and yet is not charged with attempted murder. In many gang fights it appears that if someone is brought down the gang members often stab him totally indiscriminately, but it is only if the injury is very severe that attempted murder is charged and only in rare cases is a conviction obtained. In the family assault where one spouse uses a knife on the other it is rare to charge attempt to murder unless there is some evidence of intention to kill.

I would suggest that in practice attempt to murder should be restricted to those cases where an intent to kill can be shown either as the assailant's intention or by assuming the intention to kill in cases where a natural and probable result of the assault is death. The remainder of cases which could possibly be classified as attempt to murder following Cawthorne could be charged as assault to the danger of life, or assault to severe injury, or both. As there is no mandatory, no minimum and no maximum sentences for any aggravation of assault other than murder there would seem no difficulty in practice in adopting such a course. It would also avoid the risk of making the crime of attempted murder less seriously regarded by charging it too often.

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END