HIGH COURT OF JUSTICIARY

[2007] HCJ13

Lord Eassie

Lord Mackay of Drumadoon

Lord Uist

OPINION OF THE COURT

delivered by LORD EASSIE

in

HER MAJESTY'S ADVOCATE

against

ISAAC MICHAEL PURCELL

Advocate Depute: Prentice, Q.C., Solicitor Advocate, Mason; Crown Agent

Accused: Kerrigan, Q.C., Lenehan; Fairbairns

4 October 2007

Introductory

[1] The accused in this case is prosecuted on an indictment which contains, among others, a charge of murder. That charge arises from the death of a 10 year old boy who was fatally injured when, as he was in the course of crossing a street at a pedestrian crossing controlled by traffic lights, he was struck by a motor car driven by the accused. The charge, which is set out in fuller detail below, alleges a number of instances prior, to and including, the fatal collision with the boy, Jack Anderson, of what might shortly be described as dangerous, or, in the terminology of earlier road traffic legislation, reckless driving. It does not however contain any allegation that the accused assaulted Jack Anderson by driving the car at him. The Advocate Depute confirmed that it is not in any way contended by the Crown, either in terms of the indictment or in the evidence adduced, that the accused had any intention of causing injury to Jack Anderson or any other person.

[2] Against the circumstances thus very briefly summarised, following the conclusion of the evidence for both the Crown and the defence, counsel for the accused intimated his wish to make a submission that on the facts alleged in the charge of murder, and the evidence given in support of it, it would not be open to the jury to return a verdict of guilt of murder, as opposed to culpable homicide or the statutory offence under section 1 of the Road Traffic Act 1988 (as amended) which was libelled expressly as an alternative to the charge of murder. Following discussion with counsel for the accused and the Advocate Depute conducting the trial for the Crown the judge presiding at the trial thought it appropriate that the submissions and argument on this matter should be heard by a bench of three judges, including of course the judge presiding the trial. That was duly arranged and we heard those submissions and arguments. Having retired to deliberate what had been put before us by counsel for the accused and the Advocate Depute we then gave as the decision of the court that it would not be open to the jury to convict the accused of murder and that the presiding judge at the trial should direct the jury accordingly. We stated that we would give our reasons for that decision in writing at a later date, which we now do in this opinion.

[3] We turn first to the indictment. In addition to the charge of murder (and the alternative offence libelled of a contravention of section 1 of the Road Traffic Act 1988) the indictment contains certain other charges of contraventions of the 1988 Act which we mention briefly and for completeness, *videlicit* a contravention of section 2 of the Act respecting alleged incidents of dangerous driving following the fatal collision between the car driven by the accused and Jack Anderson and contraventions of section 143 of the Act (absence of

insurance) and section 170 (failure to stop after an accident and failure to report the accident to the police). As ultimately amended the principal charge is in these terms:

"(2) on 5 October 2006 on St John's Road, Meadowplace Road, Ladywell Road, Corstorphine High Street and Saughton Road North, all Edinburgh and on other roads in Edinburgh, you did drive motor vehicle registered number W118 WDS with criminal disregard for the safety of other road users, and in particular, pedestrians, and did:

(a) on St John's Road, when signalled to stop by Constables Christopher Beechman and Jolyon Perkins, both Lothian and Borders Police, Edinburgh driving a marked police car there, fail to do so;

(b) drive onto the opposite carriageway of St John's Road at excessive speed and travel through a pedestrian crossing on the wrong side of the road;

(c) remain in the opposite carriageway of St John's road, causing the driver of a motor vehicle proceeding there to take evasive action to avoid a collision with said motor vehicle driven by you and travel through a pedestrian crossing on the wrong side of the road;

(d) fail to give way to a lorry on Drumbrae roundabout, enter said roundabout at excessive speed, overtake a number of motor vehicles travelling in the nearside lane of said roundabout, cut into the line of traffic travelling in the nearside lane in order to turn left into Meadowplace Road, causing the drivers of motor vehicles in said nearside lane to take evasive action to avoid a collision with said motor vehicle driven by you;

(e) enter said Meadowplace road at excessive speed, in the opposite carriageway and in the path of oncoming traffic;

(f) continue along said Meadowplace Road at excessive speed, turn into Ladywell Road at excessive speed, and on Ladywell Road, drive on the opposite carriageway at excessive speed;

(g) overtake a line of traffic travelling through the pedestrian crossing outside Corstorphine Primary School, Corstorphine High Street, at excessive speed, the applicable speed limit being 20 miles per hour there, and when a crossing patrol assistant wearing reflective clothing and carrying a 'lollipop' stick was standing at said crossing, and a number of children were on the pavement there, said pedestrian crossing being clearly identified by a triangular 'school crossing patrol ahead' sign;

(h) drive on Corstorphine High Street at excessive speed;

(i) overtake a line of stationary traffic queuing at temporary traffic lights on Corstorphine Hill Street at St Margaret's Park, and fail to comply with the red light at said traffic lights;

(j) overtake a motor vehicle at the junction of Corstorphine High Street and Saughton Road North;

(k) drive on Saughton Road North at excessive speed, the applicable speed limit being 30 miles per hour there, overtake a number of motor vehicles being driven there, and drive on the opposite carriageway, causing other drivers to take evasive action to avoid a collision with said motor vehicle driven by you;

(l) overtake a number of vehicles on Saughton Road North at excessive speed, continue along Saughton Road North on the opposite side of the road and in the face of oncoming traffic, causing other road users to take evasive action to avoid a collision with said motor vehicle driven by you;

(m) overtake a line of stationary vehicles queuing at a pedestrian crossing on Saughton Road North, at a speed in excess of 60 miles per hour, the applicable speed limit being 30 miles per hour there, fail to comply with the red traffic light at said pedestrian crossing, said red light having been activated by Jack Anderson,

born 4 May 1996, now deceased, pressing a button at the said crossing, enter said pedestrian crossing on the wrong side of the road, execute a 'chicane' manoeuvre between said line of stationary traffic overtaken by you and the line of stationary traffic then facing you, and cause said motor vehicle driven by you to collide with said Jack Anderson then crossing the road at said pedestrian crossing in obedience with the 'green man' signal, whereby he was injured so severely that he died from his injuries;

and you did murder him."

[4] At an early point in the course of the argument before us, the Advocate Depute gave a summary of the evidence led for the Crown in support of the principal charge. This was helpful, given the stage at which proceedings had reached, but in the event the precise nature of the evidence did not appear to be material in the determination of the issues of principle argued before us. The Advocate Depute summarised the evidence given by various witnesses and there was played a video recording (taken from within a moving police car) of the route followed by the accused from St John's Road, Corstorphine, a CCTV recording from a camera on a building in Ladywell Road, Corstorphine and a further such recording from a camera on a house which showed a section of Saughton Road North immediately to the north of (but not including) the pedestrian crossing at which the fatal collision took place. The last of those was said to depict the accused's vehicle overtaking a southbound car halted at the red light in the initial stage of the "chicane" movement whereby the accused, in order to avoid a vehicle halted at the other, northbound side of the crossing, cut back to the southbound lane by driving as it were diagonally across the crossing through the gap between the stationary northbound and southbound cars respectively. In general terms, the evidence so summarised was simply reflective of the averments of fact contained in the charge. For his part, Mr Kerrigan, counsel for the accused, stated that while there were some minor points in the summary which he could quarrel, for the purposes of his submission it was unnecessary to do so. Mr Kerrigan readily agreed that there was sufficient evidence, if it were accepted by the jury, to entitle the jury to return a verdict of guilt of culpable homicide (with a maximum sentence of life imprisonment) or the statutory alternative under section 1 of the 1988 Act (with a maximum penalty of 14 years imprisonment).

Submissions

[5] In summary, the material parts of Mr Kerrigan's submissions were to the effect that it had been the accepted position in Scots law since at least the advent of the motor car that reckless driving, however appalling, which resulted in death might found a charge of culpable homicide but not murder. (Plainly there could be cases of murder where the driver had deliberately driven the car at the victim, thus using the car as a weapon to assault the victim, but this was not alleged in the present case.) Counsel referred to the discussion in *Gordon on Criminal Law* (3rd ed.) Chapter 23, founding particularly on the terms of para.23-17 in which the author writes:

"Now that it is accepted that a drunken motorist who drives his car at 70 miles an hour in a built-up area and kills a pedestrian on a pedestrian crossing or on the pavement is guilty (at common law) only of culpable homicide, it is submitted that the law can be accepted as being that murder cannot be committed unless the accused intended to cause some personal injury."

Further, the passages from *Macdonald: A Practical Treatise on the Criminal Law of Scotland* (5th ed.) quoted by *Gordon* at para.23.19 and the views expressed in that paragraph indicated that a wilful act was necessary to found a charge of murder and that the wilful act in question had to be an assault. The circumstances alleged in the present prosecution, while extremely tragic and very serious, were, if anything, less serious than those established in *McDowall* v *HM Advocate* 1998 S.C.C.R. 343, a road traffic case, charged as culpable homicide. Emphasis had been placed by the trial judge in his charge in that case on the need for "reckless" or "complete" disregard of the consequences of the driving of the accused as the criterion for guilt of culpable homicide and the terms of that charge had been approved in the subsequent appeal. If such recklessness, or dangerousness, in an accused's driving was the test for culpable homicide, it was difficult to see how it could also be a basis for a conviction for murder. A prerequisite for any charge of murder was an assault, or an act intended to cause injury to the deceased, or, at the very least, intended to cause physical

harm directly linked to the injury and the death of the deceased. There was in any event no policy reason for innovating upon the accepted position in Scots law to the effect that at common law reckless or dangerous driving causing death constituted at most culpable homicide. The penalties available to the courts on conviction for culpable homicide, or indeed the statutory alternative offence, were sufficient. Counsel for the accused also referred to *Cawthorne* v *HM Advocate* 1968 J.C. 32; *Drury* v *H.M. Advocate* 2001 S.L.T. 1013; 2001 S.C.C.R. 583; and *Scott* v *H.M. Advocate* 1995 S.C.C.R. 760. Nothing in the opinions given in those cases gave any support to the view that the circumstances of the present case could constitute the crime of murder under Scots law.

[6] For his part the Advocate Depute contended, in summary, that the commission of a wilful act intended to cause personal injury or other harm was not necessary for the commission of the crime of murder. He submitted that a person who caused death would be guilty of murder where that person's actings demonstrated his willingness to run the risk of causing death (or serious injury) or where the person's conduct created an obvious and serious risk of death (or serious injury). As authority for this proposition the Advocate Depute invoked what was said in *Macdonald* (5th ed.) page 91 where it was stated:

"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 is so where the crime perpetrated involves either wilful intent to do grave personal injury, or the wilful use of dangerous means implying wicked disregard of the consequences to life".

The Advocate Depute founded particularly on the language in the phrase "the wilful use of dangerous means implying wicked disregard of the consequences to life". To establish the crime of murder it was, he said, enough that there be such "dangerous means" and in the present case the jury would be entitled to infer that as the accused approached the pedestrian crossing at which other traffic had halted in response to the red light he should have realised the likelihood of a person using the crossing and that in executing his "chicane" manoeuvre he displayed an obvious disregard of the consequences to life. In response to enquiry from the court, the Advocate Depute submitted that if the accused had succeeded in an attempt to avoid hitting the young boy, he could nonetheless be convicted of attempted murder.

[7] The Advocate Depute also referred to the case of *Niven*, 21 December 1795 to which reference was made by Hume in his *Commentaries on the Law of Scotland Respecting Crimes* (4th ed.) Volume 1 at page 23. In that case the author records that it was held that a libel of firing a cannon down a lane or alley in which persons were present, one of whom was killed, amounted to murder even though the pannel was not activated by enmity to any specific one of those persons, all of whom were unknown to him. The Advocate Depute also sought assistance from fire raising cases. He referred us to an indictment in the case of *HM Advocate* v *Birrel* which alleged murder in consequence of setting fire to a building - but he acknowledged that it was not clear from the indictment what was alleged to be the state of knowledge of the accused respecting the presence of the victims in the building. Invited by the court to analyse more closely the possible analogy of death resulting from fire raising, the Advocate Depute then referred to *Alison* 1, 18 which contains *inter alia* the statement, on p.52,

"In like manner, if one wilfully set fire to a house with intent merely to destroy a building, but the fire kill an individual, this will be held as murder, though the fire raiser had no reason to believe that any person was in the house; or if he set fire to a stack-yard, and the flames spread to a dwellinghouse, and kill any of the inmates, this is nothing less than murder."

However, that did not accord with the modern law. To convict a fire-raiser of murder, it was now essential to show knowledge of, or at least good grounds for believing, the presence of persons in the building to which the fire was set. Nonetheless, it was submitted that a statement of the current law might be found in what was said by *Alison* at the foot of p.52, namely:

"Perhaps the safest rule that can be stated on this subject is, that homicide, though not originally intended, will be held as murder which is committed during the commission, or in the attempt to commit, a capital crime, or one obviously hazardous to life; but that, where it ensues, without being intended, during the course of an inferior delinquency, under which no peril to life could reasonably have been anticipated, it will amount to culpable homicide only."

The reference to a crime "obviously hazardous to life" was said by the Advocate Depute to include, in modern parlance, the offence of driving dangerously. As respects the views expressed in *Gordon*, to which counsel for the accused had referred, the Advocate Depute accepted that the terms of para.23.17, to the effect that death caused by reckless driving did not constitute murder, represented the settled view for generations. To that extent what was said in *Gordon* was recognised by the Advocate Depute to be against his submission but, said the Advocate Depute, there must be cases in which the reckless driving presented an obvious risk of death and, death having resulted, that reckless driving would, in his submission, be murder.

Discussion

[8] It is, we think, appropriate to observe at the outset of our discussion of the issue presented to us for decision that in his submission for the Crown the Advocate Depute did not suggest that the present case involved any novel or unenvisaged circumstances or any societal change which might conceivably require the court to consider developing or adapting the common law crime of murder to meet those new circumstances or important changes in society. As we understood the endeavour of the submission for the Crown, it was to the effect that the law had for a long time treated as murder cases of death caused by "dangerous means implying wicked disregard of consequences to life"; that concept equiparated with reckless conduct presenting obvious risks of death or serious injury; and it was not necessary for the accused person to have committed any wilful act, such as an assault, intended to cause personal injury or other harm. The only qualification to that proposition suggested by the Advocate Depute was that the reckless or grossly negligent conduct had to be sufficiently serious as to amount to wicked disregard of, or recklessness as to, the consequences for life. As already indicated, the authority given by the Advocate Depute for this submission was to be found in the passages in *Macdonald* and *Alison* which have been mentioned above in the summary of his submissions.

[9] The definition or murder which has customarily been given to juries is that found at p.89 of *Macdonald* (5th edn.). It is in these terms:

"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."

(Following what was said in *Drury* v *HM Advocate* 2001 S.L.T. 1013; 2001 S.C.C.R. 583, the definition is now usually qualified by the insertion of the adverb "wickedly" before "intended" but that qualification is of no consequence for present purposes.) We would observe that *Macdonald* is here referring to any "wilful" act. As respects the notion of "wicked recklessness", *Macdonald* goes on in the succeeding paragraph to observe:

"The amount of recklessness which may constitute murder varies with circumstances. Conduct which would not indicate total recklessness in the case of an attack upon a strong full-grown person might do so in the case of an infant or aged person. One blow even with the hand might be sufficient to infer murder in the case of a child. As regards frail and aged people, it has been well said that violence to them is doubly reprehensible, and that the weak are entitled to protection against the degree of violence that will injure them. If in attempting or perpetrating another crime 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."

While it is of course true that the traditional *Macdonald* definition of murder refers to "wicked recklessness", it is in our view evident from that subsequent discussion that the author is considering recklessness in the

context of the consequences of an assault or at least an act, such as deliberate poisoning, intended to cause personal injury (though such poisoning is almost certainly also an assault). Also, in the case of death ensuing in the course of the commission of another crime, what *Macdonald* has in contemplation is the use of serious and reckless violence during that other criminal enterprise.

[10] As respects these aspects of the definition and explanation given by *Macdonald* of the crime of murder, we would observe that the core element of the crime of murder is the deliberate killing of another human being. While there may no doubt be cases in which the perpetrator may have outwardly expressed by word or obvious deed his intention to kill, there are many cases of fatal assault in which there is no such clear expression of intention. The problem is common to many legal systems. The solution adopted in Scots law is to treat the perpetrator of an attack as having, in law, an intention to kill if the nature and extent of the violence of the attack were such as to demonstrate a "wicked recklessness" as to the consequences of his attack upon the victim. As was observed by the Lord Justice General (Clyde) in *Cawthorne* v *HM Advocate* 1968 J.C. 32, 35 the reason for the "wicked recklessness" alternative being allowed was that "in many cases it may not be possible to prove what was in the accused's mind at the time". So to meet that evidential difficulty in establishing an intention to kill, the law in effect attributes to the person committing a violent, fatal assault in circumstances such as to exhibit an utter disregard for the consequences of his violence, a *mens rea* (or criminal mind) which may be equiparated with that of the intentional killer. Put in other words, a person who uses such gross violence as to indicate that he has no regard or concern whatever for the consequences of that violence on the survival or otherwise of the victim of his violent assault is to be treated as having the *mens rea* (or criminal mind) equivalently wicked to that of one who actively intends the death of his victim.

[11] In these circumstances, although the term "reckless" may be used both in the defining of the *mens rea* of an attacker in a fatal assault and also in the context of certain statutory offences such as section 1 of the Road Traffic Act 1988 (in its unamended form) or the crime of culpable homicide, it is important to bear in mind that the term is being used in different contexts. In the latter context, the notion of recklessness, or gross negligence, is the constituent element of the crime or offence (in some respects, it is inherent in the *actus reus* of the crime or offence) whereas in the former it supplies the *mens rea* for murder in an assault having fatal consequences in which there is no prior or declared express intention to kill. The distinction is well noted in *Gordon* at para.26.03 (p.362) in the discussion of the degree of negligence necessary to found a charge of culpable homicide. *Gordon* records that gross negligence or recklessness is required for culpable homicide and gives the road traffic example "a damn stupid way to drive" as an instance of such recklessness. He then goes on to say "... This second type of negligence is often referred to as recklessness, but it must be distinguished from that 'wicked and deliberate' recklessness whose presence may make even unintentional homicide murder". A footnote refers one back to para.23.19 of the work which states:

"Murder is the most heinous of all crimes, and cannot be present in the absence of wickedness and depravity. It has been submitted above that generally the necessary wickedness may be inferred where the killing was intentional. Where the killing was unintentional but caused by an assault wickedness and depravity must be found in the nature of the assault, which must exhibit 'wicked recklessness'. Recklessness is therefore not so much a question of gross negligence as of wickedness. Wicked recklessness is recklessness so gross that it indicates a state of mind which falls to be treated as being as wicked and depraved as the state of mind of a deliberate killer."

[12] In our view *Macdonald* was also alert to that important distinction. Thus strong support for the view that in his discussion of wicked recklessness as a constituent for the *mens rea* of murder *Macdonald* was indeed concerned only with cases of a wilful assault or attack is to be found in what is written, some pages further on at p.101 in *Macdonald*, in the discussion of culpable homicide to which the court drew attention during the hearing. Having noted in the preceding paragraph that mere negligence does not found a charge of culpable homicide and that if death results from gross fault or negligence in the management of vehicles culpable homicide is committed, *Macdonald* goes on to say in the first paragraph commencing on p.101:

"With the prevalence of fast-travelling motor vehicles on the road, the tendency of the law in the case of fatal accidents is to hold the driver of the vehicle which inflicts the injury guilty of homicide only if his conduct is notably and seriously negligent or displays utter disregard for the safety of others."

It is therefore, in our view, plain that since *Macdonald* attributes that high standard of "utter disregard for the safety of others" to what is required for culpable homicide in the situation of a road traffic death (and we did not understand the Advocate Depute to dispute that such remained the test for culpable homicide in the case of a fatality - cf. *McDowall*) the same test cannot apply for murder. Indeed, when asked how the jury could meaningfully and usefully be directed by the presiding judge as to the distinction between "utter disregard" for culpable homicide purposes and "wicked recklessness amounting to utter disregard" for murder purposes the Advocate Depute was at some very evident difficulty in providing any answer. His very evident difficulty may be attributable to a confusion respecting the distinction between the concept of wicked recklessness as to consequences in the commission of an assault and offences which themselves are defined by the notion of recklessness.

[13] In seeking to derive support for his proposition that the circumstances set out in the charge with which we are concerned in the present indictment could relevantly constitute murder, the Advocate Depute founded particularly on the passage in *Macdonald* at p.91 which has already been quoted but which, for convenience, we quote again:

"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 is so where the crime perpetrated involves either wilful intent to do grave personal injury, or the wilful use of dangerous means implying wicked disregard of consequences to life."

As already noted, emphasis was particularly placed on the last part of the second sentence quoted. Again, that passage must be read in context. Subject to a possible exception in the case of the example given subsequently by *Macdonald* of death following fire raising (to which topic we shall shortly revert), all of the illustrations given subsequently involve the commission of a primary offence involving the intentional infliction of personal injury. And this passage must also be read along with *Macdonald's* treatment of death resulting from dangerous driving to which we have adverted in the preceding paragraph of this opinion.

[14] Additionally the Advocate Depute referred us to the passages in *Alison* which we have quoted above in summarising his submission. The Advocate Depute readily recognised however that *Alison's* instance of the perpetrator of a fire raising being guilty of murder though having no reason to believe that anyone was or might be in the building to which the fire was set did not represent the modern law. In our view that example instanced by *Alison* (which followed upon passages to similar effect in *Burnett: Treatise on various branches of the criminal law of Scotland*, p.6 and *Hume* vol.1 p.24) is a reflection of the then current thinking that what is sometimes termed "constructive malice" could supply the necessary *mens rea* for murder. In other words, under that thinking, if an accused were engaged in a serious, intentional - and usually capital - crime, guilt of murder would follow if death ensued in the course of the commission of that serious criminal enterprise, irrespective of the specific intention of the accused, his state of knowledge, or the degree of violence employed in the immediate events leading to the fatality. The fire raising example occurs in the discussion in para.18 of *Alison* in which the author is expounding the proposition set out in larger font at the outset of the paragraph that - "It is murder if death ensue from an intention not to kill, but to do some other highly wicked and felonious act."

[15] On our understanding of *Alison* the paragraph is devoted to the cases of death occurring where the doctrine of constructive malice might apply. It is in that light that one should read the passage towards the foot of p.52 which we have quoted above in relation to the commission of homicide during the course of a capital crime or one obviously hazardous to life. At least in its former vigour the doctrine of constructive malice no longer forms part of the modern law of Scotland (though some traces may possibly exist in death caused in the course of an assault and robbery). Accordingly we think the Advocate Depute was right to

recognise immediately that the fire raising case instanced by *Alison* as a crime of murder would not be murder under the law of Scotland as it has been established for many decades. We would add that this recognition accords with what is said by *Gordon*, para.23.32 where it is stated respecting the similar instances given by *Hume*, *Burnett* and also, for present purposes, *Macdonald* at p.91 that there are "no reported cases of this kind and the statements in the textbooks can be disregarded as deriving from a doctrine of constructive malice of a kind no longer accepted in Scots law." We would add further that, as respects the examples of death resulting from abortion or during rape instanced by those writers in their exposition of constructive malice as a sufficient *mens rea* for murder, it may be noted that in the preceding paragraphs *Gordon* similarly regards them as not being consonant with the modern law.

[16] Accordingly in so far as the argument for the Crown proceeded upon these passages in *Alison*, and also to an extent similar passages in *Macdonald*, in which the authors were dealing with that doctrine or thinking of constructive malice as a basis for conviction for murder, we consider that the argument proceeds upon an unsound foundation in the modern law. We are not persuaded by anything said by the Advocate Depute that the modern law is other than as set out by *Gordon* in para.23.33 (p.309) - "the actual situation is that there is murder wherever death is caused with wicked intention to kill or by an act intended to cause physical injury and displaying a wicked disregard of fatal consequences." The circumstances libelled in the present case do not satisfy the requirements of that exposition of the law of murder since it is accepted that they do not libel any wilful act intended to cause physical injury and, as we indicated at the outset of this opinion, the Advocate Depute made clear that it was not the contention of the Crown that, in distinction to the very dangerous nature of his driving, the accused had any intention to injure the unfortunate Jack Anderson or any other person. And in talking of the modern law we would comment, importantly, that it should be noted that the views expressed in regard to this domain in the 3rd edition of *Gordon* are those expressed in the 1st edition, published some 40 years ago in 1967. Since that time they have represented the accepted views among jurists which have not been the subject of any subsequent challenge.

[17] We would add that, apart from the fact that the doctrine of constructive malice has long since ceased to have any material rôle in the modern law of murder, there would, in our view, be a further logical problem in the present case posed by any reliance on that doctrine to the effect that death occurring ancillary to the course of the commission of another serious ("capital") crime is murder. That logical problem is that in the present case there is no independent "capital" or equivalent offence respecting which the tragic death in this case is in some way ancillary. The only serious "capital" offence which the Advocate Depute could invoke in his reliance on *Alison* was the fatally dangerous driving itself. But that is the primary offence, and constituted only by the dangerousness of the driving.

[18] For all these reasons we concluded that the submission for the Crown was unsound and that the submission advanced by Mr Kerrigan for the accused should be upheld.

[19] By way of a final remark, we would record some concern that the issue which this Bench was convened to resolve was not dealt with as a preliminary matter. Having regard to the provisions of section 72(6) of the Criminal Procedure (Scotland) Act 1995 it plainly could have been. The terms of the indictment alleging murder did not allege any intentional crime of assault or the commission of other personal injury. In the discussion before us, nothing really turned upon the evidence led. Had the issue been so discussed and disposed of as a preliminary matter the attendance of witnesses and jurors, and the interruption of a jury trial, would have been avoided. It is plainly desirable that matters of law such as that debated before us for effectively one and a half days, should be dealt with before any jury trial commences. (As a postscript to our decision we note that in the event, following the giving of our decision, the Crown accepted a plea of guilty to culpable homicide and the trial judge imposed a sentence of 12 years imprisonment).