An examination of the familial homicide offence created by section 5 of the Domestic Violence, Crime and Victims Act 2004 and proposals for reform.

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An examination of the familial homicide offence created by section 5 of the Domestic Violence, Crime and Victims Act 2004 and proposals for reform

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Abstract

This thesis examines the criminal offence of familial homicide created by section 5 of the Domestic Violence, Crime and Victims Act 2004. This offence imposes liability on the defendant if he either caused or allowed the death of the victim, and it does not have to be shown which of these alternatives applies. The offence was created to respond to a loophole in the law under which if it could not be proven which of the defendants killed the victim, or that they were acting together to cause death, they could be acquitted.

However, the offence created issues of its own. This thesis builds on the positive aspects of the offence in terms of convicting culpable defendants whilst addressing its weaknesses and the issues it creates for underlying criminal theory. The thesis discusses the theory regarding causation, omissions, *mens rea*, and accessorial liability which are all affected by the new offence. It also considers domestic violence as it is prevalent within this context.

The two main changes to the law proposed by this thesis relate to causation and omissions liability. A more gradated law of causation is necessary, and thus a theory of direct and indirect causation is advanced. It also argues that a new personal association duty is needed, expanding the traditional exceptions to omissions liability. Regarding accessorial liability, this thesis argues that in situations where it is unclear who kills the victim and who allows his death, the familial homicide offence which blurs the distinction between the parties is appropriate because it ensures that culpable defendants are no longer escaping liability. However, where the role of each party is clear the law needs to be reformed. This thesis proposes that the current approach towards *mens rea* and domestic violence should remain unchanged.

DECLARATION

This work has not previously been accepted in substance for any degree and is not being concurrently submitted in candidature for any degree.

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STATEMENT 1

This thesis is the result of my own investigations, except where otherwise stated. Where correction services have been used, the extent and nature of the correction is clearly marked in a footnote(s).

Other sources are acknowledged by footnotes giving explicit references. A bibliography is appended.

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STATEMENT 2

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Introduction

In the last decade studies have consistently shown that there are an unacceptably high number of child homicides.[1] A 2004 study found that there were between 80 and 110 homicides of children each year,[2] which meant that up to two children per week were killed.[3] Parents were the suspects in 78% of cases.[4] A 2008 study found that 210 children died following abuse in England within a 16 month period.[5] A 2009 study found that 35% of child homicide victims were younger than 1 year.[6] These terrible statistics have unfortunately subsisted to the present day. A study published in 2012 found that every ten days a child is killed at the hands of their parent.[7] Children under 1 year old are at the highest risk of homicide when compared to other age groups.[8] In almost two thirds of cases involving children killed by another person, the parent is the main suspect.[9] To add to this shocking picture, 77% of homicides of victims aged under 16 were committed by someone to whom they were acquainted.[10]

These statistics are heinous in themselves, but exacerbating the problem are the low conviction rates. In cases where children under the age of 10 were killed by their

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[1] Furthermore, as stated by Barran, D., "Developments in Protecting Victims of Domestic Abuse" [2009] *Family Law* 416 at p. 416, 'the number of domestic homicides remains broadly unchanged over the past 10 years and the number of children who live with domestic abuse remains at an unacceptable level'.

[2] Creighton, S., *'Child Protection Statistics'* (London: NSPCC; 2004) at p. 4.

[3] Creighton, S., & Tissier, G., *Child Killings in England and Wales* (London: NSPCC; 2003) <http://www.familieslink.co.uk/download/june07/Child%20killings.pdf> accessed 21st May 2012.

[4] *Ibid.*

[5] BBC News Online, "'More Children' Dying after Abuse", 10th December 2008 <http://news.bbc.co.uk/1/hi/uk/7775032.stm> accessed 21st May 2012.

[6] Gilbert, R., *et al* "Burden and Consequences of Child Maltreatment in High-Income Countries" (2009) 373 *Lancet* 68 at p. 73.

[7] Smith, K., (ed) *et al, Homicides, Firearm Offences and Intimate Violence 2010/11: Supplementary Volume 2 to Crime in England and Wales 2010/11* (London: Home Office; 2012) <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/crime-research/hosb0212/hosb0212?view=Binary> accessed 21st May 2012 at p. 21.

[8] Home Office, *Statistical News Release: Homicides, Firearm Offences and Intimate Violence 2010/11: Supplementary Volume 2 to Crime in England and Wales 2010/11* (London: Home Office; 2012) <http://www.homeoffice.gov.uk/publications/science-research-statistics/research-statistics/crime-research/hosb0212/> accessed 21st May 2012 at p. 1.

[9] Smith, above at p. 21. This has also been found to have occurred in cases of shaken baby syndrome. Cobley, C., Sanders, T., and Wheeler, P., "Prosecuting Cases of "Shaken Baby Syndrome" – A Review of Current Issues" [2003] *Criminal Law Review* 93 at p. 97 state that 'the main suspects at the start of the police investigation were usually the natural parents of the child and occasionally other carers'.

[10] Smith, *ibid.*

parents or carers there were only convictions in 27% of cases.[11] The focus of this thesis is the offence of familial homicide, which was introduced by section 5 of the Domestic Violence, Crime and Victims Act 2004 in order to tackle one of the obstacles to securing a homicide conviction in cases involving children or vulnerable adults killed in a domestic setting.

The thesis argues that there are two fundamental problems with the approach taken by the familial homicide offence. As a result, the offence is both over- and under-inclusive. Each of these problems is symptomatic of broader trends in criminal justice and criminal law. First, many contemporary criminal law statutes are, deliberately or otherwise, overly broad, with the result that legislation which has been designed to remedy a particular mischief ends up being used in ways for which it was not suitable. Second, contemporary criminal law theory tends to place such emphasis on individual autonomy that other equally important principles such as welfare are neglected.

There are several examples of the first problematic trend. Anti-social behaviour orders were designed to be used against those who repeatedly commit criminal acts of a certain level of severity.[12] Yet the deliberately loose wording of the statutory definition of anti-social behaviour has allowed them to be used to restrict the behaviour of the homeless and the mentally ill.[13] They have even been used to ban a protestor from going within 100 yards of Olympics venues and to prohibit an HIV sufferer from having sexual intercourse with another person without first telling them that he has the virus.[14] The statutory definition of terrorism is similarly broad,

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[11] Creighton, above. These statistics relate to the time period between 1 January 1998 and 31 December 2000.

[12] See Macdonald, S., "A Suicidal Woman, Roaming Pigs and a Noisy Trampolinist: Redefining the ABSO's Definition of 'Anti-Social Behvaiour'" (2006) 69 *Modern Law Review* 183 for further detail.

[13] See for example the Cardiff case in which a 74 year old woman was given an anti-social behaviour order for begging on the city's streets. Detail on this case is available at BBC News Online, "Cardiff ASBO for Agripina Gheorge, 74, Over Begging", 30th August 2011 <http://www.bbc.co.uk/news/uk-wales-south-east-wales-14714829> accessed 21st May 2012. Also notable is the case of Jennifer Ford, a woman with mental health problems who was given an anti-social behaviour order. See Macdonald, above at p. 203 for further detail on this case, as well as general commentary on the legislative over-breadth of anti-social behaviour orders.

[14] See BBC News Online, "Protestor Barred from All Jubilee and Games Events", 3rd May 2012 <http://www.bbc.co.uk/news/uk-england-london-17941850> accessed 21st May 2012 for details on the protestor barred from the Olympics and The Independent Online, "Man Jailed for Giving Partner HIV", 25th July 2011 <http://www.independent.co.uk/news/uk/crime/man-jailed-for-giving-partner-

encompassing serious property damage where no-one is caused to fear for their own personal safety yet with no exception for political protest as in other comparable jurisdictions.[15] The terrorism-related stop and search powers in section 44 of the Terrorism Act 2000 were used to remove 82 year old Walter Wolfgang from the Labour party conference for heckling Jack Straw,[16] and the House of Lords has confirmed that an individual may be convicted of the terrorism-related criminal offence contained in section 58 of the Terrorism Act 2000 even if he has no connection whatsoever with terrorism.[17] Another example of legislative over-breadth is the way in which the Protection from Harassment Act 1997 has been used. This statute was developed to combat stalking, yet it has been used in wider circumstances. For example, publication of a series of articles by a newspaper amounts to harassment,[18] as does inciting a dog to bark.[19] Section 4A of the Public Order Act 1986 has been used to prosecute a user of the social networking site Twitter for racially abusive messages he sent in relation to a football player.[20] This could be considered problematic because section 4A was designed, in a similar manner to section 5 of that same Act, to combat public disorder and anti-social behaviour.[21] These examples are illustrative of the broad approach to legislative drafting, and resultant mission creep, which has characterised many recent criminal laws.

The same is true of the familial homicide offence. Section 5 was designed to rectify the sort of evidential problems which arose in *Lane*. In this case the 22 month old

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hiv-2325811.html> accessed 21st May 2012 for details on the ASBO handed to the HIV sufferer in question.

[15] See Walker, C., "The Legal Definition of "Terrorism" in United Kingdom Law and Beyond" [2007] *Public Law* 331 and Golder, B., & Williams, G., "What is "Terrorism"? Problems of Legal Definition" (2004) 27 *University of New South Wales Law Journal* 270 who indicate that it is difficult to define this concept but do lay down guiding principles from different jurisdictions.

[16] See Joint Committee on Human Rights, *Demonstrating Respect for Human Rights? A Human Rights Approach to Policing Protest* Seventh Report of Session 2008-09 (Volume II HL Paper 47, HC Paper 320; 2009) at p. 161. The amendments made by section 59 of the Protection of Freedoms Act 2012 seek to address this.

[17] *R v G* [2010] 1 AC 43. This decision is criticised by Hodgson, J., & Tadros, V., "How to Make a Terrorist Out of Nothing" (2009) 72 *Modern Law Review* 984.

[18] *Thomas v News Group Newspapers* [2002] EMLR 4.

[19] *Tafurelli v DPP* [2004] EWHC 2791.

[20] *R v Stacey*, appeal number A20120033. This was criticised in the media; see The Independent Online, "Is Liam Stacey's Jailing after his Muamba Tweets a Step Too Far?", 28th March 2012 <http://blogs.independent.co.uk/2012/03/28/liam-staceys-jailing-a-step-too-far/> accessed 21st May 2012 for example.

[21] See Stone, R., *Civil Liberties and Human Rights* (Oxford: Oxford University Press; 8th edition; 2010) at pp. 284-7.

victim was killed by either her mother or her stepfather.[22] As it could not be proven which of the defendants actually killed the victim or that they were acting together to cause the death, both defendants were acquitted. The injustice was obvious, and acted as a catalyst for the creation of the familial homicide offence. The offence attempts to plug the gap in the law by holding that if it can be shown that the victim died from an unlawful act by another, the defendant was a member of the victim's household, had frequent contact with him, was aware or ought to have been aware of a significant risk of serious harm to the victim, the unlawful act occurred of circumstances of the kind that the defendant foresaw or ought to have foreseen and the defendant failed to take reasonable steps to protect the victim from the risk of harm it is not necessary for familial homicide liability to prove each defendant's precise role in the victim's death. Yet although this response to the decision in *Lane* may be praiseworthy, section 5(1)(d) and 5(2) indicate that the offence may be used even if the precise role of each party *is* clear. This means that the offence is far wider than was necessary to address the mischief at which it was aimed. This is problematic because it means that defendants who commit murder might only be convicted of the lesser familial homicide offence. Prosecutors might, for example, charge this offence as opposed to murder because it is easier to prove. They might also feel pressure to accept an offer to plead guilty to familial homicide, instead of pursuing a murder charge to trial.[23]

The underlying problem here is that section 5 may be used in a way for which it is not suited. This causes over-inclusivity because individuals who should not fall within the scope of the offence do in fact fall within it. This thesis shows that, as well as potentially being a problem in practice, this is also problematic from the perspective of basic principles and accordingly it suggests possible reforms.

The second problematic trend relates to the emphasis placed on individual autonomy. The principle of individual autonomy holds that individuals are autonomous agents and should therefore be free to live their lives according to their own choices and reasons as far as is possible. Although this principle is undoubtedly important, in

[22] *R v Lane & Lane* (1986) 82 Cr App R 5.
[23] In *R v Owen (Jason)* [2009] EWCA Crim 2259 there was greater evidence against the mother and her partner in relation to the victim's death in contrast to their lodger, yet all three were convicted of familial homicide. This indicates that this theoretical issue has in fact transcended into practice.

certain instances the emphasis placed on it has had adverse consequences. The most obvious example of this is the law governing omissions liability. In domestic law there has been an autonomy-based reluctance to impose omissions liability on an individual except in certain limited circumstances.[24] This has been at the expense of other important considerations, such as the welfare principle, social interconnectedness and social responsibility. In England and Wales today the priest and the Levite in the parable of the good Samaritan could simply walk past the injured man without any legal obligation to call for an ambulance.[25] An individual may walk past a stranger's child struggling to swim in a deep pool and watch him drown without being under any legal obligation to try and rescue him. A diner may witness another diner choking to death in a restaurant without any legal obligation to help. A person may walk past a stranger being raped without fear of reprisal by the criminal law for his failure to call the police. And a leading academic feels able to defend this position by insisting that the inaction of the individuals in these examples does not make the world a "worse place":

> Drowning it [a child] makes the world a worse place, whereas not preventing its drowning only fails to improve the world.[26]

These examples highlight the problem with an overemphasis on the importance of individual autonomy. The familial homicide offence suffers from this affliction. The form of omissions liability in section 5 is too limited. It fails to catch all those who might be deserving of familial homicide liability, partly due to the offence's artificial limitation to individuals who live in the victim's household.[27] As a result the offence is under-inclusive. The proposals advanced within this thesis aim to address this.

In summary, the familial homicide offence is both over-inclusive and under-inclusive, catching some individuals who would previously have been convicted of a

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[24] These arguments are discussed in greater detail in Chapter Three of this thesis. These limited exceptions are demonstrated by cases such as *R v Miller* [1983] 2 AC 161.

[25] See *Miller*, above at p. 175 in which Lord Diplock stated: '[t]he conduct of the parabolical priest and Levite on the road to Jericho may have been indeed deplorable, but English law has not so far developed to the stage of treating it as criminal; and if it ever were to do so there would be difficulties in defining what should be the limits of the offence.'

[26] Moore, M., *Act and Crime* (Oxford: Clarendon Press; 1993) at pp. 58-9.

[27] This will be considered in further detail within Chapters One and Three.

more serious offence whilst at the same time failing to catch other individuals who should be held liable. This is demonstrated by the following example:

> K and his young son V visit the house of O on a regular basis. O witnesses K inflicting serious injury on V on a number of occasions, but does nothing. She also hits V on two occasions, causing minor bruising. V later dies from injuries inflicted in a particularly serious attack by K. O is convicted of assault occasioning actual bodily harm. The Crown Prosecution Service decides to accept K's offer to plead guilty to familial homicide.[28]

The application of the familial homicide offence to K highlights section 5's over-inclusivity. On the facts K should be liable for murder, but as the resources of the Crown Prosecution are stretched it has instead opted for familial homicide as this is more expedient. The statute is also under-inclusive as demonstrated by the case of O. O would not be liable for familial homicide because section 5(1)(a)(i) requires that she must be a member of V's household, and this is not the case. Yet she had regular contact with V and the risk of further harm that he faced; was aware, or at least ought to have been aware, of this risk; and yet failed to take action to protect the victim from this risk. A conviction for assault occasioning actual bodily harm contrary to section 47 of the Offences Against the Person Act 1861 does not accurately reflect her contribution to the harm that V suffered.

The above example illustrates the very real problems with the familial homicide offence. This thesis explicates these problems and presents a reasoned case for reform. In so doing, the thesis exposes deeper flaws with the criminal law's current approach to omissions liability and causation. So although the primary focus of the thesis is the familial homicide offence, some of the ideas and arguments that will be advanced transcend familial homicide and apply to the criminal law more broadly. The thesis begins with a chapter which contextualises and outlines the background to this area of law. Chapters Two, Three, Four, Five and Six then discuss different aspects of the familial homicide offence in turn, namely causation, omissions, *mens rea*, accessorial liability, and the possibility of a specific defence for use in cases involving domestic violence, expounding the problems outlined above whilst

[28] A note about the terminology used within this thesis can be briefly made here. 'K' is used to refer to the killer of the victim, 'O' is used to refer to the omitter, and 'V' is used to refer to the victim.

rejecting some of the other criticisms of section 5 and finally advancing proposals for reform.

Chapter One

Familial Homicide: Rationale, Response and Reform

As indicated in the introduction, there was a gap in the law which existed prior to enactment of the familial homicide offence. This occurred in cases where it could not be proven which of the defendants involved killed the victim or that they were acting together to cause death. Accordingly, the Law Commission reviewed this area of law and laid down proposals for reform. Although substantively different to these proposals, the familial homicide offence contained within section 5 of the Domestic Violence, Crime and Victims Act 2004 (DVCVA) is based on this approach.

Section 1 of this chapter discusses the unsatisfactory state of the law prior to the familial homicide offence. It also considers the Law Commission's proposals for reform. Section 2 discusses the familial homicide offence and the jurisprudence that it has created. It highlights problematic aspects of the offence which have given rise to the issues outlined in the introduction, thereby indicating why further reform is necessary. Section 3 sets out the proposed draft Bill and provides an outline of the remainder of the thesis.

1. The previous law

a. Case law and commentary

The type of factual situation which is involved here is where the victim has been injured or killed by at least one of two potential defendants, however, it cannot be proven which of them did it, or that they were acting together to cause the injury or death. There are a number of significant cases which highlight the issues within this area of law and the legal loophole that necessitated reform.

In *Abbott*, both parties were convicted of fraud.[1] Although this was a property offences case, the Court of Appeal quashed the appellants' convictions and in so

[1] *R v Abbott* (1955) 39 Cr App R 141.

doing made a key statement which was subsequently applied to the above factual situation within homicide law. Lord Goddard LCJ stated that:

> If two people are jointly indicted for a crime and the evidence does not point to one rather than the other, and there is no evidence that they were acting in concert, the jury ought to return a verdict of Not Guilty in the case of both because the prosecution have not proved the case [...] although it is unfortunate that a guilty party cannot be brought to justice, it is far more important that there should not be a miscarriage of justice and that the law maintained that the prosecution should prove its case.[2]

This principle fails to consider the possibility that the two parties involved were at least culpable omitters, and should therefore incur criminal liability. By placing too much emphasis on individual autonomy rather than on securing justice for victims and punishing culpable omissions, unsatisfactory and legally problematic outcomes occurred. The statement demonstrates a gap in the law because although the defendants may not have the necessary culpability required for an accessory, they were still culpable for an offence, yet there was no fall-back offence with which to charge them.

A similar issue was raised by *Marsh v Hodgson* in which it was unclear which of the two parties had inflicted injuries on a young child contrary to section 1 of the Children and Young Persons Act 1933 (CYPA).[3] Although the evidence did not clearly indicate which of the parties inflicted the injuries, at first instance both defendants were convicted. They appealed, relying on *Abbott,* but their appeal was rejected on the grounds that both parents were there throughout the whole period in which the injuries were shown to have been inflicted. Although the outcome was correct because both defendants were culpable by reason of their inaction at least, the reasoning adopted was problematic. This is because the defendants were only convicted because they were there for the whole time period in which the injuries occurred. Defendants can still be culpable even if they are not there at the precise moment at which the injuries were inflicted. So, although they may not reach the standard of accessorial liability for the main offence, they may nevertheless

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[2] *Ibid.*, at pp. 148-9. This was cited in *R v Lane & Lane* (1986) 82 Cr App R 5.
[3] [1974] Crim LR 35.

criminally culpable so should be treated as such. This point is discussed in greater detail both below and in subsequent chapters.

The law took a harsh approach. It would only impose liability if it was clear which of the defendants killed the victim, or that they were both acting together to cause the death, or that both parties were there through the duration of the period in which it was incontrovertible that the injuries were inflicted. This is unsatisfactory because individuals may be criminally culpable even when they do not satisfy this high threshold.

This unfortunate state of affairs remained largely unchanged by *Gibson*.[4] *Gibson* related to injury to the victim rather than death. However, the principles laid down were directly applicable to homicide, as seen in subsequent cases.[5] The defendants' baby daughter suffered non-accidental injuries.[6] The injuries were inflicted by either the mother or the father, or both; however, it could not be proven which of them actually did it.[7] The court stated that:

> [T]here being no explanation from either parent, and no evidence pointing to one rather than the other, the inference can properly be drawn that they were jointly responsible and so both guilty as charged.[8]

This case followed the previous law to the extent that it held that clear evidence must establish the defendant's precise role in the offence before he can be convicted. However, it adopted a broader approach than the previous cases because it held that even though it may not be clear which of the defendants inflicted the injury, or that they were both acting together to cause death, accessorial liability may nevertheless be imposed. The defendants did not have to be there for the duration of the time period to incur liability, marking a departure from the more restrictive approach in *Marsh*. In *Gibson* the mere fact that the parties had joint custody of the victim meant that an inference of joint responsibility for the offence could be drawn. However,

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[4] *R v Gibson & Gibson* (1984) 80 Cr App R 24.
[5] *Lane* for example.
[6] *Gibson* at p. 28 per O'Connor LJ.
[7] *Ibid.*, at p. 26.
[8] *Ibid.*, at p. 30.

their convictions were quashed as the trial judge had erred in law due to the directions given to the jury.

This wider principle was heavily criticised. For example, Williams argued that:

> There certainly was evidence pointing to one spouse rather than the other: the only spouse who had shown violence to the infant was the wife. If there was to be any kind of presumption, it should have related to the wife alone. I find it hard to decide which of the adjudicating bodies in this case emerge with the least credit: the jury, the trial judge, or the Court of Appeal. At least the Court of Appeal prevented injustice being done in the particular instance.[9]

Williams was joined in his criticism by Griew, who opined that the Court of Appeal's argument that the mere fact that both parents had joint custody meant an inference of joint responsibility could be drawn was 'plainly erroneous'[10] as it contradicted established principles of accessorial liability.[11] For example, it must be established that there is a case to answer and the guilt of both parties must be proved. Smith also highlighted that *Gibson* contravened the established legal approach because it deviated from the principle that both defendants could only be properly convicted if the jury was satisfied regarding each defendant 'that, if he did not himself inflict the harm, he assisted or encouraged the other to do so.'[12] He stated that the judgment 'should be treated with caution'.[13]

This case did depart from established principles because it marked out somewhat unchartered territory. However, the criticism levied against the decision appeared to be based on the authors' strict adherence to individual autonomy, rather than welfare for example. Defendants who have joint custody of a victim are culpable for injury or death that may be inflicted on them by the unlawful act of the other party if they are aware, or ought to have been aware, of the risk of that harm occurring. *Gibson* can be praised to a certain extent because it held that in cases where evidential issues would mean that it may be difficult to secure convictions as it is unclear which of the defendants killed the victim, this would not be a bar to prosecution. Merely because

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[9] Williams, G., "Which of You Did It?" (1989) 52 *Modern Law Review* 179 at p. 195.
[10] Griew, E., "It Must Have Been One of Them" [1989] *Criminal Law Review* 129 at p. 132.
[11] *Ibid.*, at pp. 130-131.
[12] Smith, J.C., "Case & Comment – *Gibson*" [1984] *Criminal Law Review* 615 at p. 616.
[13] *Ibid.*

their precise role in the harm suffered cannot be established does not mean that they should escape liability. This argument is expanded in subsequent chapters.

Yet *Gibson* can be criticised because it left the law unsettled. On the one hand were cases such as *Abbott* and *Marsh*, whereas on the other hand *Gibson* laid down a broader approach. The resolution to this conflict occurred in *Lane*.[14] *Lane* highlighted the tension faced in homicide cases involving evidential issues. This tension is between ensuring that culpable individuals are convicted, and avoiding innocent parties being convicted.

In *Lane* the victim was killed by either her mother or her stepfather. The injury occurred at some point during the day before the child died. During that period each party had been absent from the house, leaving the child in the care of the other, and there had been periods when they were both in the house together. Evidence did not establish which of the defendants inflicted the injuries, exactly when they happened, or who was present at the time. The court followed *Abbott* and *Marsh*, holding that although it was clear that at least one of the defendants killed the victim, because it could not be conclusively proven which of them did it both defendants were acquitted. The court held that where evidence does not point to one defendant rather than the other, and there is no evidence that they were acting in concert, both should be acquitted. However the court did distinguish *Marsh* on the facts; in *Marsh* the defendants were shown to have been there for the duration of the offence, whereas in *Lane* both of the defendants were absent for part of the time period in which the child's fatal injuries could have occurred.

Lane settled the law, concluding that if the role of each party was not clear, both would have to be acquitted even if the victim's death occurred when the child was in their joint care. This decision was praised by certain commentators. This is because it limited the likelihood of convicting innocent individuals for a serious homicide offence, even though this was done at the expense of failing to secure justice for the victim. Williams opined that *Lane* put the law back on course,[15] a point supported by

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[14] Above.
[15] Williams, above at p. 195.

Griew.[16] Williams argued that the judgment was correct because in his opinion a culpable failure to act should not suffice for liability unless there was an act of encouragement and the defendant intended to encourage the offence.[17] He relied on a strict interpretation of criminal law doctrine and principles, and a strong adherence to the principle of individual autonomy.

These comments put certainty and clarity above securing justice for the victim and convicting culpable defendants of a serious offence. A child's murder went unpunished solely for reasons of individual autonomy and evidence. The victim died at the hands of either her mother or her stepfather, yet they both walked free. Smith made a general point of relevance here, stating that prosecutions may be levied against the defendant in relation to their omission due to such culpability even when they do not actively assist or encourage the principal killer.[18] *Lane* would prevent such individuals from being convicted despite their culpability.

The problem was the restrictiveness of the law. The courts adopted a strict approach towards accessorial liability. It was to be hoped that the court would retreat from this restrictive approach but this was not to be the case. *Russell* upheld the *Lane* principle.[19] The defendants lived with their baby daughter. Both defendants were in receipt of methadone prescriptions. The victim died from a methadone overdose, but it could not be proven which of the defendants administered the fatal dose.[20] The defendants denied giving methadone to the victim on this occasion, however, they had both dipped her dummy in it in the past when she was teething. The court held that because they had jointly administered the drug in the past, and as there was no explanation from the defendants as to how she had died, it could be inferred that administration of the drug was a joint enterprise.[21]

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[16] Griew, above at p. 132.
[17] Williams, above at p. 198.
[18] Smith, above at p. 616.
[19] *R v Russell & Russell* (1987) 85 Cr App R 388. See the brief comment on this case by Smith, J.C., "Case Comment – *Russell*" [1987] *Criminal Law Review* 494.
[20] *Ibid.*, at p. 392.
[21] *Ibid.*, at p. 394.

Russell held that a defendant could only be convicted if it could be proven that he committed the crime, or that the defendants were involved in a joint enterprise.[22] Although both defendants were convicted of manslaughter, which was a positive result because those responsible and culpable for the victim's death were convicted of a homicide offence, this case perpetuates the unsatisfactory *Lane* principle. Furthermore, commentators criticised the fact that convictions occurred. Williams described the decision as 'a miscarriage of justice,'[23] and stated that:

> I see no value in using the criminal law against loving parents who have accidentally killed or injured their child, even though what they did was reprehensible.[24]

Lane was followed in the property offences case of *Bellman*,[25] while *Aston & Mason* endorsed *Lane* within homicide law.[26] The defendants' manslaughter convictions were quashed on the basis that it could not be established which of the defendants killed the child, or that they had wilfully and intentionally encouraged the other to cause injury to her. *Lane* was followed despite the court expressing reservations over the outcome, describing it as an 'unwelcome conclusion'.[27] A similar result occurred in *Strudwick*.[28] It could not be shown which of the defendants inflicted the fatal injuries and thus their manslaughter convictions were quashed. This is a direct echo of *Lane*.

The injustice of the prevailing judicial approach highlighted the need for reform. The approach of the law failed to convict culpable defendants,[29] and this was particularly concerning because it is often difficult to prove what actually happens in such cases.[30] Another issue was that the existing child cruelty offence contrary to section

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[22] *Ibid.*
[23] Williams, above at p. 191.
[24] *Ibid.*, at p. 194
[25] *R v Bellman* [1989] AC 836.
[26] *R v Ashton & Mason* [1992] 94 Cr App R 180.
[27] At p.185 per the Lord Chief Justice.
[28] *R v Strudwick* [1994] 99 Cr App R 326.
[29] This has been noted by Hayes, M., "Criminal Trials where a Child is the Victim: Extra Protection for Children or a Missed Opportunity" (2005) 17 *Child and Family Law Quarterly* 307 at p. 309 who states 'although at least one of those present must be guilty, unless he or she can be identified, all must be acquitted.'
[30] Herring, J., "Mum's Not the Word: an Analysis of Section 5" in Clarkson, C.M.V., & Cunningham, S., *'Criminal Liability for Non-Aggressive Death'* (Hampshire: Ashgate; 2008) pp. 125-153 at p. 127 states that '[c]hild abuse cases often involve a complex factual matrix: the adults involved often lie,

1 of the CYPA, which covers neglect of a child, was insufficient to adequately punish culpable defendants by virtue of the fact that in labelling terms it did not cover cases of homicide, and the sentence was lenient in comparison to homicide sentencing.[31] The Law Commission summarised the unsatisfactory state of the law with their statement that 'there is near universal recognition that the problem is extremely serious and that reform is necessary'.[32] Accordingly they attempted to resolve the issues. The next section will discuss their proposals for reform.

b. The Law Commission's proposals

The Law Commission was concerned that:

> [O]ur legal system is currently doing a grave disservice to society and in particular its most vulnerable members. It is presently failing to provide an effective mechanism for bringing to justice those who are responsible for committing grave crimes against children, often their own.[33]

In both its Consultative Report and Final Report it highlighted the problems noted above in relation to *Lane*, and indicated that its proposals aimed to increase the conviction rate for culpable individuals. Its proposals attempted to do this by creating two different substantive offences alongside evidential and procedural reforms.

First, it created an aggravated form of the child cruelty offence contrary to section 1 of the CYPA which would be punishable by 14 years' imprisonment.[34] The offence would be committed where a defendant committed an offence contrary to section 1 which resulted in suffering or injury to health of a kind which was likely to be caused to the victim and its occurrence resulted in, or contributed significantly to, the victim's death.

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the expert evidence can be equivocal, and the victims are unable to provide accounts of what happened.'

[31] The maximum penalty is now ten years' imprisonment and a fine.

[32] Law Commission, *Children: Their Non-Accidental Death or Serious Injury* (Law Commission No. 279; 2002) at p. 15, [2.1]. Dennis, I., "Which of You Did It?" [2003] *Criminal Law Review* 353 also summarises the unsatisfactory nature of this area of law.

[33] Law Commission, *Children: their Non-Accidental Death or Serious Injury* (Law Commission No. 282; 2003) at p. 34, [5.20].

[34] *Ibid.*, at p. 45, [6.5] outlines the full terms of the offence and its details.

This attempted to broaden the law. As noted above the section 1 offence was insufficient for labelling and culpability reasons and so an aggravated form of the offence, with a heavier penalty, was a positive proposal. However, this offence was criticised in the academic literature. Although generally supportive of this new offence due to the fact that it increased the scope for culpable individuals to incur criminal liability, and thereby increased the likelihood of justice being secured for the victims, Glazebrook was critical of the offence itself.[35] He opined that:

> [O]ne may still ask whether there is not more that it could, and should, do to protect children from being harmed.[36]

Furthermore, he highlighted a key problem. Under this offence it would still be necessary for the defendant to be convicted of wilful cruelty to the victim, and that this would be problematic because it would depend on whether the child was in the victim's care at the time, thereby excluding defendants who may be culpable by virtue of their omission to protect the victim. Moreover, he felt that the approach gave rise to arbitrary distinctions in terms of the omissions liability it laid down.

The essence of Glazebrook's argument was that the proposals did not go far enough. However, the Law Commission did propose another offence to go alongside their first proposal, which may have ameliorated the force of Glazebrook's criticisms. They proposed an offence of failing to protect a child. This would apply where the victim suffered a specific harm, such as death or grievous bodily harm, and the defendant was aware, or ought to have been aware, of the risk of this happening at the hands of another party. The defendant must also have failed to take reasonable steps to protect the victim from the risk, and the death or injury must have occurred in circumstances of the kind that the defendant anticipated or ought to have anticipated.[37] The defendant must have been responsible for, and connected to, the victim, which meant that they lived in the same household, or were related, or the defendant looked after the victim under a childcare arrangement. The maximum sentence was 7 years' imprisonment.

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[35] Glazebrook, P., "Insufficient Child Protection" [2003] *Criminal Law Review* 541 at pp. 541-2.
[36] *Ibid.*, at p. 542.
[37] Clause 2 of its Draft Bill. See pp. 47-56 of Report 282, above, for further detail on this offence.

The first offence applied where the defendant himself caused the victim's death, and the second offence applied where the victim died at the hands of another but the defendant could nonetheless be liable for death – as a principal – if certain conditions were met. This helped to ameliorate the force of Glazebrook's criticism because it imposed a broader form of omissions liability than had previously existed.

Cobley, in a similar vein to Glazebrook, described the Law Commission's approach as 'rather cautious in parts'.[38] The offence was not wholly cautious as it did break new ground. However, the scope of omissions liability it created was somewhat tentative by virtue of its limitations to concepts such as 'responsibility' and the need for a childcare arrangement in certain cases. As will be seen below, as well as throughout this thesis, the scope of liability for this type of offence in fact needs to be much broader in order to bring culpable defendants to justice.

In addition to the two substantive offences, the Law Commission proposed evidential and procedural reforms.[39] It proposed a statutory statement of responsibility. This would require the responsible person to explain to the court how the death or injury occurred. It also proposed that in certain cases, the judge must not decide whether the case should be withdrawn from the jury until the close of the defence, and also that if the defendant in such a case had the statutory responsibility but failed to give evidence, the jury would be permitted to draw inferences from that failure. These evidential provisions attempted to strike a fair balance between ensuring that culpable individuals were legally held to account whilst ensuring that they received a fair trial.

Although Parliament considered the Law Commission's report when debating the familial homicide offence, the legislation actually enacted differs substantially to the Commission's proposals. The next section will discuss familial homicide.

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[38] Cobley, C., "Criminal Prosecutions when Children Die or are Seriously Injured" [2003] *Family Law* 899 at p. 903.

[39] See pp. 3-4 of Report 282, above, for further detail on these changes, and Dennis, I., "Non-accidental Death or Serious Injury to Children" [2003] *Criminal Law Review* 743 for a summary. Although the evidential proposals were set to make key changes to the law, and evidential provisions do now sit alongside section 5, the evidential issues are not the focus of this thesis and will only be discussed briefly.

2. Familial homicide

Section 5 of the Domestic Violence, Crime and Victims Act 2004 (DVCVA) creates the offence of familial homicide. As enacted, it stated:

(1) A person ("D") is guilty of an offence if –

(a) a child or vulnerable adult ("V") dies as a result of the unlawful act of a person who –

(i) was a member of the same household as V, and

(ii) had frequent contact with him,

(b) D was such a person at the time of that act,

(c) at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and

(d) either D was the person whose act caused V's death or –

(i) D was, or ought to have been, aware of the risk mentioned in paragraph (c),

(ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and

(iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.

(2) The prosecution does not have to prove whether it is the first alternative in subsection (1)(d) or the second (sub-paragraphs (i) to (iii)) that applies.

(3) If D was not the mother or father of V–

(a) D may not be charged with an offence under this section if he was under the age of 16 at the time of the act that caused V's death;

(b) for the purposes of subsection (1)(d)(ii) D could not have been expected to take any such step as is referred to there before attaining that age.

(4) For the purposes of this section –

(a) a person is to be regarded as a "member" of a particular household, even if he does not live in that household, if he visits it so often and for such periods of time that it is reasonable to regard him as a member of it;

(b) where V lived in different households at different times, "the same household as V" refers to the household in which V was living at the time of the act that caused V's death.

(5) For the purposes of this section an "unlawful" act is one that –

(a) constitutes an offence, or

(b) would constitute an offence but for being the act of –

(i) a person under the age of ten, or

(ii) a person entitled to rely on a defence of insanity.

Paragraph (b) does not apply to an act of D.

(6) In this section –

"act" includes a course of conduct and also includes omission;

"child" means a person under the age of 16;

"serious" harm means harm that amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861;

"vulnerable adult" means a person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise.

(7) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine, or to both.

Between 2005 and 2008, 17 individuals were convicted of this offence.[40]

The Domestic Violence, Crime and Victims (Amendment) Act 2012 modified the above offence. It holds that section 5's provisions also apply when the victim 'suffers serious physical harm'.[41] The punishment is a maximum of 10 years' imprisonment, or a fine, or both.

This thesis focuses solely on the familial homicide offence, therefore only brief discussion of this new offence will take place. During the 2004 Parliamentary debates preceding the familial homicide offence, it was argued that the offence

[40] Domestic Violence, Crime and Victims (Amendment) Bill HC Deb, 21st October 2011, col 1180 at col 1181.

[41] The full provision is set out in Appendix Two.

should be extended to cover cases where victims suffer serious harm as well as death.[42] The Law Commission had also proposed such an extension.[43] It was argued that limiting the offence to cases where the victim dies would be unsatisfactory because the offence would then only be available in instances where it is too late to save the victim.[44] Imposing liability at an earlier stage would protect vulnerable victims. Originally, the Government had several arguments for limiting the scope of the offence to cases in which the victim died.[45] First, there were other ways in which the law could cover cases of physical injury, such as grievous bodily harm or child cruelty.[46] Second, there are key differences between cases where the victim dies and those in which he survives, such as the fact that in cases of survival, the victim may be able to give evidence. Third, it is more difficult to define serious harm. Fourth, confining the offence to cases in which the victim died reflected the special status of death in law.

All but the fourth of these points can be dismissed as arguments for limiting the offence to cases of death. First, the existing methods of covering such cases were insufficient as discussed above. They did not fairly reflect the magnitude of the harm suffered. Second, the statute was designed with children and vulnerable adults in mind. Such individuals may be unlikely, or physically unable, to give evidence if they survive an attack. Third, the fact that it may be more difficult to define serious harm, which is questionable anyway, does not automatically prevent the creation of such an offence or mean that this task is not important and necessary.

The fourth argument, however, has validity. To group a homicide offence with an offence against the person in the same statute is undesirable because it subjects two defendants who were charged with very different offences to the same stigma and sanctions as a result of labelling their conduct equally. Their conduct is not equal, so

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[42] See, for example, Domestic Violence, Crime and Victims Bill HC Deb 22nd June 2004, col 56, at cols 56-7 per Mr Heath.
[43] See paragraph 2(1)(c) of their Draft Bill.
[44] See, for example, Hayes, above at p. 316.
[45] See, for example, Domestic Violence, Crime and Victims Bill HC Deb 22nd June 2004, cols 61-2 per Mr Goggins.
[46] Contrary to sections 18 and 20 of the Offences Against the Person Act and section 1 of the Children and Young Persons Act 1933 respectively.

should not be labelled as such. Further arguments on the importance of fair labelling are given in the accessorial liability chapter.

However, there was definitely a need for an offence of causing or allowing the serious injury of a victim. This is because a homicide offence comes into effect too late to protect the victim. If a middle-tier offence exists this may deter future cases and help to ensure that action is taken in respect of unacceptable conduct and culpable defendants much earlier. As stated by Sir Paul Beresford who introduced the Bill:

> The Bill will assist the prosecution of people who hurt children or vulnerable adults and those who stand by and allow such acts. It means that when a child is seriously physically harmed, or when the actual cause of death is not specifically identified, those who carried out the abuse or stood by can be prosecuted.[47]

The new lesser offence does reflect the fact that there is a gap in the law that needs to be addressed. Yet the proposals amalgamate what should be two separate offences into one all-encompassing statute. This is a mistake. The two offences should be kept separate. This would ensure that the law respects the fact that homicide is a distinct harm, much like the fact that rape has purposely been kept separate from other sexual offences within the Sexual Offences Act 2003.

A non-fatal offence has been set out in the Draft Bill to this thesis.[48] The defendant is liable if he causes or allows the serious injury of the victim. Consequently, although the substantive chapters focus on the homicide offence, the arguments proposed in the chapters are applicable to the proposed offence or causing or allowing serious harm to the victim. One obvious instance of direct applicability is the new duty of personal association proposed in the omissions liability chapter. The duty argued in the omissions liability chapter as a more satisfactory replacement for the current form of omissions liability in the familial homicide offence would also apply to the offence of causing or allowing serious harm; if the defendant breaches his duty of personal association in such a case he will be liable for this offence. Another obvious

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[47] Domestic Violence, Crime and Victims (Amendment) Bill HC Deb, 21st October 2011, col 1180 at col. 1180.

[48] This is set out below, and also in Appendix Five.

instance of direct applicability is the *mens rea* test. The same *mens rea* test adopted for familial homicide should apply in the lesser offence of causing or allowing serious harm.

Section 5 was also accompanied by evidential and procedural changes to the law which are encapsulated within section 6 of the DVCVA. Under this, the jury is permitted to draw adverse inferences from the defendant's failure to give evidence at trial, as well as to the question of whether he is guilty for murder or manslaughter even if there would otherwise be no case to answer in relation to that offence. It also postpones the stage at which a submission of no case to answer can be made in cases where the precise role of each party is unknown.[49] Academic concerns have been expressed over whether section 6 would withstand a challenge based on the right to a fair trial enshrined in Article 6 of the European Convention on Human Rights.[50]

As neither the lesser offence of causing or allowing serious injury nor the evidential and procedural provisions within section 6 are the focus of this thesis, they will not be discussed further.

Of the many notable changes that the familial homicide offence made to the law, a few can be highlighted here. In contrast to the previous law under which the prosecution had to prove which of the defendants killed the victim or that they were both acting in concert, section 5(2) provides that the prosecution does not have to prove what the role of the defendant was.

The offence also creates a new form of omissions liability. This will be considered in greater detail in Chapter Three. Traditionally, omissions liability is imposed on A for the harm that his failure to act has directly caused B. A fails to act which directly causes harm to B. The example of *Gibbins & Proctor* helps to explain this point.[51] This case involved direct omissions on the part of both defendants as it was their direct failure to feed the victim which caused her to die of starvation. Similarly, in

[49] *R v Ikram & Parveen* [2008] 2 Cr App R 24 holds that this provision does not prohibit but merely postpones the stage at which a submission of no case to answer can be made. This was followed in *R v Reid* [2012] EWCA Crim 1478.
[50] Dennis, I., "Editorial: The Domestic Violence, Crime and Victims Act 2004" [2005] *Criminal Law Review* 83 at p. 84.
[51] *R v Gibbins & Proctor* (1919) 13 Cr App R 134.

Miller it was the defendant's direct failure to put out his smouldering mattress that caused the fire damage to the building in which he was squatting, which again indicates the traditional approach towards omissions liability.[52]

However under familial homicide omissions liability is imposed on A in respect of the harm suffered by C at the hands of B for A's failure to act in respect of the risk B posed to C. The dynamic has shifted. The focus is no longer whether A may be liable as an accessory to the offence committed by B: now A incurs liability as a principal for his culpable failure to protect C from the risk B posed. This shift means that the familial homicide offence addresses the lacuna which *Lane* left in the law. Since in a case like *Lane* it is quite clear that both defendants failed to take steps to protect the victim, they may now be held liable for a homicide offence even though it cannot be proven that they were at least acting together to cause the victim's death.

The remainder of this section will explain the precise requirements which must be satisfied in order to secure a familial homicide conviction under section 5 as it presently stands. It will then indicate the ways in which the offence differs to the proposals of the Law Commission. Finally, it will consider academic commentary on the new offence.

a. Conditions for liability

There are a number of different conditions which need to be satisfied. These are as follows:

i. The victim was a vulnerable adult
ii. The defendant was a member of the same household as the victim
iii. The defendant had frequent contact with the victim
iv. The victim was at significant risk of serious physical harm
v. The defendant failed to take reasonable steps to protect the victim from that risk
vi. The defendant was aware or ought to have been aware of the above risk

[52] *R v Miller* [1983] 2 AC 161.

vii. The death occurred in circumstances of the kind that the defendant foresaw or ought to have foreseen

Another important aspect is that:

viii. The defendant may be sentenced to 14 years' imprisonment on conviction.

Of these requirements, section 5(5) holds that 'unlawful act' is one which constitutes an offence And section 5(6) defines 'serious harm' as that which would amount to grievous bodily harm as laid down by the Offences Against the Person Act 1861. They are not contentious and so will not be discussed further.

i. 'Vulnerable adult'

A child or a vulnerable adult may be the victim of this offence according to section 5(1)(a). A child is a person who is aged under 16, which does not give rise to legal issues here. The meaning of 'vulnerable adult', however, is less clear. Section 5(6) expands the meaning of this, stating that a vulnerable adult is:

> [A] person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise.

There are various ways in which a person may be characterised as 'vulnerable' for the purposes of this section and if they do not fall within any of these categories they could still fall within the definition if they fit into the broader, residual category of 'otherwise'. This point was made during the Parliamentary debates in which Baroness Scotland stated the category of 'or otherwise' is necessary because:

> [D]efinitions change rapidly. There may be a new species which could include 'or otherwise' about which we do not know.[53]

[53] Domestic Violence, Crime and Victims Bill HL Deb, 21st January 2004, col GC327 at col. GC334.

A similar point was made by the Earl of Rosslyn who indicated that 'vulnerability can be multi-faceted and is not just caused through mental incapacity.'[54] Furthermore, it was stated that 'vulnerability' is a matter of commonsense for the courts, leaving them interpretational discretion.[55]

So, this is a broad term. This is advantageous because there are a wide number of individuals who may be considered vulnerable for a variety of different reasons, thereby the statute increases the likelihood for justice to be secured for such persons. It would therefore be difficult, arbitrary and artificial to attempt a narrower definition. This thesis leaves the 'vulnerable adult' aspect of the legislation unchanged for these very reasons.

The courts have adopted a generous interpretation of this term. In *Su Hua Liu* the victim suffered from depression, was of low intelligence, and was effectively kept as a slave by her husband.[56] The court held that she satisfied the requirement of 'vulnerable adult', stating that:

> [T]he facts of this case are especially distinctive and we hope no other case will come near them: a vulnerable woman, kept as a slave by her husband for payment of what he sees as a debt, ill-treated, assaulted and abused until death by her husband's mistress while he stands idly by despite warnings and advice.[57]

Providing more guidance on the precise meaning of 'vulnerable adult' is *Khan*.[58] The Court of Appeal highlighted the term's broad nature and indicated that an expansive approach is necessary in order to secure justice for a wide range of individuals as envisaged by the legislation. The court stated that a young and healthy adult may

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[54] Domestic Violence, Crime and Victims Bill HL Deb, 15th December 2003, col 949 at col. 999.
[55] Domestic Violence, Crime and Victims Bill HL Deb, 21st January 2004, col GC327 at col. 334 per Baroness Scotland.
[56] *R v Su Hua Li & Lun Xi Tan* [2007] 2 Cr App R (S) 12.
[57] *Ibid.*, at [21].
[58] *R v Khan* [2009] 1 Cr App R 28. For further discussion of how the court interpreted key terms of the legislation, see Morrison, S., "Allowing the Death of a Vulnerable Adult" (2009) 125 *Law Quarterly Review* 570; Leigh, L.H., "Protecting Vulnerable Adults from Serious Harm" (2009) 173 *Criminal Law and Justice Weekly* 107; Ormerod, D., "Domestic violence: Domestic Violence, Crime and Victims Act 2004 s. 5(1) – Allowing Death of Vulnerable Adult" [2009] *Criminal Law Review* 349; Reed, A., "Court of Appeal: Spousal Homicide and Foresight of Harm" (2010) 74 *Journal of Criminal Law* 196.

nevertheless be vulnerable.[59] Here the victim was vulnerable because she was young, lonely and isolated in a foreign country. Furthermore, it indicated that the vulnerability of the victim need only be temporary for the statute to apply and that:

> A fit adult may become vulnerable as a result of accident, or injury, or illness. The anticipation of a full recovery may not diminish the individual's temporary vulnerability.[60]

Through this broad interpretation the court accorded with Parliamentary intent. This wide interpretation is to be commended for adopting a broad approach to whether victims fall within the statute, thereby increasing the likelihood of achieving justice.

Watt also concerned a vulnerable adult, although the focus of this case was the sentences handed down.[61] The victim was a vulnerable adult because he had been homeless for part of his life, was estranged from his family, and was kept as a slave in the household.[62] He also had signs of mental health problems.[63]

The next requirement for liability is that the defendant must have been a member of the victim's household.

ii. 'Household'

Section 5(1)(a)(i) states that the defendant must have been a member of the victim's household. Section 5(4)(a) holds that a person may fall within this definition even if he does not live in the household if:

> [H]e visits it so often and for such periods of time that it is reasonable to regard him as a member of it.

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[59] *Khan*, *ibid.*, at [26].
[60] *Ibid.*, at [27].
[61] *R v Watt* [2012] 1 Cr App R (S) 31.
[62] *Ibid.*, at [8], [9].
[63] BBC News Online, "Michael Gilbert: Missed Opportunities in 'Slave' Case", 7th July 2011. <http://www.bbc.co.uk/news/uk-england-beds-bucks-herts-14064016> accessed 21st May 2012.

Section 5(4)(b) holds that the relevant household is that of the victim. The rationale for broadening this term to include defendants who do not actually live in the household was explicated by Baroness Scotland:

> [T]here are many households in which the parties do not live together every day; they may live next door to one another or around the corner from one another, but they visit very regularly. [...] Quite often the perpetrator may be a frequent visitor but not a permanent resident. [...] In considering the mischief that we want to cure, we decided that the Law Commission's definition was too narrow in that it might exclude many of the cases that currently fall through the net and which we wish to catch.[64]

This makes sense as it accords with the reality of contemporary society. However an issue arises over artificiality since the term used is 'household' but it covers those who do not live there. This adds to the complexity and confusion of this novel offence, and is discussed in greater detail in subsequent chapters.[65]

This definition of household represents a broader form of omissions liability than the traditional, autonomy-based, approach. Yet it does not go far enough. Baroness Scotland explained that the rationale of limiting familial homicide liability to members of the victim's household was because those outside the household may have difficult relationships with those inside it, and to impose a duty on such individuals 'may only increase the pressure in an already difficult situation'.[66] This consideration is insufficient to impose such an artificial restriction on the boundaries of familial homicide. Baroness Scotland's reasoning places insufficient weight on the severe consequences which may occur in such cases and impedes the legislation's aims of securing justice for the victim and convicting culpable defendants.

During the Parliamentary debates it was indicated that it is for the court to determine whether a person is a member of the household.[67] In *Khan* the court held that

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[64] Domestic Violence, Crime and Victims Bill HL Deb, 21st January 2004, col GC327 at col. GC346.
[65] See Chapter Three for example.
[66] Domestic Violence, Crime and Victims Bill HL Deb, 21st January 2004, col GC327 at col. GC361.
[67] Domestic Violence, Crime and Victims Bill HC Deb 22nd June 2004, col 56 at col. 68 per Mr Goggins.

whether a defendant is a member of the victim's household is a question of fact.[68] The court additionally stated that:

> [T]his legislation does not apply to visitors to the household who have caring responsibilities for the eventual victim, and have frequent contact with him or her, but who are not, and cannot begin to be described as members of the same household.[69]

Aside from also stating that 'household' is defined in section 5(6), the court gave little guidance as to the meaning of this term.[70] Such lack of clarity is particularly significant in cases where the defendant does not actually live with the victim because the precise moment at which the threshold will be crossed is unclear, meaning that the precise pool of potential defendants cannot be conclusively ascertained.[71] To leave the exact parameters of such a serious offence uncertain is far from satisfactory.[72]

iii. 'Frequent contact'

The next requirement of familial homicide liability is that by virtue of section 5(1)(a)(ii) the defendant must have had frequent contact with the victim. Baroness Scotland outlined the rationale for this provision during the Parliamentary debates, indicating that: 'the phrase is intended to encapsulate the responsibility of the close members of the household without being too limiting.'[73]

Khan interpreted this term. The appellants argued that the trial judge should have directed the jury that they must have had frequent contact with the risk faced by the victim, rather than the victim herself. However, the court resisted this attempt to narrow the offence holding that the requirement related to the victim rather than the

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[68] *Khan*, above at [28].
[69] *Ibid.*
[70] *Ibid.*, at [30].
[71] *Ibid.*
[72] This argument is made by Morrison, above at p. 571.
[73] Domestic Violence, Crime and Victims Bill HL Deb, 21st January 2004, col GC327 at col. GC 348. Furthermore, she stated that: All the household members who have frequent contact with the V may be guilty of an offence. Either they caused the death or they failed to take reasonable steps to protect the child, having been aware of the risk and done nothing.

risk.[74] This is sensible and accords with the wording of the legislation, which identifies foresight of the risk as part of the *mens rea*, not *actus reus*, of the offence. So what needs to be shown for this requirement is that the defendant had frequent contact with the victim herself.

iv. 'Significant risk'

The next requirement for liability is that the victim was at 'significant risk' of serious physical harm by virtue of section 5(1)(c). No statutory guidance is provided, although a Home Office Circular states that:

> The risk is likely to be demonstrated by a history of violence towards the vulnerable person, or towards others in the household. For example, a person cannot be guilty [...] if the victim died from a blow when there was no previous history of abuse, nor any reason to suspect a risk. Where there is no reason to suspect the victim is at risk, other members of the household cannot reasonably be expected to have taken steps to prevent the abuse and eventual death.[75]

Judicial guidance was initially provided by *Mujuru*.[76] The trial judge directed the jury that this term meant 'more than minimal', which is essentially the *de minimis* rule. However, the Court of Appeal disagreed with this approach through application of *Brutus v Cozens*,[77] stating that:

> [T]here is nothing in the Domestic Violence, Crime and Victims Act 2004 to suggest that the word "significant" as used in s.5(1) was intended to bear anything other than its ordinary meaning. It is an ordinary English word in common use [...] There may be room for disagreement in any given case about whether risk of serious physical harm to the deceased was or was not significant and, if it was, whether the defendant was or ought to have been aware of the fact, but the decision remains one of fact for the jury applying their collective understanding of the word "significant".[78]

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[74] *Khan*, above at [30].
[75] Home Office Circular, *The Domestic Violence, Crime and Victims Act 2004* (London: Home Office; 2005) <http://www.homeoffice.gov.uk/about-us/corporate-publications-strategy/home-office-circulars/circulars-2005/024-2005/> accessed 21st May 2012 at [27].
[76] *R v Stephens & Mujuru* [2007] 2 Cr App R 26.
[77] [1981] AC 394.
[78] *Stephens & Mujuru,* above at p. 340. For comment on this decision see Ramage, S., "The Meaning of "Significant" Risk" (2008) 179 *Criminal Lawyer* 5.

The court held that further definition of 'significant' is undesirable and unnecessary. This was in order to ensure maximum protection for those vulnerable individuals who were at risk of harm,[79] and accordingly a definition of 'significant' was undesirable because it would inevitably restrict the scope of the offence.[80] This was followed in *Ikram*[81] and *Khan*, and such an approach keeps the law simple. Moreover, it makes sense as such a provision is quite clearly a question of fact.

v. 'Reasonable steps'

As explicated in Chapter Six of this thesis, the 'reasonable steps' test forms part of both the *actus reus* and *mens rea* of the offence. Section 5(1)(d) lays down that the defendant must have:

> [F]ailed to take such steps as he could reasonably have been expected to take to protect V from the risk.

In explaining the rationale of this provision, Baroness Scotland stated that:

> When the courts consider what reasonable steps a person might have taken, it is important that they look at all the circumstances of the individual, and what might be considered reasonable.[82]

Khan held that 'this pre-condition requires close analysis of the defendant's personal position.'[83] A direct comparison of this assertion with the previous Parliamentary statement indicates that the court has followed Parliamentary intent. Another positive aspect of this judicial approach is that it is tailored towards the individual defendant. It focuses on the defendant himself in order to determine whether he failed to take reasonable steps to protect the victim, thus ensuring that such defendants are culpable.

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[79] *Ibid.*, at p. 338.
[80] See Ramage, above. Contrastingly, see Ormerod, D., "Case Comment – Causing or Allowing Death of a Child or Vulnerable Adult" [2008] *Criminal Law Review* 54 at p. 56 who states that '[t]he courts should guard against the jury's unwitting dilution of the few limitations that do exist in the offence,' and indicates that this is what the Court of Appeal did.
[81] Above.
[82] Domestic Violence, Crime and Victims Bill HL Deb, 21st January 2004, col GC327 at col. GC356.
[83] *Khan*, above at [33].

vi. 'Aware or ought to have been aware'

The next requirement for liability is contained within section 5(1)(d)(i). This holds that the defendant must have been aware, or ought to have been aware, of the significant risk of serious harm. The rationale for this dual approach was because:

> Whether someone did indeed foresee a danger is very difficult to prove. But that they 'ought to have foreseen' it, that they were in a position and had such information that a reasonable person would have foreseen the harm, that can be proved. To limit the offence to those who did not in fact foresee the harm, and can be proved to have foreseen the harm, would leave a very significant loophole.[84]

Although these arguments relate to the foresight aspect of the *mens rea* contained in s5(1)(d)(iii), they are equally applicable to the awareness requirement within s5(1)(d)(i). Clearly defendants who are categorically aware of the risk demonstrate the requisite culpability, but as highlighted by the above statement this may often be difficult to prove. A fallback approach which imposes liability if the defendant ought to have been aware of the risk ameliorates this concern. Moreover, such defendants are deserving of liability for the offence. These points are discussed within Chapter Four.

Mujuru held that whether the defendant was aware, or ought to have been aware, of the risk is a question of fact for the jury.[85] *Khan* indicates that this aspect of the legislation is widely drafted in order to catch a wide range of potential culpable defendants, but that this broad route to liability is limited by the reasonable steps test.[86]

vii. 'Circumstances of the kind'

Section 5(1)(d)(iii) outlines the *mens rea* requirement that the unlawful act 'occurred in circumstances of the kind that D foresaw or ought to have foreseen'. The above

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[84] Domestic Violence, Crime and Victims Bill HL Deb, 9th March 2004, col 1143 at col. 1158 per Baroness Scotland.
[85] Above, at p. 340.
[86] Above, at [32].

statement from Baroness Scotland indicates the rationale for this provision and the arguments made above are equally applicable here.

Khan stated that the circumstances in which death actually occurred did not have to be *identical* to what had occurred prior to the fatal attack.[87] So the fact that the violence inflicted in the fatal attack in *Khan* was more extreme than previous attacks did not affect the finding that this provision was satisfied. The place of attack is immaterial:

> The place where the fatal attack took place was irrelevant. Although ultimately a jury question, the circumstances would probably have been the same *kind*, if not identical, if the fatal attack had occurred while the couple were on holiday, away from their home.[88]

If the defendant was aware or ought to have been aware of the significant risk in question the place of attack is irrelevant.[89] This demonstrates a broad judicial approach towards this term, and this is to be welcomed because it increases the likelihood of catching culpable defendants within its ambit.

viii. Sentencing

Under section 5(7), the maximum sentence for the familial homicide offence is 14 years' imprisonment, or a fine, or both. There have been a few cases in which the courts have had to consider appeals against sentence. The first case to consider this issue was *Su Hua Liu*, the horrific facts of which were outlined above. The first defendant was sentenced to nine years' imprisonment for manslaughter and five years' imprisonment for inflicting grievous bodily harm with intent. The second defendant was sentenced to six years' imprisonment for familial homicide. In dismissing their appeals against sentence the court stated that:

> The facts of this case must turn the stomach of any humane person. We note that the maximum sentence for the new offence under section 5 of the 2004 Act is 14 years. [...] All these sentences are richly deserved. Neither applicant

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[87] *Ibid.*, at [39].
[88] *Ibid.*
[89] See Morrison, above at pp. 572-3.

> received a day too long. These applications lack any scintilla of merit and are refused.[90]

These strong terms indicate how seriously the court will take a conviction for familial homicide. This also occurred in *Ikram,* in which the defendants were both convicted of familial homicide and sentenced to nine years' imprisonment. In dismissing the appeals against sentence, the court provided some sentencing guidance, stating that:

> Even if the identity of the person responsible for the fatal injuries cannot be established, the possible range of culpability, both in relation to the circumstances in which death occurred and as between the different defendants, is very wide. [...] Culpability for the death may also encompass all the levels of manslaughter, both at the higher and towards the lower end of the scale. [...] At the same time the defendant who allows the fatal injury to be inflicted may on the evidence be very close to an accomplice to virtually but not quite the full extent of that violence.[91]

Again the court indicated that cases of familial homicide would be dealt with severely at sentencing stage. However, the sentence differs to the maximum of life imprisonment available for convictions of murder or manslaughter. Given that the possible range of culpability for familial homicide encompasses all the levels of manslaughter, this disparity is inappropriate. Accordingly the Draft Bill to this thesis proposes a maximum sentence of life imprisonment.

This section has provided further explanation as to the meaning of the particular terms and aspects within the legislation. The next section indicates the differences between the statute which has actually been enacted and the proposals advanced by the Law Commission.

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[90] Above at [23].
[91] Above at p. 1434.

b. Differences in approach

There are a number of differences between the approach of the Law Commission and that of Parliament.[92] This section will highlight the most significant of these. First, section 5(1)(a) provides that a child must die as a result of the unlawful act, which contrasts to section 2(1)(c) of the Law Commission's Draft Bill which holds that the defendant may be liable if the victim suffers grievous bodily harm, for example. This is both a strength and a weakness. It is a strength because it clearly demarcates the distinct harm of homicide within one statutory provision, and this is beneficial for labelling and clarity reasons as discussed previously. However, the provision comes into effect at too late a stage to protect vulnerable victims from death. Although this issue has been ameliorated to a certain extent by the recently created lesser offence, this is problematic for labelling reasons. A more beneficial approach is to adopt the approach of the Draft Bill to this thesis, which maintains the distinct harm of homicide with a separate offence covering serious harm.

Second, familial homicide limits the range of potential defendants to those who were members of the victim's household. This is again a narrower construct than that of the Law Commission, who proposed that the defendant may be liable if he had responsibility for the victim. The rationale for this change was that Parliament felt the second of the Law Commission's offences was too widely drawn, and that 'household' provided 'a tighter, more justifiable group to bring within the new responsibility'.[93] This analysis is flawed, as 'household' is an inappropriate concept on which to base familial homicide liability.[94]

Third, the familial homicide offence does not abolish or modify the existing child cruelty offence contrary to section 1 of the CYPA. This is problematic not only for the reason stated above, but it also has wider issues regarding the law of child neglect. Indeed, the charity Action for Children has recently launched a campaign to

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[92]For extensive discussion of the differences between the approaches, see House of Commons, *The Domestic Violence, Crime and Victims Bill: Domestic Violence Provisions* (HC Paper 04/44, 9th June 2004) <http://www.parliament.uk/briefing-papers/RP04-43> accessed 21st May 2012 at p. 54 onwards.

[93] Domestic Violence, Crime and Victims Bill HL Deb, 21st January 2004, col GC327 at col. GC333 per Baroness Scotland.

[94] See Chapter Three.

reform this offence, arguing that it is insufficient for modern society by virtue of the fact that it is outdated and does not catch all types of neglect.[95]

Fourth, section 5 applies to vulnerable adults as well as children. This contrasts to the proposals of the Law Commission which solely focused on children. This extension is beneficial because it catches a wider number of vulnerable victims within its ambit. Defendants may be culpable for their failure to take action in respect of a vulnerable adult as well as in respect of a child, and their culpability is not lessened in respect to vulnerable adults, thus this approach is justified.

Fifth, the sentence has been increased by section 5. This is beneficial because 14 years' imprisonment better aligns with the harm that has been done to the victim, and thereby better reflects both the severity of the harm and the culpability of the offender. However, it fails to align with the current law of homicide offences such as murder and manslaughter which have a maximum penalty of life imprisonment. Accordingly this thesis increases the sentence to life imprisonment to more accurately reflect the harm that has been caused to the victim.

The offence has changed substantially from the proposals originally advanced by the Law Commission. The next section will outline academic concerns over the offence, indicating why further reform is needed.

c. Academic commentary

The familial homicide offence is problematic for a number of reasons. This section discusses the most significant of these.

i. *Mens rea*

There is uncertainty over whether the *mens rea* for the offence is recklessness or negligence. The *mens rea* is laid down in section 5(1)(d) and comprises three limbs, namely that the defendant was aware, or ought to have been aware of the risk in

[95] Action for Children, *Keeping Children Safe: The Case for Reforming the Law on Child Neglect* (Watford: Action for Children; 2012).

question, that he failed to take reasonable steps to protect the victim from that risk, and that the act occurred in circumstances of the kind that the defendant foresaw or ought to have foreseen.

In addition to academic uncertainty over whether the *mens rea* is recklessness or negligence, the statutory approach has been criticised is because it is arguably too easily satisfied, and academics feel that this is inappropriate for such a serious offence. Hayes questions 'whether liability for a serious offence should rest on negligence.'[96] Hoyano and Keeenen criticise what they perceive to be a purely objective *mens rea* test, stating that in such cases certain defendants are 'unable to perceive a risk to a child, even when they ought to have done.'[97]

Chapter Four settles the debate over whether the *mens rea* is actually recklessness or negligence and considers the academic concerns over the statutory test. It ultimately mounts a defence against this wave of academic opinion, arguing that in fact the statutory approach towards *mens rea* is indeed the most appropriate.

ii. Low threshold for liability

The familial homicide offence has also been criticised for establishing too low a threshold for liability. In particular, critics point to the fact that the offence can apply to someone who does not live with the victim, and to an adult who may nevertheless be young and healthy. This has been argued to be problematic because in contrast to the traditional approach towards omissions liability, this offence not only broadens the scope of this form of liability but it does so to an as yet untravelled extent.[98] It is understandable that concerns did exist as the offence was a novel development to the law, but this thesis highlights why extending omissions liability in such a fashion is in fact justifiable and that, moreover, liability needs to be extended further in order to catch all culpable defendants within its ambit and thereby achieve justice for the victims which they have wronged.[99]

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[96] Hayes, above at p. 322.
[97] Hoyano, L., & Keenen, C., *'Child Abuse'* (Oxford: Oxford University Press; 2007) at p. 165.
[98] See, for example, Hayes, above.
[99] Chapters Two, Three and Four discuss these aspects in greater detail.

iii. Domestic violence

Academic commentators have expressed concerns that the offence would have adverse implications for defendants who have themselves been victims of domestic violence. Herring, for example, argues that the offence fails to recognise a mental condition defence and thus the severe psychological impact that domestic violence can have on victims.[100] Furthermore, he opines that the use of the offence in such situations:

> [A]ssumes escape routes from the violence which are either not there or are not reasonable to expect the woman to take.[101]

The section 5 offence does not contain a domestic violence defence. This is considered by certain academics to be unsatisfactory because it fails to recognise the reality of the situations faced by victims of violence. It judges them against the standard of the reasonable person, and this is unfair because it arguably does not take into account the full impact of domestic abuse on victims. Refuge argues that the offence is unfair because 'the silence of women in these circumstances does not generally signify collusion with the perpetrator, it generally signifies fear.'[102]

However, the current form of liability within section 5 does provide important safeguards for victims of violence. The literature surrounding domestic violence and its particular application to the familial homicide offence is discussed in greater detail in Chapter Six, in which it is argued that the current statutory approach is the most appropriate one to take.

iv. Ambiguity

Yet another problematic aspect of the offence is that it contains an unacceptable level of ambiguity and lack of clarity. Hayes argues that 'household' is indefensibly

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[100] Herring, J., "Mum's Not the Word: an Analysis of Section 5" in Clarkson, C.M.V., & Cunningham, S., *'Criminal Liability for Non-Aggressive Death'* (Hampshire: Ashgate; 2008) pp. 125-153 at pp. 141-3.
[101] *Ibid.*, at pp. 152-3.
[102] Refuge., *Refuge Response to the Domestic Violence Crimes and Victims Bill* (London: Refuge; 2004) at p. 3.

vague, resulting in the precise ambit of section 5 being unclear.[103] She indicates that whether a person falls within the legislation is 'fortuitous' and could make prosecutions difficult.[104] Similar arguments have been made by Ormerod who describes the Act's failure to define 'household' as 'lamentable'.[105] Although some clarification has been made by the case law, concerns do remain particularly regarding the scope of omissions liability, and this thesis responds to these issues by clarifying the law.

v. Offence used for a broader purpose than for which it was designed

A final issue with the offence is that it was originally designed to respond to an evidential problem as demonstrated by *Lane*. However, the offence has been used in a broader manner than was originally envisaged. As highlighted by cases such as *Lewis*,[106] *Kenny*,[107] and *Hunt*,[108] it has been applied in cases where the role of each party *is* clear. In each of the aforementioned cases the male defendant was convicted of murder while the female defendant was convicted of familial homicide. This is not necessarily a weakness however, since the female defendant in each of these cases was sufficiently culpable to deserve homicide liability. But there is a broader issue. Where the role of each party is clear there are several reasons, including labelling and practical concerns, for maintaining a sharp distinction between the killer and the culpable bystander. This is discussed in the accessorial liability chapter.

The next section will outline the chapter structure of this thesis, highlighting the key contribution that each chapter makes and how it responds to issues within the familial homicide offence.

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[103] Hayes, above at p. 317.
[104] *Ibid.*, at pp. 318-19.
[105] Ormerod, D., *Smith & Hogan: Criminal Law* (Oxford: Oxford University Press; 12th edition; 2008) at p. 564.
[106] BBC News Online, "Judge Sums Up in Baby Murder Case", 31st October 2006 <http://news.bbc.co.uk/1/hi/wales/south_west/6103806.stm> accessed 21st May 2012.
[107] BBC News Online, "Mother Jailed after Baby's Death", 15th December 2006 <http://news.bbc.co.uk/1/hi/wales/south_west/6181051.stm> accessed 21st May 2012.
[108] BBC News Online, "Baby Killer Given Life Sentence", 24th October 2008 <http://news.bbc.co.uk/1/hi/england/south_yorkshire/7688929.stm> accessed 21st May 2012; Sky News Online, "Dad Snapped Baby Daughter's Spine", 24th October 2008 <http://news.sky.com/home/uk-news/article/15127627> accessed 21st May 2012.

3. An overview of the research

Each chapter responds to strengths and weaknesses of the familial homicide offence and thus, when taken cumulatively, propose a new structure of liability for the familial homicide offence.

The next section outlines the proposed homicide ladder for this area of law in order to place the familial homicide offence in its most appropriate location.

a. The homicide ladder

The familial homicide offence was designed to respond to cases such as *Lane* in which the precise role of each party was unclear. This is the first situation in which the offence may apply. However, it has also been applied in a second situation, namely where the role of each party to the victim's death is clear. This has resulted in a much wider ambit for the offence than was originally envisaged. This is potentially problematic because it means the offence could be used even where murder or manslaughter should be charged instead. Accordingly, this thesis draws a distinction between direct causes, for example the actual killer, and indirect causes, for example the culpable omitter. This distinction not only helps differentiate between the offences with which each type of defendant should be charged, but also recognises the fact that omissions are causal, as will be argued in Chapter Two.

The current form of the offence has the potential to apply to the indirect cause of the victim's death in cases where the causal role of each party is known. Similarly, it applies in such cases where it is clear that the individual did not have had a significant causal role, applying the principle stated in *Giannetto*.[109] As detailed in the subsequent chapters, the role that the familial homicide offence plays in the proposals is much narrower, justifiably so, than the current structure. The structure which is proposed for such cases is as follows:

[109] *R v Giannetto* [1997] 1 Cr App R 1.

Current law			Proposal	
Causal role	**Offence(s) chargeable**		**Causal role**	**Offence(s) chargeable**
Cause	Murder Manslaughter Accessory to murder Accessory to manslaughter Familial homicide		Direct	Murder Manslaughter
			Indirect	Accessory to murder Accessory to manslaughter Familial homicide The appropriate offence here will depend on the defendant's *mens rea.*
No significant causal role	Accessory to murder Accessory to manslaughter Familial homicide		No significant causal role	Accessory to murder Accessory to manslaughter

The offence of familial homicide is a lesser offence than murder or manslaughter, and being an accessory to murder or manslaughter.

The next section states the Draft Bill, which replaces the current section 5 offence.

b. Draft Bill

The first offence detailed below applies where the victim dies, whereas the second offence applies where the victim suffers serious harm.

1. A defendant (D) is guilty of the offence if:

a. A child or vulnerable adult (V) dies as a result of the unlawful act of K

b. At the time of K's unlawful act D had:

i. a personal association with V; and

ii. regular contact with V

c. D was, or ought to have been aware of, a significant risk of serious harm being caused to V by an unlawful act of K

d. D's failure to take steps to protect V from the risk of harm in paragraph c was unreasonable

e. the act occurred in circumstances of the kind that D foresaw or ought to have foreseen

f. D is not guilty of this offence unless:

i. he made a significant contribution to V's death; but

ii. he did not contribute to V's death directly, or may not have done so

g. A person guilty of an offence under this section is liable on conviction on indictment to a maximum of life imprisonment

2. For the purposes of this section

a. V is a child or vulnerable adult

i. 'Child' means a person under the age of 18

ii. 'Vulnerable adult' means a person aged 18 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise

b. An 'unlawful act' is one which

i. Constitutes an offence or

ii. Would constitute an offence but for being the act of a person under the age of ten or a person entitled to rely on a mental condition defence or is unfit to plead

iii. This definition covers both acts and omissions

c. 'Personal' means that

i. D and V had a link or connection with each other including, but not limited to, an association for a common purpose

ii. A personal association includes familial, social, and employee relationships. It also includes persons who care for V in any capacity.

d. An 'association' means that

i. There must be a pre-existing relationship between D and V; and

ii. There is a level of familiarity between D and V

e. 'Harm' includes

i. Physical harm

ii. Mental harm

iii. Emotional harm

3. A defendant (D) is liable for an offence if:

a. instead of 'dies' in clause 1(a), V 'suffers serious harm as a result of the unlawful act of K'

b. instead of 'significant risk of serious harm' within clause 1(c), there was a 'significant risk of harm'.

c. A person guilty of an offence under this section is liable on conviction on indictment to a maximum of life imprisonment.

A brief note regarding sentencing can be made here. The maximum sentence regarding imprisonment for the homicide offence has been increased from 14 years as stated in section 5(7) of the existing legislation to a maximum of life. This is to align with the existing homicide framework surrounding offences such as murder or manslaughter, which also have a maximum sentence of life. Regarding the lower level offence, the tariff has also been set at a maximum of life imprisonment in order to align the law with the existing law regarding non-fatal offences as laid down by the Offences Against the Person Act 1861.

c. Deterrence

There is a potential counterargument to the familial homicide offence, both in its original and its revised form, which needs to be responded to before further discussion of the thesis occurs. This argument holds that such offences may actually deter individuals from associating themselves with vulnerable individuals for fear that they may then be open to criminal penalties. An example helps to explain this point:

> V, an 85 year old woman with dementia, is in a nursing home. Her only visitor is a friend, O, who comes once a month. She tells O that a nurse in the home, K, keeps stealing money from her and is scared he might hurt her. As V had made similar claims in the past regarding a previous nursing home, O dismisses these comments as ramblings. V later dies from an assault by K.

The counterargument detailed above holds that the existence of the familial homicide offence, and therefore the fact that O may be open to prosecution for this offence because she is the sole visitor to an elderly lady, may deter such individuals from visiting lonely and vulnerable people in case they are prosecuted for such an offence. This is obviously a serious concern. However it can be responded to on three key grounds. These will now be considered in turn.

i. Stringent conditions for liability

The first reason for why this counterargument against familial homicide-type statutes can be dismissed is because both the familial homicide offence and the revised form of the offence detailed above safeguard against such individuals being wrongly held liable. Take the above example. O would not incur liability under either the familial homicide offence or its revised form as proposed by this thesis because she was not aware, nor ought to have been aware, of the risk of harm. This is because on the facts she had no idea that the comments from V would result in her death. She therefore had no reason to be aware, or ought to have been aware, of the significant risk of serious harm that V faced.

Furthermore, she would not be held to have breached the duty of care she owed V because her failure to act in respect of the above would not be held to have been unreasonable. This is because she had not witnessed any kind of abuse by the nurse in question, and thus she did not fall short of the statutory standard expected of her.

Even if it is opined that there are other situations in which such individuals may incur homicide liability, for example if the above facts are modified so that O was aware or ought to have been aware of the risk of serious harm, and therefore could be liable for the offence, there are other reasons for why this counterargument to familial homicide-type statutes can be disregarded.

ii. Deterrence theory

The second reason for why this counter-argument can be dismissed is based on the literature surrounding deterrence theory, which can be used by analogy. Deterrence theory in its usual application holds that the existence of certain crimes does not work to deter the culprit himself nor society generally from committing the crime in

question. In order for deterrence theory to work, the offences must be enforced with regularity and must reinforce social conventions which already exist.[110]

The majority of commentary on deterrence theory opines that it is not fully effective. Ashworth, for example, states that:

> The evidence on what is called 'marginal deterrence' is generally equivocal, and it cannot be assumed that creating a new crime or increasing the maximum punishment will lead – in a kind of hydraulic relationship – to a reduction in the incidence of that conduct.[111]

There is a large body of literature regarding deterrence theory.[112] The academic consensus is that deterrence is not a strong rationale for creating and punishing crimes because it does not actually have this effect.[113] So, even if in theory statutes may deter individuals from engaging in particular conduct, in practice deterrence does not occur.

The above views on deterrence theory can be applied to familial homicide in two ways. First, the conditions required for deterrence to work to deter offenders from criminal conduct would not be likely to apply to familial homicide in the manner detailed above. This is because in order to work effectively the offences must be enforced with regularity and accord with social conventions. Punishing individuals from visiting vulnerable members of society will not align with this and is at cross-purposes with the nature of the familial homicide offence which is to punish those who have a close relationship with the victim and who are aware of a significant risk of serious harm to those victims.

Second, deterrence as a function of criminal law is not generally regarded as effective in practice as applied to offenders, as detailed above, and therefore by analogy it can be argued that it will not be effective to deter individuals from visiting

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[110] Ashworth, A., *Principles of Criminal Law* (Oxford: Oxford University Press; 2009; 6th edition) at p. 16

[111] *Ibid.*, at p. 17.

[112] See von Hirsch, A., & Ashworth, A., (eds) *Principled Sentencing* (Oxford: Hart Publishing; 1998) and von Hirsch, A., & Ashworth, A., *Proportionate Sentencing* (Oxford: Oxford University Press; 2005) for example.

[113] See, for example, Beylevfeld, D., Deterrence Research and Deterrence Policies in von Hirsch, A., & Ashworth, A., (eds) *Principled Sentencing* (Oxford: Hart Publishing; 1998) at pp. 66-79.

vulnerable persons. This is because even if in theory the existence of familial homicide or a similar offence may deter individuals from visiting vulnerable members of society through the presence of a criminal statute, in practice such statutes are not likely to have this effect. As discussed above, theoretical pronouncements and practical application are not intrinsically linked in the law surrounding deterrence.

For the above reasons, the existence of familial homicide or its revised formulation will not deter individuals from visiting vulnerable members of society in any event, and thus the theoretical problem raised above is not likely to apply.

iii. Current application of the law

Another argument which helps to explain why the above counterargument is not likely to materialise relates to the way in which the law currently operates. It may be objected that the revised form of familial homicide as explained above and detailed in greater detail throughout this thesis may deter individuals from visiting vulnerable members of society because it broadens the scope for the offence to apply.

However, this can be responded to on the grounds that the familial homicide offence has existed since 2004 without this deterrent effect. One case which can be used to support this assertion is *Lewis*.[114] Here, the child's aunt intervened in the case despite the existence of the familial homicide statute. The same occurred *in Su Hua Liu* in which the victim's co-worker made steps to intervene and still retained contact with the victim.[115] These examples demonstrate that the existence of the section 5 offence has not deterred individuals from visiting and becoming involved in the care of vulnerable members of society.

Furthermore, expanding certain aspects of the offence in order to strengthen it will not be likely to have a significant deterrent effect. This is because the changes are designed to have an incremental impact on the law and to strengthen it in an incremental fashion. As the existing statute has been demonstrated above to not have

[114] Above.
[115] Above.

this deterrent effect, reforming the statute whilst maintaining its essence, rationale and purpose will not greatly increase the likelihood of any deterrent effect. This follows on from the above point which holds that statutes do not have a great deterrent effect in any event.

For the three reasons given above, the counterargument to the existence of familial homicide both in its original and its revised form can be dismissed.

d. Chapter outline

This section gives a chapter outline for the remaining substantive chapters of the thesis.

i. Chapter two: familial homicide and the law governing criminal causation

There are three main issues with the doctrine of causation in this context. First, the current law does not respect the fact that omissions are, contrary to the majority of academic commentary, causal. Second, the binary nature of the current law is problematic because it is too rigid. Third, the current approach towards the doctrine of intervening acts, which focuses on voluntariness, gives rise to unsatisfactory, arbitrary results.

The causation chapter advances proposals for reform. First, it argues that the law of causation must recognise that omissions are causal. Second, it adopts a gradated structure for familial homicide which holds that the defendant may be a direct or an indirect cause of a result, or no cause at all. This contrasts to the current law, which holds that the defendant either causes or does not cause the result. Third, it proposes that the law should adopt an operative cause-based approach to the doctrine of intervening acts, rather than the current voluntariness-based approach, which will not lead to such arbitrary outcomes.

Taken together, these proposals aim to respond to the problems and unfair outcomes which result from the current unsatisfactory law of causation. The distinction

between the direct cause and the indirect cause can be seen in clause 1(f) of the Draft Bill.

There is a point relating to the terminology used within this thesis which can be noted here. In accordance with the proposals advanced in the causation chapter, the direct killer of the victim will be referred to as 'the direct cause' throughout this thesis. The indirectly causal defendant, usually the omitter, will generally be referred to as 'the indirect cause'.

ii. Chapter three: familial homicide and the law governing omissions liability

This chapter discusses omissions liability. Although the familial homicide offence broadens the scope of omissions liability, some issues remain.

The key problem is that the current form of omissions liability is too narrow and so fails to catch all those who should be held culpable. This is particularly concerning as one of the key conclusions of the causation chapter was that omissions are causative. This narrowness is due to the limitation of the duty to act to those who are members of the victim's household. This artificial construct unjustifiably places too tight a constraint on the reach of omissions liability. This is because the victim may be placed at significant risk by someone outside of the household, and a defendant may be culpable for failure to act in respect of this risk.

Consequently, this chapter develops a new duty to act which replaces the current duty within the familial homicide offence. It develops a duty of personal association. This is a more satisfactory way of approaching the law of familial homicide because, as discussed within the chapter, it is more likely to catch those who are culpable for the victim's death within its ambit. The proposals relating to omissions liability are laid down in numerous provisions within the Draft Bill. Of significant importance are clauses 1(a)(i), 1(a)(ii), 2(a), 2(c) and 2(d) which develop the relationship that the defendant must have with the victim and clauses 1(c) and 2(e) which indicate the harm which the victim must be at risk of before a duty to act in relation to the

victim's death may be imposed. Clauses 3 lays down similar provisions in relation to the lesser offence of causing or allowing serious harm to the victim.

iii. Chapter four: is the *mens rea* required for familial homicide appropriate?

This chapter discusses *mens rea.* There is extensive academic criticism of the *mens rea* used in section 5, and debate over whether it consists of negligence or recklessness. This chapter clarifies the law and responds to academic criticisms, arguing that the current form of *mens rea* within section 5 is the most appropriate for this context. It comes to this conclusion through analysing a number of different *mens rea* tests and concluding that none of these would be appropriate, whereas the form of *mens rea* adopted by the offence best achieves the aims for which familial homicide was developed. This is because it couples a subjective test for fault with a qualified objective test, thus achieving the responsibility-based benefits of a subjective approach with the evidential benefits of an objective approach. This helps to improve the likelihood of convicting all those who should be culpable for the offence, thus aligning with the original aims of the legislation as discussed above.

Consequently, the key proposal of the *mens rea* chapter is that the form of *mens rea* within section 5 is the most appropriate, and therefore it should be maintained within the revised structure of familial homicide liability advanced by this thesis. This is enshrined in clauses 1(c), 1(d) and 1(e) of the Draft Bill.

iv. Chapter five: familial homicide and the issues it raises for accessorial liability

Chapter Five considers accessorial liability. As noted above, there are two broad situations in which familial homicide may apply. The first is the *Lane*-type situation in which the role of the killer and the omitter cannot be demarcated. The second is where the role of each party is clear. This chapter discusses the issues that each of these situations raise for the law of accessorial liability.

In terms of the *Lane*-type situation, this chapter argues that it is appropriate to blur the distinction between the killer and the bystander for evidential reasons, thus convicting both parties of familial homicide. There are three key reasons for this; to ensure the conviction of culpable omitters, to achieve justice for victims, and for labelling reasons.

This chapter argues that *Lane* demonstrated two problems. The first was that the threshold for secondary party liability was set too high. This chapter argues that the familial homicide offence resolves this problem. By contrast, the second problem – the evidential issue of being unable to identify the actual killer – is irresolvable. However, it will be argued that the familial homicide offence does help to ameliorate this problem because it gives those defendants who did not actually kill the victim an incentive to say what actually happened. Under the previous law there was less incentive; if both defendants remained silent they increased the likelihood of being acquitted, as in *Lane* itself. The evidential provision in section 6(2), which permits the jury to draw adverse inferences from the silence of the defendants, further helps to ameliorate this issue because it provides an incentive for the defendants to tell the truth about what happened. This helps to increase the likelihood of securing justice and convicting culpable individuals in such cases.

In terms of the other situation in which the familial homicide offence may apply, namely where the offence can be charged even though the precise role of the killer and that of the omitter is obvious, this chapter argues that the distinction between the parties must be clearly maintained. There are two key reasons for this; the derivative principle and the principle of fair labelling. The current law does not fully respect this distinction between the killer and the bystander in situations where the role of each party is known. This is because it permits both parties to be convicted of familial homicide even where their precise role in death is clear.

Accordingly, the current law needs to be reformed in order to respect these reasons for maintaining a clear distinction between the direct cause and the indirect cause in such situations. This chapter proposes that the same basic structure of offences should exist as for the current law, but that there should be a clear demarcation between who can be liable for which offence. There are a number of offences within

the law that may apply here; murder, manslaughter, being an accessory to murder or manslaughter, and familial homicide. The proposals for reform outlined here make a clear division between which offence each individual involved may be liable for, according to their role in death. They are laid down within the above homicide ladder.

The proposals argue that where it is clear who is the direct cause, or causes, these individuals should be convicted of murder or manslaughter. This is a major change from the current law which allows the direct cause of the victim's death to be convicted of familial homicide even when the requirements for murder or manslaughter may be met, and their precise role in death is known.

Regarding the bystander, the proposals argue that these individuals may be liable as accessories to murder or manslaughter, or for familial homicide. The contrast between the offences which the killer and the bystander may be liable for is obvious, and it clearly differentiates between the parties according to their role in death. Having different categories which the bystander may fall into more adequately reflects the fact that culpable individuals may have different levels of culpability. It helps to ensure that the offence labels more fairly reflect the defendant's wrongdoing.

v. Chapter six: why a specific domestic violence defence to familial homicide is unnecessary

The final chapter discusses domestic violence, which is present in a number of cases within the current context.[116] Certain academics argue that due to this prevalence, and the potential injustice involved in convicting defendants who have been victims of domestic violence and thus do not perceive the potential risk to the victim of familial homicide, a specific domestic violence defence to a familial homicide charge is necessary. Other academics argue that a specific defence is unnecessary. Griffin believes that the current reasonable steps test adequately safeguards victims

[116] See, for example, Fugate, J., "Who's Failing Whom? A Critical Look at Failure-to-protect Law" (2001) 76 *New York University Law Review* 272 and Herring, above, who both highlight the frequency of domestic violence in failure to protect law.

of domestic violence.[117] This debate, and the confusion over whether the test within section 5 does in fact safeguard victims of domestic violence, indicates the need for the statutory approach towards domestic violence cases to be considered in greater detail.

The chapter concludes that a specific domestic violence defence is not needed. This is for four reasons. First, the breach of duty test provides an important safeguard against such defendants being wrongly held liable. Second, the *mens rea* test also provides such a safeguard, ensuring that familial homicide liability is not unjustifiably imposed on such defendants. Third, a domestic violence defence would be discriminatory. Fourth, the defence may exonerate culpable defendants.

The key proposal of this chapter is that, contrary to some academic opinion, a specific domestic violence defence to familial homicide is unnecessary and the statute should not be amended to include such a defence.

Conclusion

This thesis makes several key contributions to the law. Moreover, although the familial homicide offence was developed to respond to a purely evidential issue, this thesis has more ambitious aims. It aims to provide a more fair, realistic and just way of approaching the wider issues raised by the offence. For example, it develops a novel approach towards causation, despite the fact that the familial homicide offence sidesteps the causation issue by holding that it does not need to be shown whether the defendant caused the death or allowed it.

The proposals advanced within this thesis also have the potential to make a broader contribution to the criminal law generally as they can be applied in different contexts. This is most notable in relation to the causation and omissions liability chapters as they can be applied to different contexts, such as drugs homicide and cases of accessorial liability generally, for example.

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[117] Griffin, L., "Which One of You Did It? Criminal Liability for "Causing or Allowing" the Death of a Child" (2004) 15 *Indiana International and Comparative Law Review* 89 at p. 102.

Chapter Two

Familial Homicide and the Law Governing Criminal Causation

Introduction

This chapter will discuss the way in which criminal causation principles operate within the familial homicide context. There are three key problems here. First, the law does not adequately reflect the causative role of criminal omissions. It places too much emphasis on the duty requirement of omissions liability, overlooking the importance of causation. Second, the current approach towards causation is too rigid, as the defendant is either regarded as a cause of the offence or he is not. Adopting such a simplistic, binary approach towards causation gives rise to anomalous and unfair results, as well as labelling concerns. Third, the current doctrine of intervening acts, which adopts a voluntariness-based approach, is problematic. It causes arbitrary results and leads to potential injustice.

The first part of this chapter will discuss these issues, ultimately concluding that the current law of causation needs reform. The second part will outline proposals for reform.

As indicated in Chapter One, this thesis adopts the terminology of 'direct cause' for the killer or killers, and 'indirect cause' for the omitter or omitters. However, for reasons of clarity, this chapter will refer to the killer as 'the killer' and the omitter as 'the omitter' for the first part of the chapter, as the proposals for reform are only laid down in the second part. Once the proposals have been outlined in the second part, and the precise meaning of each has been defined, the terms 'direct cause' and 'indirect cause' will be used.

Before this chapter discusses the intricacies and issues raised by the law of causation as it applies to the familial homicide context however, it is important to understand the idea of causation generally and the importance of the legal debate to which it has given rise. The notion of causation is a key one for the law, a point highlighted by Alexander who states that '[c]ausation is, or at least appears to be, a fundamental

building block of large swathes of the law.'[1] Causation is a complicated topic, and thus it is important to outline its general complexities before its more specific intricacies are considered. This section will outline some of the key views.

There are a number of issues surrounding the concept of causation, such as what it should be based on, where its boundaries are to be drawn, and how it should be defined. These issues, amongst a number of others, essentially form the overarching question for debate, namely 'what is causation?' This section helps to highlight the nature and importance of this debate, discussing the following issues: the link between legal and scientific causation, the link between causation and culpability, omissions as causes, the degree to which causation is an evaluative concept, the degree to which causation is scalar, how the doctrine of intervening causes should be defined, and whether it is possible to develop an overarching theory of causation. This section will now discuss each of these in turn.

1. The link between scientific and legal causation

One of the key issues surrounding the nature of causation is whether legal and scientific causation are the same or, if not, what the differences are between them. Scientific causation and legal causation essentially set out to achieve the same aim, namely whether a specific act or course of conduct causes a result. However, that is where the similarities between them end. Although legal causation may be based on scientific causation, it is much more specific than scientific causation, and causes which may be regarded as causes in science may not be regarded as legal causes.

Yet certain authors opine that there is a strong link between legal causation and scientific causation. Moore, for example, argues that because causation is a scientific concept, the question of culpability should remain separate from the question of causation.[2] However this does not necessarily follow. This is because the fact that the defendant is a cause of a result is actually part of what makes him criminally responsible and therefore culpable. This is discussed further in the next subsection,

[1] Alexander, L., "Michael Moore and the Mysteries of Causation in the Law", forthcoming, available at <http://ssrn.com/abstract=1924437m> last accessed 4th August 2012.
[2] Moore, M., *Placing Blame* (Oxford: Clarendon Press; 1997) at pp. 334-5.

but it is important to note that the scientific elements of causation do not necessarily mean that it should be divorced from the question of culpability.

Another issue which relates to the link between scientific and legal causation is the degree to which causation is metaphysical. Moore, who has written extensively on the topic of causation, argues that legal causation is a metaphysical concept.[3] This means that its precise scope and meaning must be assessed in great detail, and that it has a precise and logical definition. Adopting such an approach can be criticised because it makes the law of causation too complicated and divorced from reality. This is particularly problematic for this area of law which is shrouded in complexity anyway.

The next issue surrounding the concept of causation is whether it is linked to a defendant's culpability.

2. The link between causation and culpability

As mentioned above, Moore opines that the questions of causation and culpability should remain separate within the law. However, this chapter argues throughout that causation is in fact an essential question when ascertaining criminal culpability; it is a component of culpability.[4] Nonetheless, a linked argument to support the idea of causation as an aspect of culpability can be briefly stated here. Chan and Simester opine that culpability is often defined too narrowly,[5] and the same can be argued of Moore's refusal to extend the definition of culpability to include the extent to which a defendant causes a result. Furthermore, Moore argues in detail that causation is inextricably linked to moral blameworthiness.[6] This morality-based argument which underlines and characterises his entire approach towards causation is outside the scope of this thesis. However, it can be briefly noted here that if an approach is used

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[3] Moore, M., "Moore's Truths about Causation and Responsibility: A Reply to Alexander and Ferzan", forthcoming, available at <http://www.springerlink.com/content/95g7qw402686334m/> last accessed 4th August 2012. For further discussion of the metaphysical aspect of Moore's arguments, see Schaffer, J., "Disconnection and Responsibility", forthcoming, available at <http://www.jonathanschaffer.org/moore.pdf> last accessed 4th August 2012.

[4] Also see Tadros, V., *Criminal Responsibility* (Oxford: Oxford University Press; 2005).

[5] Chan, W., & Simester, A.P., "Four Functions of Mens Rea" (2011) 70 *Cambridge Law Journal* 381.

[6] These arguments are explained and discussed in greater detail in Moore, M., *Causation and Responsibility: An Essay in Law, Morals, and Metaphysics* (Oxford: Oxford University Press; 2010).

which is heavily based on morality, as opined by Moore, then it cannot be separated from culpability as this is essentially the point at which moral blameworthiness is punishable by the criminal law.

A third issue surrounding the meaning of causation is whether omissions fall within its definition. This will now be discussed.

3. Omissions as causes

Many authors have argued that omissions are not causal.[7] However, although in the minority, others have conversely argued that omissions are causal despite the fact that they may appear to be literally nothing, and therefore cannot cause harm.[8] These arguments are discussed in significant detail both below and within Chapter Three, and therefore they will not be restated here.

However, it is important to note that the question of what causation is must include determination of the long-standing theoretical debate over whether causation includes omissions. This chapter argues that omissions are causal for a number of reasons, and therefore to exclude them from causation theory would be unfair, unjust, and inaccurate.

The next aspect to consider is whether causation as a legal concept should be evaluative.

4. The degree to which causation is evaluative

Causation is widely regarded as an evaluative concept, with judges frequently making decisions on whether a defendant is a cause of a result based on policy. The concept is therefore evaluative because the courts evaluate whether the defendant's conduct is causative in any given case, often analysing whether the defendant should

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[7] Hogan, B., "Omissions and the Duty Myth" in Smith, P., (ed) *Criminal Law – Essays in Honour of JC Smith* (London: Butterworths; 1987). See below for further academic arguments against viewing omissions as causal.

[8] See, for example, Leavens, A., "A Causation Approach to Criminal Omissions" (1988) 76 *California Law Review* 547.

be regarded as a cause according to policy. An example of this is the case of *Empress* which is discussed in detail below.[9] Moreover, as stated by Norrie:

> It is all very well to trace causal responsibility *back* to an individual, but, looking forward from the individual's act to the intervention of subsequent further acts and causes, at what point does the law cease to impute causation? In particular, given that in this context the law is dealing with causal sequences which frequently *begin* with a criminal action (e.g. an assault) and end with a further (potentially) criminal consequence (e.g. a death), how do the legal concepts rationalise the imputation or non-imputation of causal responsibility for the further consequence in light of a new causal intervention?[10]

This indicates the evaluative nature of causation. Whether causation should have such an expansive evaluative role has given rise to debate within the theoretical literature. It makes sense that causation should have such a role because it is based on morality and culpability, as detailed below, which are themselves evaluative concepts.

However, it may alternatively be argued that causation should not be evaluative in nature, and that decisions should not be so heavily based on policy. This is because it is an essential element of criminality, and thus to base it upon policy and evaluation is inappropriate because it is too vague for a proper construction of the criminal law. These considerations are discussed throughout this chapter, and this chapter aims to resolve some of the theoretical issues raised.

Another theoretical issue surrounding the meaning of causation relates to scalarity.

5. The degree to which causation is scalar

Moore opines that causation is a scalar exercise.[11] He states that:

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[9] *Environmental Agency v Empress Car Company* [1998] 2 WLR 350.
[10] Norrie, A., *Crime, Reason and History* (London: Weidenfeld & Nicolson; 1993) at p. 1
[11] Moore, M., "Moore's Truths about Causation and Responsibility: A Reply to Alexander and Ferzan", forthcoming, available at <http://www.springerlink.com/content/95g7qw402686334m/> last accessed 4th August 2012.

> One act or event is "more of a cause" of some harm than other acts or events. Scalarity thus allows for the comparison of degrees of causal contribution to the happening of some event.[12]

This basically means that certain causes have a greater effect on the harm than others. This may be true, but it overcomplicates the issue. If all causes are causes, albeit of varying degrees, it is arguably unnecessary to determine which causes are more causal than others. Due to the complexity and intricacies surrounding the debate over what causation actually is, adopting such an approach towards the underlying theory of causation makes the law unnecessarily complicated and obscures the issue. Arguing that some causes are more causal than others is irrelevant because all of them are causes, and thus there is no need to decide if one is more causal than another.

The issue of scalarity is one that is picked up by commentators on Moore's work, and this exemplifies the academic debate in this area, again highlighting the complexity of the law of causation.[13] Yet another issue surrounding the underlying theory of causation is how the doctrine of intervening acts should be defined. This will now be considered.

6. How the doctrine of intervening causes should be defined

The doctrine of intervening acts is an important aspect of the traditional approach towards legal causation. An issue arises however over the theoretical approach which should be adopted to explain and shape this doctrine. As this element of legal causation is discussed in great detail within this chapter it will only be discussed briefly in order to highlight the issues it raises for causation theory.

The traditional approach adopted towards this doctrine is based on voluntariness. However, whether this is the correct approach is questionable, particularly within the familial homicide context, because it places undue emphasis on the temporal condition of when the conduct of the killer and the omitter occurred. Other

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[12] *Ibid.*, at p. 2.
[13] Alexander, L., & Ferzan, K.K., ""Moore or Less" Causation and Responsibility" (2012) 6 *Criminal Law & Philosophy* 81. See Moore's response to this, above.

conceptions of the doctrine of intervening acts could be based on the operative cause principle, or welfare, or control, for example. Accordingly the theoretical basis of this as a part of legal causation needs to be analysed in greater detail, an exercise undertaken in the later stages of this chapter.

A final issue which arises when determining the answer to the meaning of causation is whether an overarching theory of causation can be developed within the law.

7. Whether it is possible to develop an overarching theory of causation

It will become clear through the subsequent discussion within this chapter that although there are guiding principles which lead the law of criminal causation, it does have a moral nature which requires the courts to look at the facts of each case in order to determine whether the defendant meets the requirements of criminal causation.[14] This is particularly the case in the familial homicide context in cases often involve complicated factual situations thereby making the issue of causation difficult to determine. It is therefore difficult to develop an overarching theory.

However, certain academics have attempted to develop such a theory. Hart and Honoré proposed a theory of causation based on the idea of abnormality of condition.[15] They argued that there is a distinction between normal conditions and abnormal conditions, and only abnormal conditions should be regarded as the cause of a criminal result. Although this work has been well-respected, analysed and discussed for many years, Hart and Honoré's theory of causation has been heavily criticised and it does not withstand academic scrutiny.[16] Even though only the basic theory has been briefly outlined here, it is still easy to see why there is widespread academic criticism of their approach. The main problem arises from the principle of legal certainty. Such an approach towards causation based on abnormality of condition is inevitably difficult to define, and questions over the boundaries between an abnormal and a normal condition will arise. This vagueness would also have

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[14] For further detail on the moral aspects, see Tadros, above.
[15] Hart, H.L.A., & Honoré, T., *Causation in the Law* (Oxford: Clarendon Press; 2nd edition; 1985).
[16] See, for example, Norrie, A., *Crime, Reason and History* (London: Weidenfeld & Nicolson; 1993). Moore is also critical of their theory.

practical as well as theoretical problems because it would be difficult to apply and implement within the law.

Accordingly, although attempts have been made by academics such as Hart and Honoré to develop an overarching theory of causation to underpin the legal theory, it is difficult, if not impossible, to successfully develop a theory which encompasses all of the intricacies of causation because, as highlighted above, there are a number of issues which require determination of what causation is. Furthermore the discussion above has barely scratched the surface; it merely demonstrates the key issues. Take for example the debate surrounding causation in accessorial liability which has not been considered here.[17] Additionally, even if an overarching account of causation could be created in theory, it is unlikely to be implemented in practice because of this overwhelming complexity and the fact that it would have to be very broad, and thus would be impossible to apply.

8. Conclusion

This section has highlighted some of the conceptual difficulties and academic debate surrounding the law of causation. The theoretical complexities of criminal causation are discussed in more specific detail throughout this chapter when necessary, and therefore this chapter aims to not only explain the issues with criminal causation as applied to the familial homicide context, but also gives an insight into the debate and contentious nature of criminal causation in a more general sense.

Part A – problems with the current law

This section outlines the main problems within the current law of causation.

[17] See the debate between Moore, above, and Gardner, J., "Moore on Complicity and Causality" (2008) 156 University of Pennsylvania Law Review 432 at p. 432 for example. Moore opines that the conduct of accessories to a crime is non-causal whereas Gardner argues that it is in fact causal.

1. The current law of causation

In order to incur criminal liability for a result crime the defendant must be a factual and a legal cause of the result.

a. Factual causation

The defendant is a factual cause of the result when it is proven that but for his conduct the harm would not have occurred in exactly the same way. This is known as the 'but for' test, and it is relatively easily satisfied as there are obviously a lot of factors which will be but for causes of a particular result. The test is a simple process of logic which excludes those factual causes that do not have a logical connection to the result. The test is, however, incredibly broad. For example, it would hold the defendant's parents as a cause of the result. To have this as the sole test of causation would unjustifiably broaden criminal liability due to its wide-reaching scope,[18] and thus it is supplemented by legal causation.

b. Legal causation

The defendant is a legal cause of the result when it is proven that he is an operative and substantial cause of it.[19] This means that his conduct must satisfy the *de minimis* principle. The essence of the *de minimis* principle is that if the defendant's contribution to the result only has a trivial impact on the outcome he will not be held to be a legal cause of it. This limits the scope of factual causation because it excludes minimal but for causes from liability.[20] The defendant's conduct must be a substantial and operative cause of the result,[21] not merely insignificant or insubstantial.[22] This approach accords with common sense and fairness, as to hold a defendant liable for a trivial contribution would not accurately reflect his level of wrongdoing. As criminal liability is so severe, and affects key aspects of defendants'

[18] Padfield, N., "Clean Water and Muddy Causation: is Causation a Question of Law or Fact, or Just a Way of Allocating Blame?" [1995] *Criminal Law Review* 683 at p. 684.
[19] *R v Cheshire* [1991] 1 WLR 844 at pp. 851-2.
[20] *R v Cato* [1976] 1 All ER 260.
[21] See e.g. *Cheshire,* above and *R v Rafferty* [2007] EWCA Crim 1846.
[22] *Cato,* above; *Cheshire*, above.

lives, it must not be taken lightly.[23] Also, allowing trivial causes to suffice for criminal liability may overwhelm the judicial system due to the sheer volume of conduct which could be held criminal. Although this is more of a theoretical problem than a practical problem as the Crown Prosecution Service is not likely to prosecute trivial causes, it is still an issue. This is because to hold trivial causes as criminal would undermine the legitimacy and authority of the law. There is little point in stating that a particular contribution is criminal in theory if no action will be taken against it in practice. Requiring that the defendant's conduct is more than a minimal cause thus helps to ensure the effective and legitimate administration of justice.

The chain of legal causation from the defendant's actions to the result can be broken by an intervening act of, for example, the victim or a third party.

The current law of causation gives rise to three key issues within the familial homicide context. These will now be discussed in turn.

2. The causative role of omissions

The first issue with the current law relates to omissions liability. Put simply, omissions are causal. However, the law fails to give adequate weight to the causative role of omissions. This is because it places too much emphasis on establishing a pre-existing duty to act, and on whether the defendant has breached this.[24] Although this is obviously of vital importance in establishing omissions liability, this focus has been allowed to overshadow the causative nature of omissions.

The current law's failure to recognise the causal significance of omissions is shown by *Stone & Dobinson.*[25] This case raises two major points of law. First, it indicates that omissions are causative, as the court states that an essential requirement of

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[23] For further general detail on this point, see Ashworth, A., *Principles of Criminal Law* (Oxford: Oxford University Press; 6th edition; 2009) at Chapter 1 and pp. 32-4.

[24] Smith, P., "Legal Liability and Criminal Omissions" (2001-2) 5 *Buffalo Criminal Law Review* 69 at p. 70 states that 'the causal status of omission is an obscure and controversial matter that is inconsistently handled in law', which demonstrates the issues here.

[25] *R v Stone & Dobinson* [1977] 2 WLR 169. See also *R v Gibbins & Proctor* (1919) 13 Cr App R 134 which also assumes that omissions are causal, and that defendants may be convicted of murder if death was caused by their failure to act. See most notably the discussion at pp. 137-8.

establishing liability for manslaughter by virtue of failing to act is that 'by reason of such negligence the person died'.[26] Second, the court held that there can be a duty to act in cases of voluntary assumption of responsibility. Despite the fact that the court considers these two important questions of law, academics tend to focus on the duty ratio of the case,[27] overlooking the ratio relating to omissions being causal. This tendency to overlook the causation issue in favour of the duty point in *Stone* is part of a larger tendency by academic commentators and the courts to focus on duty to the exclusion of causation in relation to omissions liability.[28] However, it is crucial that the law reflects the causality of omissions. It is important that a duty is not only established and shown to have been breached, but also that the breach is shown to have made a causal contribution to the result.

This section will outline the main arguments for viewing omissions as causal.[29] It will then discuss potential objections to adopting a causation analysis towards omissions, ultimately disregarding them. This section will thus conclude that the law of causation merits reform in order to fully reflect the causal nature of omissions.

The issue of whether omissions cause harm has been subject to intense academic debate.[30] It is argued here that omissions are causative. Failure to act causes harm because it makes the victim worse off than he would have been if the defendant had intervened.[31] Take the following example:

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[26] *Ibid.*, at p. 361. See also p. 359 for example, at which the court again assumes that omissions are causative.

[27] See Ashworth, A., "The Scope of Criminal Liability for Omissions" (1989) 105 *Law Quarterly Review* 424 at p. 443 and Cobb, N., "Compulsory Care-giving: Some Thoughts on Relational Feminism, the Ethics of Care and Omissions Liability" (2008) 39 *The Cambrian Law Review* 11. Both authors extensively discuss the controversial nature of such a duty.

[28] A similar point is also made by Wilson, W., *Criminal Law: Doctrine and Theory* (Essex: Pearson Longman; 2nd edition; 2003) at pp. 82-3 who states 'the common law limits liability for omissions in respect of crimes of commission by requiring a **relationship of responsibility** sufficient to impose a moral duty to act. Requiring such a relationship has the advantage of providing a convenient, if incomplete, analytical peg upon which to hang proof of causation and fault.'

[29] For further detail on this argument generally, see Leavens, A., "A Causation Approach to Criminal Omissions" (1988) 76 *California Law Review* 547.

[30] See the contrast between, for example, Hogan, B., "Omissions and the Duty Myth" in Smith, P., (ed) *Criminal Law – Essays in Honour of JC Smith* (London: Butterworths; 1987) on the one hand and Feinberg, J., *The Moral Limits of the Criminal Law: Harm to Others* (Oxford: Oxford University Press; 1984) and Ashworth, A., "The Scope of Criminal Liability for Omissions" (1989) 105 *Law Quarterly Review* 424 on the other.

[31] For further detail on this argument generally, see Feinberg, above at chapter 4.

> O is V's childminder. K, V's dad, drops V off at O's house five mornings per week. O sees the injuries to V, which have been inflicted by K. V tells her that his dad hits him and kicks him. O does nothing. V later dies from severe injuries incurred in a particularly brutal attack by K.

Opponents of the view that omissions are causative would argue that O's conduct does not cause the harm. Although she does not make the situation better by intervening, she does not make it worse; she simply does nothing. O does not change the status quo, and it is thus like she is not even there, so she should not be criminally punished. She does nothing; and doing nothing cannot cause harm, as it is nothing at all.[32] However, this argument is incorrect for two reasons.

First, the argument is flawed. O is there, and can act to change the situation. The argument does not take into account the reality of the situation, namely O's presence. By failing to act O makes a significant contribution to the harm because her inaction puts V is in a worse position than she would otherwise be. V's death is caused partly because of O's omission.[33] As stated by Tanck:

> Since the mother could have removed her child from the dangerous situation, her failure to do so was a contributing cause of death.[34]

To suggest that omissions do not change the status quo is mistaken. Omissions *do* change the status quo because they adversely affect the victim's interests.[35] Take the above example. The status quo of the situation relates to K and V, where K injures V

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[32] As Hogan, above at p. 85 states, 'there is no way you can *cause* an event by doing nothing [...] to prevent it'. This argument is supported by Weinryb, E., "Omissions and Responsibility" (1980) 30 *Philosophical Quarterly* 1 at p. 10 who states that 'The event that could have been prevented, had the agent performed the action he actually refrains from performing, is neither the result nor the consequence of the refraining. It is just another phase in a causal process that goes on without any intervention on the part of the agent in question.' However, it must be noted that he does not conclude that omitters should not be held criminally culpable; in fact, he takes the opposite view and argues that criminal liability should be attributed to omitters in certain cases.

[33] This argument is supported by Leavens at p. 573, who states '[a] failure to engage in the preventive conduct in these cases can [...] be seen as an intervention that disturbs the status quo. When such a failure to act is a necessary condition (a "but for" cause) of a particular harm, then that failure fairly can be said to cause that harm.' See also Kirchheimer, O., "Criminal Omissions" (1941-2) 55 *Harvard Law Review* 615 at pp. 618-9 who argues that omissions are causal. He states 'there is no difference between the causality of omission and of positive action, and the same rules, or absence of rules, which govern commission apply to omission. It may seem more difficult in practice to establish a causal nexus in the cases of omission than in those of commission, but this difficulty concerns not the existence of the connection but the relevance of the expected action to the final outcome.'

[34] Tanck, N.A., "Commendable or Condemnable? Criminal Liability for Parents Who Fail to Protect Their Children from Abuse" [1987] *Wisconsin Law Review* 659.

[35] For further detail on setting back interests, see Feinberg, above chapter 4.

and kills him. The status quo is the interaction between these two individuals alone. However, O changes this. O is a third individual, and her presence alters the status quo by changing the dynamic of the situation. By failing to act, she adversely affects V because V is deprived of help that she could otherwise receive from the third person present, possibly saving her life. V is dependent on O to act to protect her from K, thus O's failure to act alters the status quo of the original situation, which just involved K and V.

Taking the analysis further, those who opine that omissions are not causal because they are nothing at all have a flawed view of what actually happens. They opine that omissions are not causal because O does not change the status quo as the same outcome would have occurred whether she was there or not. However, there are in fact three different situations in this type of case; the situation relating to the old status quo, the new situation with O present, aware of the risk of harm and failing to protect V, and the new situation with O present, aware of the risk of harm and acting to protect V. The correct approach is actually to compare the latter two situations, rather than the first and the second. This is because such an approach compares the two potential outcomes which may occur from O being involved in the situation, rather than the flawed analysis which compares the situation where O is not involved at all with the situation where O is involved but does nothing.

The second reason for why the argument is incorrect is because it is purely academic and metaphysical, which means it is divorced from the practical application of causation principles. It is too abstract, and thus detached from the reality of modern society. The essence of the argument is that omissions do not cause harm to the victim because they are nothing at all. Yet this argument ignores the fact that individuals are dependent on each other in society. Every day individuals are affected by what their fellow citizens do or do not do. Yet the argument looks at the omission in isolation from the broader societal context. In reality, the victim has a strong level of dependence on the bystander because if the bystander acts then she could save the victim's life. This is demonstrated by the above example, where V is reliant on O to act to protect her from K. Due to this dependence, O contributes to the harm suffered by V by failing to act in accordance with it, and thus she has a causal role.

The standard argument against viewing omissions as causative can be dismissed for the two reasons given here. Moreover, there are a number of arguments which support the view that omissions are causative. Ashworth, for example, believes that omissions can cause results in principle.[36] However, he does envisage practical problems with applying causation principles to omissions because the factual situations are often complicated, thus increasing the scope for evaluative judgments to be made in individual cases.[37] Nonetheless, this issue can be overcome.

First, Ashworth's arguments are based on the existing binary approach towards causation. However, as argued throughout this chapter, the current approach is flawed. Reform of the law which would result in a clearer, more logical, and fairer test for causation would make determination of causal questions easier and thus mean that Ashworth's concerns are addressed.

Linked to this is the argument that an evaluative approach towards causation is not necessarily a drawback. If the causation tests themselves are clear, evaluation of individual culpability against such tests will allow fair and just determination of causal questions. This is because it allows the jury to look at each case and decide whether to impute causal liability. Although this may blur the law slightly because it gives scope for policy decisions to be made, it may still be a pragmatic and fair approach. Moreover, at a general level the tests themselves remain the same, meaning that the law can be applied in a consistent manner. Consequently, Ashworth's practical objection carries less weight.

Additionally, an evaluative approach towards causation exists anyway, which demonstrates that there is no reason to single out omissions as problematic.[38] Furthermore, merely because determining issues of causation for omissions may be more difficult than for acts, this does not mean that it is impossible, nor does it mean that such a task should not be undertaken. Indeed, as detailed in this chapter, there are several strong reasons for undertaking such a task, most notably the fact that

[36] Ashworth, above at pp. 111-12. Husak, D.N., *Philosophy of Criminal Law* (New Jersey: Rowman & Littlefield; 1987) at p. 161 also states that 'both positive actions and omissions *can* be causes.'
[37] Ashworth, above at p. 112.
[38] Leavens, above at p. 570.

omissions cause harm and thus those who engage in such conduct, breaching their duty of care, should be criminally sanctioned.

Another argument which indicates that omissions should be treated as causal is that it is too simplistic to say that acts cause results whilst omissions do not. This is because the dividing line between an act and an omission does not necessarily mirror the dividing line between having causal responsibility and not having causal responsibility. Causal responsibility can sometimes be fairly attributed to an omission, which in turn means that the traditional distinction between acts and omissions is insufficient to explain the distinction between causes and non-causes. The case of *Bland* highlights that causal responsibility can sometimes fairly be attributed to an omission, thereby demonstrating that the traditional distinction between acts and omissions collapses.[39] This case indicates that there is little moral distinction between the act of switching off a life support machine and the omission of failing to refill the feeding tube which keeps the patient alive. The omission is causal just like the act is, so it should be held as such. The lack of meaningful distinction between an act and an omission is discussed in greater detail in the omissions liability chapter.

The next section will discuss further objections to adopting a causative approach towards omissions, ultimately dismissing them.[40]

a. The artificiality objection

The first objection to adopting a causal analysis towards omissions is that it is artificial. As argued by Hogan, the defendant cannot be held to be causal when he, himself, did not actually cause the result.[41] He does absolutely nothing, so does not

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[39] *Airedale National Health Service Trust v Bland* [1993] AC 789.

[40] A major objection to holding omissions as causal is based on individual liberty. Holding omissions as causal would inevitably increase the scope for criminal liability for omissions, and this is objectionable because it restricts individual freedom to act freely. However, this objection has been extensively discussed, and ultimately rejected, in the omissions liability chapter, meaning that it is not necessary to restate the arguments here.

[41] As Hogan, above at p. 85 states '[i]f any proposition is self-evident [...] it is that a person cannot be held to have caused an event which he did not cause.'

cause harm. He should be punished solely for the omission, rather than being artificially held as the cause of the result.[42]

However, as noted above, omissions do cause harm because they change the status quo of the situation, and thus adversely affect the victim's interests. Moreover, the dependence of individuals on other members of society further supports the conclusion that omissions may contribute to an outcome because failure to act in respect of such dependence removes the chance of rescue from the victim which she would otherwise have. As omissions are causal, the foundation of Hogan's argument is incorrect. Rather than being artificial to describe omissions as causal, it is fair and reflects what actually occurs.

Moreover, Hogan later makes a concession to his argument, stating that:

> [A] result may be caused by the defendant's *conduct* and the totality of the defendant's conduct causing a result may properly include what he has not done as well as done.[43]

So, on the one hand Hogan argues that omissions cannot cause criminal results. However, on the other he concedes that omissions may be included in a sequence of criminally punishable conduct. This approach is flawed. If a self-standing omission cannot be a cause then it is does not make sense to argue that when incorporated within a sequence of conduct it may be causal. The omission still exists, and plays a crucial role in the conduct which is ascertained to be causal, so it is contradictory to argue that freestanding omissions cannot be causes.

Hogan uses *Miller*[44] to support his argument, arguing that it is inappropriate to only look at the last part of the conduct in the chain, namely the omission in *Miller*, when deciding liability. However, there are issues with his use of this case. Even if the court does look at the entire chain of conduct, in *Miller* the omission was the pivotal factor in imposing criminal liability. Although Miller's initial conduct consisted of the acts of accidentally setting a mattress alight, waking up and realising what had

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[42] *Ibid.*, at p. 86.
[43] *Ibid.*, at p. 88.
[44] *R v Miller* [1983] 2 AC 161.

happened, then moving into an adjacent room and falling asleep, it was the omission for which he was held liable. He failed to extinguish the fire before falling asleep again. The court held that this failure gave rise to criminal liability on the grounds of breaching a duty to rectify his creation of a dangerous situation.[45] Hogan's ineffective use of *Miller* shows the futility of his arguments because the omission was the key factor in imputing criminal liability to the defendant due to the harm it caused. It demonstrates how much he backtracks from his original point that omissions do not cause harm because he uses a case in which the omission caused the damage.

Moreover, Hogan's argument itself is problematic. If adopted, his argument would mean that there would be few instances of 'pure omission'. This is because he essentially redefines an omission so narrowly that there will rarely be cases of it. He states that in order to be criminally punishable, an omission must be part of a larger scheme of conduct. Such a narrow definition of a true omission effectively means that all the work is done in the distinction between conduct and omissions. Consequently, this approach addresses issues of causation under the act-omission distinction. Hogan obscures the causation issue by determining it under the act-omission distinction, rather than under principles of causation. For example, in *Miller* his approach would mean that the causation issue would effectively be determined according to whether the defendant's conduct was deemed to be a pure omission or part of a larger course of conduct. If adopted, Hogan's approach would increase confusion within the law, which in turn would have implications for the principle of legal certainty.

Hogan's objection to giving a causal role to omissions can thus be dismissed. However, another objection to regarding omissions as causal relates to factual causation. This will now be discussed.

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[45] See e.g. p. 179 per Lord Diplock.

b. The factual causation objection

A second objection to the proposed causative approach is that omissions do not satisfy the 'but for' test of criminal causation, so they cannot cause harm.[46] The objection states that an omission is literally nothing, meaning that but for the defendant's omission the harm would have occurred anyway.

However, this is incorrect. Take a familial homicide case, for example. Merely because V died from injuries inflicted by K whilst O failed to act does not automatically mean that even though V would have died had O not been there, O's conduct was not causal. Indeed, as detailed above, O's failure to act does affect the outcome because it is a factor in the occurrence of harm. It is a but for cause of the harm because but for O's inaction, V would not have died in the exact same way that he did. V died from a combination of K's action and O's inaction. Had O been absent, V would have died from K's action alone. So, there is a distinction in the way that V died according to whether O was there.

The objection here is based on a misconstruction of the 'but for' test. It is based on a construction which holds that the test is 'would V have died even if O was not present?' to which the answer is 'yes'. However, this construction is incorrect. In actuality the test is 'but for O's inaction, would V have died in exactly the same way?' to which the answer is 'no'. This is the correct construction because it takes the relevant facts into consideration, and reflects the change in the status quo by taking into account O's presence and the impact her inaction has on the harm suffered by V.[47]

Consequently, this objection to adopting a causal analysis for omissions can be disregarded. Nonetheless, another objection is that a causal approach results in an unjustifiably broad scope for omissions liability.

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[46] Beynon, H., "Causation, Omissions and Complicity" [1987] *Criminal Law Review* 539 at pp. 540-1.
[47] See, for example, Ormerod, D., *Smith & Hogan: Criminal Law* (Oxford: Oxford University Press; 12th edition; 2008) at p. 70.

c. The scope objection

A third objection to adopting a causation analysis for criminal omissions is that it indefensibly increases the scope of criminal liability. Moore argues that:

> [O]nly one or a few people typically cause harm, whereas many people omit to prevent harm, so to keep most of the populace non-criminal we shouldn't punish omissions.[48]

The argument holds that treating omissions as causal would open the floodgates for liability because it is too easy to satisfy the requirements for liability. This is unsatisfactory due to liberty, autonomy and culpability concerns.[49]

Yet Moore's objection can be dismissed. First, his argument depends on the assumption that omissions do not cause harm being true. This is because he distinguishes between acts, which in his view cause harm, and omissions, which in his view do not.[50] However, as concluded above, this is not the case. Omissions do cause harm, and thus the fundamental basis of Moore's argument is incorrect.[51]

Second, increasing the scope of liability by holding that omissions cause harm is justifiable because it reflects the culpability of the perpetrator, ensuring that he receives the appropriate criminal punishment. It is therefore appropriate to hold such individuals as causes to ensure the punishment of criminally culpable and responsible individuals, as well as the effective administration of justice. Increasing the scope of omissions liability in such cases is justifiable.

Third, Moore argues that omissions should not be causal because to treat them as such would open the floodgates for liability. However, the existence of the duty requirement ensures that this is not the case. This is because a limit is placed on omissions liability, which fairly reflects the culpability of those under a duty, and

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[48] Moore, M., *Act & Crime* (Oxford: Clarendon Press; 1993) at p. 48.
[49] For further detail on these arguments, see Chapter Three.
[50] For further detail and criticism of the act/omission distinction, see Chapter Three.
[51] His distinction between acts and omissions is questionable, a point which is considered in Chapter Three.

means that criminal liability is not broadened in an unlimited fashion.[52] The *mens rea* requirement also helps to ensure that the scope of criminal liability for omission is not broadened in an unlimited way. This is because it too places an important limit on those who can be liable for the offence; for familial homicide liability only those who are aware, or ought to have been aware, of the risk of harm will satisfy the conditions for liability.

Additionally, the causation requirement itself limits the scope of omissions liability because only those individuals whose omissions are causative will be criminally liable, thus turning Moore's argument on its head. Rather than unjustifiably expanding omissions liability, causation actually limits it to those who contribute to the harmful result. This ensures that only culpable omitters are liable. This is notable in the familial homicide context where the proposals for reform adopted in this thesis limit liability to omitters who causally contribute to the victim's death, excluding those who fail to act but do not cause the result. Both the duty test and the causation requirement are needed to establish liability. The causation requirement ensures that only those omissions which have a causal impact on death will suffice for liability, and the duty test limits this requirement further in order to catch those who should justifiably have omissions liability for familial homicide imposed on them. This is because not all omissions recognised as causative will be linked with culpability, and thus the duty test is required to ensure that only culpable defendants who cause the result will be caught by the offence. An example helps to explain this point:

> O lives with her husband, K and their daughter, V. K severely assaults V and O on a regular basis, causing extensive injuries. Due to the serious injuries that she suffers, and the adverse psychological effect of such domestic violence on her,[53] O does not perceive a risk of harm to V, and thus does not take action to protect her. During one particularly severe attack, K causes injuries so severe that he kills V.

Here, O is a cause of V's death. Had she acted, V may not have died, or would not have died in the same way. She is a but for cause of V's death, and is an operating and substantial cause of it, so she satisfies the causation requirement needed for

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[52] See Chapter Three.
[53] See Chapter Six for further detail on the psychological impact that such abuse can have on individuals.

omissions liability in this context. However, arguably O is not culpable. This is because she does not perceive the risk of harm to V, thus meaning that she is not aware, or ought not to have been aware, of the risk of harm to V, and her failure to act was not unreasonable, so does not satisfy the *mens rea* or breach of duty test required for liability. This analysis demonstrates that both the duty test and the causation requirement are needed in the familial homicide context, and that due to the importance of causation here, greater weight needs to be given to it in the law.

It has been demonstrated that omissions are causative. The current law needs to take greater account of this causal role, rather than placing undue emphasis on the duty requirement of omissions liability. Although there are arguments against a causative role for omissions, these were dispensed with above, paving the way for reform of the law to account for the causal role of omissions.

The next key issue with the current law of causation is its binary nature.

3. The binary nature of causation

The current approach towards causation is binary. The defendant is either a cause of the result or not. This binary approach is problematic because it creates tension in the law as applied to omitters. According to the current law, omissions are not widely regarded as causative. Consequently, the omitter cannot be regarded as a cause of death, meaning that, at best, he would be held liable as an accessory to murder or manslaughter, or for familial homicide. However, as extensively argued above, omissions are causative. The omitter is a factual and legal cause of the victim's death, which means that he satisfies the *actus reus* of murder or manslaughter. Yet this causes a problem because it collapses the distinction between the actual killer and the omitter.

The binary nature of the current approach towards causation forces the law to either pretend that omissions are not causative in order to preserve the distinction between the actual killer and the omitter, or recognise that omissions are in fact causative and collapse the distinction between the killer and the omitter. A more gradated approach is needed in order to reduce this tension caused by the existing binary approach. This

section will discuss the current law in greater detail in order to highlight how it applies to familial homicide, thus demonstrating the problems caused by the binary nature of the existing approach, and the consequent need to reform it.

a. How causation works in the familial homicide context

The secondary party is the individual who omits to protect the victim from being killed by the principal, whether by abusing the victim alongside the actual killer or by doing nothing to protect the victim. There are two possibilities for liability regarding the omitter. First, he may not cause death, which means that he could be liable as an accessory to murder or manslaughter, or for familial homicide. Second, he may cause death, which means that he may be liable for murder or manslaughter in the same way as the killer. This section will discuss the current law of causation as it applies to each of these scenarios in turn.

Lewis helps to illustrate how causation principles operate within the familial homicide context.[54] Here the victim's mother, Lewis, witnessed her child die at the hands of her partner. She admitted that she thought her partner might hurt Aaron, yet she made a conscious decision to stay with him. She left Aaron in his care because she loved and trusted him. She stated that she put her welfare above that of Aaron's. Aaron suffered over 50 injuries and died from brain damage caused by Lewis' partner.[55] Lewis was convicted of familial homicide. The following subsections will highlight how the current law would apply to Lewis by first regarding her as no cause of death, and second regarding her as a cause of death.

i. No cause of death

Under the current binary approach towards causation, the first outcome which may occur from applying causation principles is that the omitter is not regarded as a cause of death. If he is not a cause of death he may be liable as an accessory to murder or manslaughter, provided that he aided, abetted, counselled or procured the crime with

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[54] BBC News Online, "Mother Jailed after Baby's Death", 15th December 2006 <http://news.bbc.co.uk/1/hi/wales/south_west/6181051.stm> accessed 21st May 2012.
[55] Ibid. Also see BBC News Online, "Mother 'Let Partner Hurt Baby'", 26th October 2006 <http://news.bbc.co.uk/1/hi/wales/south_west/6088850.stm> accessed 21st May 2012.

the intention to do so, and he foresaw a real possibility that the principal would kill the victim.[56] He can be tried, indicted and punished as a principal.[57] If the omitter lacks the intention to assist or encourage the killer he may be liable for familial homicide. These outcomes respect the distinction between the principal and the secondary party, as outlined in Chapter Five, however, they involve the fiction that omissions are not causative.

This restrictive binary approach causes problems in certain cases, such as *Lewis*. Lewis is either regarded as a cause of death or not; there is no room for gradation of causal responsibility. This is an issue because on the facts she did not directly cause death, which would lead to a murder charge, yet neither did she completely lack a causal role. However, she is culpable for Aaron's death. She was charged with the fall-back offence of familial homicide, which effectively side-steps questions of causation.[58] *Lewis* highlights how rigid the current law of causation is because the omitter is either a cause of death or not; yet on the facts Lewis' causal responsibility is not so clear-cut. The theory and practical application of causation principles do not accord with the reality of complex case facts.

ii. Cause of death

Under the existing binary approach towards causation, the second possibility for liability in relation to the omitter is that he is a cause of death. If the omitter is also held to be a cause of death, he may be liable for murder or manslaughter in the same way as the principal. His position then becomes indistinguishable from that of the principal, which, as discussed in the accessorial liability chapter, is problematic. If the omitter has some other form of *mens rea* than intention, he may also be charged with familial homicide.

The problem here is the way in which causation operates in practice. The omitter is either a cause of death or not. This leads to incoherent and unjust results, again, as

[56] Section 8 of the Accessories and Abettors Act 1861; *R v Bryce* [2004] 2 Cr App R 35.
[57] Section 8.
[58] Section 5(2) Domestic Violence, Crime and Victims Act 2004.

demonstrated by *Lewis*. On the facts she may be regarded as a cause of death, but this is problematic because her causal responsibility is not so clear-cut.

Another problem with the way in which the current law of causation works relates to the doctrine of intervening acts.

4. The doctrine of intervening acts

The doctrine of intervening acts is a central component of legal causation. An intervening voluntary act is free, deliberate and informed conduct of a third party which breaks the chain of causation between the original actor's conduct and the proscribed result, meaning that the original conduct is no longer an operative and significant cause.[59] Obviously if both the original conduct and the conduct of the omitter are operative and substantial causes of the victim's death, both parties may be convicted of the relevant homicide offence.[60]

The concern which arises from application of this doctrine in the current context is that even if omissions are regarded as causative and the omitter is thus held as a cause of the result, adopting the proposals for reform of causation principles outlined in this thesis within the familial homicide context means that the chain of causation will normally be broken by the voluntary intervening act of the killer. This means that the omitter will not be held liable in any event. This is problematic because the omitter is culpable. This section will give further detail on the issues caused by the current approach towards this doctrine, and how they can be responded to with a new approach.

The overarching approach toward the doctrine of intervening acts is voluntariness-based. This means that the chain of causation is broken by an act which is voluntary. There are two key issues with the operation of this approach towards the intervening acts doctrine in the familial homicide context. First, the doctrine works arbitrarily; in

[59] See *R v Pagett* (1983) 76 Cr App R 279. The intervening act may also be of the victim, or nature, for example.

[60] However, this may be difficult to prove in the frequently complex factual situations which arise here, as demonstrated in *R v Lane & Lane* (1986) 82 Cr App R 5. The doctrine also gives rise to complexity in other areas of criminal law, such as medical cases. See, for example, *R v Jordan* (1956) 40 Cr App R 152.

some cases the culpable omitter will be regarded as a factual and legal cause, but in others she will not. Second, culpable individuals are not convicted of familial homicide in cases where they should be. The following two examples demonstrate the issues here:

> Example one: V, four years old, has a best friend, X. V and X play together twice a week; once at V's house and once at X's house. One day, whilst at X's house, V tells X's mother, O, that his stepfather, K, hits him and shows her bruises on his body. V regularly turns up to O's house with severe bruising, and once with a broken arm. O does nothing. When K comes to pick V up one day he flies into a rage, viciously attacking V.
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> Example two: V, aged seven, and his best friend, Y, play together a few times a week; sometimes at V's house and sometimes at Y's house. V often has visible bruises which Y's mother, O, is aware of. She knows that it is V's mother, K, who causes the injuries. One day, K drops V off at O's house. Y complains of headaches, and shows O severe bruising to his head, telling her that K assaulted him. O does nothing. V collapses in O's house, and later dies in hospital from brain damage caused by the injuries K inflicted.

There is little doubt as to the culpability of the omitter in each example.[61] In example one, O is aware of the injuries caused to V. She can easily act to protect V. She could, for example, call the police or social services in respect of V's injuries and the physical attack, which would discharge her duty to act. In example two, again, O is aware of V's injuries, and could act to protect him.

However, applying the existing approach to causation in example one means that O would not be a legal cause of death, whereas she would be in example two. In example two, there is no intervening act by K after O's omission. Contrastingly, in example one the intervening acts doctrine excludes O from causal responsibility for the relevant offence.[62] This is because O's failure to act is no longer a significant and operative cause of V's death. The intervening act of K's physical attack breaks the chain of causation between O's omission and V's death. This outcome is unsatisfactory because causation principles exclude a culpable individual from offences requiring a causal link.

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[61] For further detail on the culpability point see Chapters Three and Four.

[62] Bar the familial homicide offence itself, as she may be convicted under the 'allowing' limb of section 5.

Contrasting the two examples demonstrates the flaws within the intervening acts doctrine. Both omitters are culpable for the victim's death. However, the arbitrary way in which the doctrine works excludes the first omitter from causal responsibility, but not the second. Causal liability hinges on the timing of the killer's actions. This is an issue not only for arbitrariness, but also because O and K are separate legal individuals, with different causal roles, so the law should reflect this and not intertwine their causal responsibility so tightly.

The above discussion also highlights another issue with the operation of the doctrine. In the first example, a culpable omitter escapes causal responsibility. This is a major issue because in this area of law cases frequently involve ongoing abuse by one party, in respect of which another fails to act. Consequently, most cases will involve a final act of abuse by the actual killer which will break the chain of causation between the omitter's failure to act and the victim's death.[63] This is problematic because the omitter is culpable for the victim's death. Justice is accordingly not achieved.[64]

The intervening acts doctrine is flawed because the leading approach towards whether an intervening act breaks the chain of causation focuses on voluntariness.[65] So, in the first example, K's intervening act breaks the chain of causation between O's omission and V's death because it is voluntary.[66] This is unsatisfactory because O's failure to act should be regarded as the operating cause of death that it is, resulting in the omitter incurring causal responsibility for the relevant offence, rather than hinging on the timing of the voluntary choice of the actual killer to kill the victim.

A better approach towards legal causation within the familial homicide context would be to adopt the operative cause principle instead of the voluntariness principle. The operative cause principle holds that provided the omitter's conduct operates on the result, the omitter is a cause of that result notwithstanding an

[63] Obviously provided it is free, deliberate and informed.
[64] Although such individuals may be liable for familial homicide as this offence does not require proof of causation, this is problematic for reasons which have been outlined in Chapters Three and Five.
[65] *R v Kennedy (No. 2)* [2008] 1 AC 269.
[66] *Pagett* holds that voluntary conduct will generally break the chain of causation.

intervening act of the killer.[67] A benefit of this approach is that it is not arbitrary. As seen above, the voluntariness approach gives rise to different outcomes in similar cases even though the defendants have parallel levels of culpability. Adopting the operative cause principle would remove this arbitrariness because it does not make such distinctions based on the timing of the killer's actions; provided the omitter's failure to act is still an operating cause of death, even though the killer's conduct intervenes, the omitter will be held as a cause. So, in both of the above examples, O would be a cause of death because the omissions still operated on the outcome.

There is case law which supports this approach. In *Dear* the defendant stabbed the victim.[68] There was some evidence to suggest that the victim reopened his stab wounds, thereby committing a voluntary intervening act. The court nevertheless held that the defendant was liable for murder because despite the victim's intervening act the defendant's conduct was still an operating cause of death. This approach is to be favoured because the defendant has contributed significantly to the death, so it is appropriate to hold him causally responsible. Medical negligence cases such as *Cheshire* demonstrate that the courts apply the operative cause principle in certain circumstances.[69]

Scottish law also provides support for the operative cause approach.[70] It places greater weight on the operative cause principle rather than on voluntariness. For example, in the *Lord Advocate's Reference* case the court stated that the chain of causation was not broken by a voluntary intervening act of the victim which was necessary in order to bring about the result.[71] In this case the victim had to self-inject a drug in order to bring about the result of an overdose leading to death, which the defendant was held as an operative cause of. This is the same in the familial homicide context where the intervening act of the killer must occur in order to bring about the victim's death, which the omitter is held liable for. This is the best approach towards such cases because the omitter's culpable conduct is still an

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[67] As held by *R v Mellor* [1996] 2 Cr App R 245 there can be more than one operative cause of a result.
[68] *R v Dear* [1996] Crim LR 595.
[69] Above.
[70] See, for example, Jones, T., "Causation, Homicide and the Supply of Drugs" (2006) 26 *Legal Studies* 139.
[71] *Lord Advocate's Reference* (No. 1 of 1994) (1995) SLT 248.

operative cause of the victim's death, so is deserving of criminal liability. The voluntariness of the killer's subsequent conduct is insufficient to negate the omitter's conduct as an operative factor on the outcome. The voluntariness approach merges the causal liability of the killer and the omitter, which is inappropriate because their culpable conduct is distinct and the law should treat it as such, as in the operative cause approach.

Consequently, the current voluntariness approach towards the doctrine of intervening acts is inappropriate for the effective administrative of justice because it fails to convict culpable individuals, and operates arbitrarily. It should be replaced with the operative cause approach.

5. The case for reform

The foregoing has demonstrated that there are three key reasons for reforming the current law of causation. First, it fails to fully account for the causative role of omissions. Second, there are problems with the restrictive way in which the current binary approach towards causation operates. Third, the voluntariness approach towards the doctrine of intervening acts is inappropriate and can result in arbitrary distinctions.

The law must reflect the causal role played by omissions because they do cause harm, so should be treated as such. Although there are potential objections to reforming the law in such a way, these have been answered above, thus paving the way for reform.

The current law does not operate effectively in practice because it gives rise to skewed results, as discussed above. These problems stem from the binary nature of causation, which regards defendants as causal or not. It does not allow for gradations in causal responsibility, which is inappropriate because the familial homicide context often involves complex factual situations, and thus different levels of culpability and causal responsibility on the part of different actors need to be recognised. Reform is necessary to reflect these gradations.

Reform is also needed in order to address the injustice caused by the current voluntariness doctrine of intervening acts. A better approach is to follow the Scottish example and adopt an operative cause approach to this doctrine.

The next part of this chapter will outline proposals for reform.

Part B – reform

The first part of this section will outline the proposals for reform. The second will explain how the proposals address the weaknesses with the current law of causation. The final section will respond to potential objections against the proposed scheme of causal liability.

1. Proposals for reform

The following table highlights the proposals for reform advanced by this chapter:

Type of cause	Definition	Applicable offences
Direct cause	Significant and contributed directly to the result	• Murder • Manslaughter
Indirect cause	Significant but only contributed indirectly to the result	• Accessory to murder • Accessory to manslaughter • Familial homicide
No cause of death	The conduct is not significant for the result	• Accessory to murder • Accessory to manslaughter • Non-fatal offences
Evidentially uncertain	Cases in which the defendant's role in death is unclear	• Familial homicide

The proposals add a third layer to the law. The current law holds that the defendant either causes the result or he does not. The proposals for reform hold that the defendant directly causes the result, indirectly causes the result, or does not cause it. The approach also makes explicit provision for cases of evidential uncertainty in accord with the original aims of the legislation as outlined in the contextual chapter.

The current tests for factual and legal causation, namely the but for and *de minimis* tests, apply to distinguish causes, whether direct or indirect, from non-causes. This is a more satisfactory approach than the current law because it applies these tests to omissions, whereas under the current law the tests are not being used appropriately because they are not effectively applied to omissions.

This section will now give further explanation of each of these proposals.

a. Direct cause

The defendant is a direct cause of death if his conduct is significant and directly contributes to the result. The concept of significance is familiar to the criminal law. It is most obviously present in the existing *de minimis* principle, as highlighted above. Further definition of these requirements will therefore not take place here, as the terms are already known within the law, and the jurisprudence will develop as cases are decided. However, an illustrative example will highlight how the terms apply in the familial homicide context:

> K lives with his elderly and frail mother, V. K regularly assaults V, causing injuries such as fractured ribs and a broken back. One night, in a particularly severe attack, K pushes V down the stairs. She dies from head injuries sustained in this attack.

K is both a significant and direct cause of V's death. He is a significant cause because his conduct has a more than minimal impact on V's death; in fact, it produces the result. His conduct is also a direct cause of death because without his conduct, V's death would not have occurred. It was necessary to produce the outcome.

Gibbins helps to highlight the meaning of a significant and direct cause.[72] Here, the victim's father and his partner failed to feed her, resulting in her starving to death. This direct omission was obviously a significant cause of the result. There was also a direct link between the omission and the victim's death. Had the defendants fed the

[72] *R v Gibbins & Proctor* (1919) 13 Cr App R 134.

child, she would not have died. The defendant may directly bring about the result, death in this context, by either an act or an omission.

If the defendant is a direct cause of death, he will be liable for murder or manslaughter.

b. Indirect cause

An indirect cause is one which is significant, but only indirectly contributes to the outcome. The contrast between this and a direct cause is obvious. The indirect cause is more remote to the outcome than the direct cause. This approach thus reflects the fact that an indirectly causal defendant has a lesser degree of causal responsibility than a directly causal one. The meaning of 'significant' has been outlined above, however, an illustrative example of the type of cases which will be indirect causes will be useful. Take the following example:

> K and O live with their daughter, V. V is regularly subjected to physical attacks by K. O witnesses some of these attacks, but does not actually assault V herself. V eventually dies as a result of the injuries sustained in these attacks.

Here, K is a direct cause of V's death as his conduct is both a significant and direct cause of the result. Without his actions V would not have died, thus they are a direct cause of death. O, however, is not a direct cause of the result because without her failure to act V would have still died, although not in the same way. Yet the fact that V would not have died in the same way as she did through O's omission playing a causal role indicates that O's conduct is a significant cause of death.

If the defendant is an indirect cause of death, he may be liable as an accessory to murder or manslaughter.[73] He may also be liable for familial homicide. These lesser offences reflect the lesser level of causal responsibility of the defendant when contrasted to those defendants who are direct causes.[74] The principal, or principals, are direct causes of the victim's death because their conduct is both significant and

[73] An individual may aid or abet by omission. See, for example, *R v Russell* [1933] VLR 59 and *Du Cros v Lambourne* [1907] 1 KB 40.
[74] See Chapter Five for further detail on this scheme.

direct. The accessory, or accessories, are indirect causes of death because although their conduct is a significant causal factor, it is a more remote cause of the result. Such an approach better reflects gradations in causal responsibility, and ensures that the label attached to the defendant's causal liability most closely reflects his level of wrongdoing.

c. No cause of death

If the defendant is neither a direct nor an indirect cause of death he could still be charged as an accessory to murder or manslaughter. This is based on application of *Giannetto* in which the court stated that '[a]ny involvement from mere encouragement upwards would suffice'.[75] Alternatively, he may be exempt from liability altogether, or may be charged with the lower tier offence of causing or allowing serious injury as detailed in the introductory and contextual chapters. This category differs from the two above categories because it involves no causal responsibility for death.

d. Lane-type scenarios

In cases of evidential difficulty such as *Lane*, the defendants may be charged with familial homicide. So, if it cannot be proven which of two or more defendants directly killed the victim, but at least one of them did, they will both be liable for familial homicide. This is limited to cases of evidential difficulty such as *Lane* because it equates the culpability of the direct cause and the indirect cause, and as outlined in the accessorial liability chapter this should be avoided unless absolutely necessary. It is necessary here to address this evidential issue. This approach towards causation therefore responds to the evidential difficulty which the offence was designed to address.

[75] *R v Giannetto* [1997] 1 Cr App R 1.

e. The operative cause principle

It is vital to adopt the operative cause approach rather than the voluntariness approach towards the doctrine of intervening acts. The operative cause principle holds that provided the conduct of the indirect cause operates on the result, he is a cause of that result despite the voluntary intervening act of the direct cause. Accordingly, the proposals for reform adopt this approach, holding that notwithstanding the conduct of the direct cause, if the conduct of the indirect cause is an operative cause of the victim's death, she will be held culpable, and criminally responsible, for death.

The proposals adopt this approach because they hold that the indirect cause must be a significant cause of the victim's death in any event, even when the conduct of the direct cause intervenes to cause the victim's death after the indirect cause's failure to protect the victim. Consequently, an intervening act of the direct cause is not a bar to liability.

The next section will outline how the proposals for reform address the weaknesses within the current law.

2. How the proposals respond to the weaknesses in the existing law

The three problems with the current law are that it does not reflect the fact that omissions are causal, that the binary nature of the current approach creates unnecessary tension within the law of causation, and that the voluntariness approach towards the doctrine of intervening acts is unsatisfactory.

a. Removes existing tension

The proposals respond to these weaknesses because they remove the existing tension in the current law of causation as it applies to indirect causes. This is because the proposals now respect the fact that omissions are causative.

Moreover, the current binary approach creates tension in the law as applied to indirect causes. According to the current law, omissions are not widely regarded as causative. However, omissions are in fact causative. The indirect cause is a factual and legal cause of the victim's death, which means that he satisfies the *actus reus* of murder or manslaughter. This causes a problem though as it collapses the distinction between the direct cause and the indirect cause.

As indicated above, the binary nature of the current law means the law must either pretend that omissions are not causative in order to preserve the distinction between the direct cause and the indirect cause, or recognise that omissions are in fact causative and collapse the distinction between the direct cause and the indirect cause. A more gradated approach towards causation is therefore needed in order to reduce this tension, and this is provided by the proposals outlined here. The proposals now respect the fact that omissions are causative whilst maintaining the distinction between the direct cause and the indirect cause through the more gradated approach.

b. Amends the doctrine of intervening acts

As indicated above, the current law has issues as a result of the existing approach towards the doctrine of intervening acts. The current voluntariness-based approach to this doctrine would fail to convict culpable individuals in certain cases by virtue of the conduct of the direct cause intervening and ultimately superseding the culpable conduct of the indirect cause in cases where the familial homicide offence does not apply. This is clearly unjustifiable in terms of justice, individual criminal responsibility, and culpability of the individuals involved.

In contrast to this unsatisfactory state of affairs, the proposed reforms adopt the operative cause approach. The defendant will be liable if his conduct operates on the death of the victim, regardless of any intervening act by the direct cause or other individual. This is more likely to catch culpable individuals, and thus achieve justice.

There are, however, potential objections to the proposals for reform. These will now be discussed.

c. Potential objections

There are two potential objections to the proposals. First, the approach may be perceived as too complex. Second, the proposals arguably have little practical impact. These objections will now be discussed.

i. Complexity

The proposals may be objected to on the grounds that they are too complicated. This is because they add an extra layer of causal responsibility into the law, arguably making a difficult area of law even more complex. The proposals create another boundary to define, and a third causal category, in contrast to the present law. The current law has two categories and so one boundary to define. However, the proposals create three categories and therefore two boundaries to define.

Nonetheless, although the proposals do create more levels of causality, this is necessary. As indicated above, the current law of causation is unsatisfactory because it creates unnecessary tension, and creates a high level of indeterminacy, confusion and complexity. The proposals, as indicated above, resolve this tension. Extra complexity, if any, which they create is necessary in order to resolve the weaknesses with the current approach.

Moreover, by creating a further tier of liability the proposals help to ensure that the defendant's culpability will be more closely reflected when compared to the law at present. This is because an approach consisting of narrowly defined categories of liability will more closely reflect the defendant's causal responsibility by its very nature. This also ensures that the label attached to the defendant's wrongdoing is more likely to reflect what he has actually done.

However, a second potential objection to the proposals is that they have little practical impact.

ii. Little practical impact

Arguably the proposals do not have much practical impact on the law. This is because both directly and indirectly causal defendants may be charged with familial homicide. Accordingly, creating this extra tier of liability for indirect causal responsibility is potentially unnecessary because it introduces unwarranted complexity into the law when there is little practical reason for doing so.

This objection can be easily dismissed. The proposals do have a large practical impact. At the moment, when a defendant is held to be a cause of the result, he may be liable for murder, manslaughter, as an accessory to murder or manslaughter, or for familial homicide. When he does not cause death he will not be liable for any offence requiring a causal link but may be liable as an accessory to murder or manslaughter or for familial homicide. However, the proposals make a key practical change, as if the defendant directly causes the result, he may be liable for murder or manslaughter, or for familial homicide in cases of evidential difficulty only. If he does not directly cause the result, he may be liable as an accessory to murder or manslaughter, or for familial homicide, or for no homicide offence at all. He must have a significant impact on the situation in order to be considered any kind of cause of the result, whether direct or indirect.

Conclusion

The proposals advanced above would have a significant, and beneficial, impact on the law if enacted. The following tables help to explain the changes that the proposals make.

Current law:

Cause	**No cause**	**Cases of evidential difficulty**
Murder	Accessory to murder	Familial homicide
Manslaughter	Accessory to manslaughter	
Accessory to murder	Familial homicide	
Accessory to manslaughter		
Familial homicide		

Proposals for reform:

Direct cause	**Indirect cause**	**No cause**	**Cases of evidential difficulty**
Murder	Accessory to murder	Accessory to murder	Familial homicide
Manslaughter	Accessory to manslaughter	Accessory to manslaughter	
	Familial homicide		

It is clear from the contrast between the two tables that the proposals have a key impact on the law. The proposals refine the offences with which defendants may be charged according to their causal liability. At the moment if the defendant is causally responsible for the result, he can be charged with any offence within the current context; whereas under the reforms the offence he can be charged with depends on the extent of his causal responsibility. This is a major practical change, and a beneficial one for the reasons given above. Additionally, an extra tier of causal liability is necessary not only to combat the weaknesses within the existing law of causation, as detailed above, but also for reasons of fair labelling.

This chapter makes three key contributions to the law of causation. First, it argues that omissions are causal, and the proposals for reform give greater effect to this. Second, it argues that the existing binary approach towards causation is unsatisfactory because it creates unwanted tension within the law. Consequently, the proposals for reform create an extra tier of liability within the law by creating categories of direct, indirect, and no cause of the result. Third, it argues that the

existing voluntariness-based doctrine of intervening acts is inappropriate. It therefore propounds the operative cause doctrine of intervening acts instead.

Taken together, these proposals create a more satisfactory and justifiable doctrine of causation than the law currently provides. They are an appropriate and effective way of addressing the weaknesses within the current law of causation as applied to the familial homicide context.

Chapter Three

Familial Homicide and the Law Governing Omissions Liability

Introduction

As explained in Chapter One, the offence of familial homicide imposes liability on an individual if he either causes the death of the victim or, of particular relevance to this chapter, he allows it. According to section 5 of the Domestic Violence, Crime and Victims Act 2004, the defendant may be liable for allowing the death of the victim. The defendant incurs omissions liability if he is a member of the same household as the victim,[1] and has frequent contact with him.[2] The duty is breached when the defendant fails to take reasonable steps to protect the victim from a significant risk of serious physical harm from the unlawful act of another.[3] He must also be aware, or ought to have been aware, of this risk of harm,[4] and the unlawful act must have occurred in circumstances of the kind which the defendant foresaw or ought to have foreseen.[5]

This statutory form of omissions liability is restrictive in scope, which means that culpable individuals escape liability, and also that justice for the victim is not always achieved. Furthermore, it does not provide adequate protection for the victim because he must be at significant risk of serious physical harm before the defendant is obliged to act to protect him. This is of particular concern when the lesser offence of causing or allowing serious harm applies.

The offence needs to be reformed in order to better achieve its original objectives.[6] This chapter proposes a new duty of personal association, breach of which leads to

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[1] S. 5 (1)(a)(i). S. 5 (4)(a) holds that D is regarded as a member of the household, even if he does not live there, if 'he visits it so often and for such periods of time that it is reasonable to regard him as a member of it'.
[2] S. 5 (1)(a)(ii).
[3] S. 5(1)(c), s. 5(1)(d)(ii).
[4] S. 5(1)(d)(i).
[5] S. 5(1)(d)(iii).
[6] These objectives were outlined in Chapter One.

liability for familial homicide, provided that the defendant has *mens rea* and satisfies the causation requirements of the offence.[7]

Section 1 will outline the rationale for the new duty of personal association. Section 2 will explain this duty, and what constitutes breach of it. Section 3 will outline potential academic objections to the duty, and respond to them, ultimately concluding that the new duty is a necessary addition to the law of familial homicide.

1. Rationale for the duty of personal association

This section explains the underlying reasons for introducing a duty of personal association. The underlying rationale of the personal association duty is unreasonableness, as will become clear throughout this chapter. The defendant should be liable for his unreasonable conduct provided that he has a pre-existing relationship with the victim and can easily act to affect her rescue. As discussed in the previous chapters, the current approach of section 5 is too narrow and does not adequately reflect the fact that individuals may be culpable due to their unreasonable conduct. A broader form of familial homicide liability is needed, and there are three key reasons for this. First, it will convict more culpable defendants of familial homicide than the present system. Second, it will provide greater protection for vulnerable victims. Third, it will give greater weight to the underlying unreasonableness rationale of the familial homicide offence. Each of these reasons will now be explained in turn.

a. Conviction of culpable defendants

Culpable individuals could escape liability within the familial homicide context due to two key problems with the law of omissions liability. First, the traditional approach towards omissions liability is too restrictive, as the list of exceptions to the general rule that omissions are not criminally punishable is too narrow to convict all culpable individuals. Second, the duty itself in section 5 is also too narrow to convict all those who should be held liable for the offence. This section will discuss each of

[7] See Chapters Two and Four for further detail.

these points in turn in order to explain this rationale for the personal association duty.

i. Expands the traditional approach towards omissions liability

As a general rule, the criminal law holds that individuals are not liable for their failure to act. However, there are certain exceptions to this rule, meaning that an individual's failure to act can be the subject of criminal sanctions in some cases.[8] This is appropriate because in certain circumstances omissions are culpable and thus merit criminal punishment.

Yet the law's traditional approach is far too restrictive within the current context, meaning that culpable defendants will escape liability.[9] In cases of familial homicide, a broader approach than the traditional doctrine is needed due to failures with the existing law. Take the traditional duty arising from a voluntary assumption of responsibility for the victim, as arose in *Gibbins & Proctor*.[10] The defendants failed to feed the victim which caused her to die of starvation. They were held liable for this failure because they had voluntarily assumed responsibility for the victim. However, this duty is too narrow to cover familial homicide cases. This because both the defendants directly failed to feed a victim for whom they had assumed responsibility, but in familial homicide cases the omitter's liability is not always so direct and obvious, and the defendant does not necessarily assume responsibility for the victim. Take the following example:

> O is V's childminder. K drops V off at O's house five mornings per week. O sees the injuries to V. V tells her that his dad hits him and kicks him. O does nothing.

Here O is the indirect cause of death. Yet she does not voluntarily assume responsibility for the victim's welfare. This is because the scope of those who may be liable under a duty of voluntary assumption of responsibility has been construed

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[8] See, for example, *R v Pittwood* (1902) 19 TLR 37 which exemplifies the contractual-based exception to omissions liability, and *R v Stone & Dobinson* [1977] QB 354 which demonstrates the voluntary assumption of responsibility exception.

[9] Elliott, C., "Liability for Manslaughter by Omission: Don't Let the Baby Drown!" (2010) 74 *Journal of Criminal Law* 163 makes a similar general point.

[10] *R v Gibbins & Proctor* (1919) 13 Cr App R 134.

narrowly by the case law.[11] The link between O and V is more indirect than the situations in which the courts have traditionally imposed duties arising from a voluntary assumption of responsibility.[12] However, O is culpable for the victim's homicide because she is an indirect cause of the victim's death, and is aware of the abuse and can easily act to prevent it, yet she does nothing. The existing voluntary assumption approach is therefore too narrow to catch all culpable individuals within its ambit.

The narrowness of the current law of omissions liability is also highlighted by the *Miller* exception to the general rule.[13] The *Miller* principle holds that if the defendant creates a dangerous situation he is under a duty to act to prevent further harm from occurring. This is too narrow to catch all those who are culpable for familial homicide because in the vast majority of cases the omitter may not create the dangerous situation herself, or it may be impossible to prove which of the defendants in fact created the dangerous situation. Take the example discussed above. O does not create the dangerous situation herself, yet she is responsible for her failure to act in respect of the situation. Criminal liability is warranted, yet her conduct would fall outside the ambit of the *Miller* principle.

Although section 5 does broaden the traditional scope of liability for omissions, which is beneficial, it needs to go much further.[14] The personal association duty further increases the scope of omissions liability and plugs the current gap in the law.

The proposed duty increases the list of traditional exceptions to omissions liability. Traditionally a strong link between victim and defendant has been necessary. The personal association duty does require a link between defendant and victim, however, it shifts the focus towards the culpability of the defendant, and whether he should be liable for his unreasonable failure to act, as opposed to whether he falls within a traditional category such as a familial obligation or a contractual duty. This is likely to catch more culpable defendants than are currently being held liable.

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[11] See *R v Sheppard* (1862) Le & Ca 147 for example.
[12] As in *Gibbins v Proctor*, above.
[13] *R v Miller* [1983] 2 AC 161.
[14] This is discussed in greater detail below.

ii. Broadens the form of omissions liability in section 5

The personal association duty is also needed to broaden the scope of the omissions liability within section 5. Section 5 is too narrow to catch all those who should be liable for familial homicide. This is due to the restrictive nature of the terms used to define the duty. Take 'household' for example. Under section 5 (1)(a)(i), a defendant can only be liable for familial homicide if he was a member of the same household as the victim. According to section 5(4)(a):

> A person is to be regarded as a "member" of a particular household, even if he does not live in that household, if he visits it so often and for such periods of time that it is reasonable to regard him as a member of it.

This narrow conception means that the defendant must have a very close relationship with the victim and spend a lot of time in a specific, restrictively defined, location with him. This is not only artificial and unrealistic but, more importantly, it does not catch all those who are culpable. Again, take the example above regarding the childminder. The care of the child takes place in the childminder's house. Although she is culpable for the victim's death, the arbitrary restriction of the offence to the victim's house means that she would not incur liability even though such liability may be deserved.

Another term used in section 5 which is too narrow to catch all those who should be held liable is 'serious physical harm'. The narrowness of this term is considered in greater detail below, but it can be briefly be stated here that the term cannot catch all culpable defendants because in order for action to be obliged, the victim must be at quite high risk of obvious harm. This sets the threshold for liability too high, as individuals may be culpable even when the victim does not suffer 'serious' or 'physical' harm.

So, the current form of omissions liability within section 5 is too narrow to catch all those who should be liable for familial homicide. The personal association approach broadens the scope of the duty which, when breached, gives rise to liability. This will be seen below when the precise terms of this novel duty are outlined.

It has been highlighted above that a new form of omissions liability is needed in the familial homicide context in order to justifiably increase the number of exceptions to the traditional rule that, generally, an individual's failure to act is not criminally punishable. Although the offence in section 5 does increase the number of exceptions, the form of omissions liability laid down by the offence is insufficient to adequately achieve the objectives of the offence because it is too narrow in scope.

A related rationale for the personal association duty is based on the need to protect vulnerable victims. This will now be discussed.

b. Protection of vulnerable victims

As the current law is too restrictive to extend to all those cases which it should, it does not fully protect victims. This is part of the rationale for developing the personal association duty. Due to the importance of protecting life, the personal association duty is necessary because it imposes omissions liability on those who are in a position to prevent further harm, or even death, to vulnerable victims, but who culpably fail to do so. Although the personal association approach raises questions over the legitimate interference with individual liberty, such incursion is justifiable when balanced against the severe harm which may be prevented by a temporary and minimal interference with liberty.[15]

Although the personal association approach does require a link between defendant and victim, it is purposely defined widely in order to maximise victim protection. The breadth of the duty will become clear when the precise terms of the duty are explicated in further detail below.

There is support for a broader scope of omissions liability on the grounds of protecting vulnerable victims. For example, other countries have a duty of easy

[15] For a similar argument, see Ashworth, A., "The Scope of Criminal Liability for Omissions" (1989) 105 *Law Quarterly Review* 424 at p. 432. The ease of discharging the duty ensures that the defendant need only take minimal steps to discharge his burden, thereby ensuring that the incursion on his liberty is minimal.

rescue; Germany has a statutory duty to assist others in peril. France, Spain and some American states also have such duties.[16]

There is also support for such duties as that within the familial homicide offence. Hughes, for example, argues that for reasons of victim protection a duty to act should be imposed when the victim is in danger, and the defendant recognises this and can easily effect the rescue.[17] As will be explained below, the personal association duty is imposed when the victim is at significant risk of harm; there is evidence of this risk; and it is unreasonable for the defendant to fail to act. There are similarities between the two approaches. For example, both require a level of harm to the victim, and only require the defendant to act when he can easily do so, thereby safeguarding his rights.

However, the proposed duty is broader because it is not limited to emergencies in the same way as Hughes' approach, which is preferable because harm does not only occur in emergency situations, and defendants do not only appreciate the victim's situation in cases of rescue. There is no reason to limit the duty to emergencies.

Another reason for why the form of omissions liability in section 5 needs to be amended is to better reflect the unreasonableness rationale for familial homicide.

c. Reflects the unreasonableness rationale for familial homicide

The current form of omissions liability within section 5 does not adequately reflect the unreasonableness rationale for familial homicide. This is because it is too narrow in scope to catch all those who act unreasonably, and are thus deserving of criminal culpability, provided that the other conditions of the offence are met. The contours of the household concept used by section 5 do not correspond to the demands of reasonableness.

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[16] See Ashworth A., & Steiner, E., "Criminal Omissions and Public Duties: The French Experience" (1990) 10 *Legal Studies* 153 and Fletcher, G., "Criminal Omissions: Some Perspectives" (1976) 24 *American Journal of Comparative Law* 703 for further discussion of these duties.
[17] Hughes, G., "Criminal Omissions" (1958) 67 *Yale Law Journal* 590 at p. 626.

The underlying rationale for this duty is unreasonableness. As indicated below, this is what liability hinges on; if the defendant's conduct was not unreasonable, he will not be held to have breached his duty and he will not be held liable. If it is unreasonable, he will breach his duty. This is an important reason for having the personal association duty. It is the failure to act, in spite of this personal association, which makes the defendant's behaviour unreasonable. Take the following example:

> D is K's sister. K comes to her house to visit twice a week with her baby daughter, V. K regularly assaults V in D's presence, and one day she attacks V so severely that V dies from her injuries.

Here, D can easily act to protect V by taking steps such as calling the police or social services. Her failure to protect V when faced with such a situation is unreasonable because she is aware of the situation and could easily act to change its outcome.[18]

The duty of personal association better reflects this unreasonableness rationale. It broadens the form of omissions liability within section 5 to catch more culpable defendants, as highlighted above, whilst ensuring that only those defendants who act unreasonably and are thus responsible for their failure to act will be caught. It does this through the conditions which are placed on the duty, such as personal association and significant risk, as well as the *mens rea* requirement. Breach of the duty allows punishment of those who have wronged another, and therefore deserve punishment.[19] Although Dressler argues that the risk of punishing innocent people is high for 'bad Samaritan' statutes,[20] the personal association aims to avoid this by the presence of the aforementioned conditions.

The above discussion has highlighted three key reasons for why the form of omissions liability in section 5 needs to be amended. The next section will explain the proposed amendments to the statute.

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[18] A general point by Glazebrook is relevant here. In Glazebrook, P.R., "Criminal Omissions: the Duty Requirement in Offences Against the Person" (1960) 76 *Law Quarterly Review* 386 at p. 411 he states that '[a] legal system might impose liability wherever a reasonable person would and could have come to the aid of another, and the criminal intent was present. The difficulties of this course are probably less than are generally admitted.'

[19] Herring, J., *Criminal Law: Text, Cases and Materials* (Oxford: Oxford University Press; 3rd edition; 2010) at p. 71, citing Kant.

[20] Dressler, J., "Some Brief Thoughts (Mostly Negative) About "Bad Samaritan" Laws" (2000) 40 *Santa Clara Law Review* 971 at p. 982.

2. The duty of personal association

The current duty within section 5 should be replaced by the duty of personal association. This duty arises when:

a) The defendant had a personal association with the victim and had regular contact with him; and

b) The victim was at significant risk of serious harm being caused by an unlawful act of the killer

The duty is breached when:

c) The defendant's failure to act was unreasonable

The duty is accompanied by a *mens rea* requirement, which is that:

d) The defendant was aware, or ought to have been aware, of the significant risk of harm to the victim; and

e) The defendant's failure to act was unreasonable; and

f) The unlawful act occurred in circumstances of the kind which the defendant foresaw or ought to have foreseen.

This *mens rea* requirement is discussed extensively in the *mens rea* and domestic violence chapters, and thus it will not be discussed in detail here. This section will now explain the first three terms of the personal association duty in greater detail.

a. The defendant had a personal association with the victim and had frequent contact with him

The first limb of the duty is that the defendant had a personal association with the victim. There are four requirements here: 'personal', 'association', 'victim', and 'frequent contact'. This section will take each of these requirements in turn, explaining them in greater detail.

i. 'Personal'

The association between the defendant and the victim must be 'personal'. This contrasts with both the approach of the Law Commission and section 5.

The Law Commission proposed that omissions liability should be imposed when the third party defendant 'has responsibility for' and is 'connected' with the victim, meaning that they live in the same household, or are related, or the defendant looks after the victim under a childcare arrangement.[21] This was a high threshold. This was exacerbated by the provision regarding child care arrangements which stipulated that the defendant could only be liable if the duty arises from a childcare arrangement where the defendant looks after the victim 'wholly or mainly' in the victim's home.[22] This restricted the applicability of the offence, thus not wholly safeguarding victims or achieving justice. A less complex approach which accounts for more everyday links, such as the personal association approach, is preferable because it does not impose artificial constructs onto everyday relationships; rather, it expresses the notion of our most common links with other individuals.

Section 5 limits potential defendants to those who are members of the same household as the victim. It again fails to give sufficient protection to vulnerable victims as it limits liability to those who have a close relationship with the victim, and frequently visit the victim's house. Yet in many situations the defendant may not have such a strong link with the victim, or be a frequent visitor. For example, the

[21] Law Commission, *Children: their Non-Accidental Death or Serious Injury* (Law Commission No. 282; 2003) Appendix A contains their Draft Bill. See sections 2 (3)(b), (c) and 2(4).
[22] *Ibid.*, section 2 (6)(b).

victim may be cared for by the third party defendant at the latter's house, or the victim may be a vulnerable adult who sees the defendant at their shared workplace. A broader approach towards omissions liability is necessary.

Adopting the approach of 'personal' provides this broader mechanism. Whether a 'personal' association exists between the two parties will be determined on a case-by-case basis. This is because there are a vast number of unconventional and varied personal links which may exist between the defendant and the victim,[23] and thus it is appropriate to determine in each individual case whether the defendant has this relationship with the victim. If a standardised approach was adopted towards the meaning of 'personal', this would inevitably exclude some of the more unconventional personal links, thus meaning that culpable defendants may escape liability. Consequently, an approach of structured discretion is needed. Structured discretion, with clearly stated principles, can engender certainty, and this is the approach which is adopted here.[24] Moreover, this will help to ensure that the proposed duty does not breach the principle of legal certainty.

However, a partial definition of 'personal' will be helpful because the proposed duty is novel, and thus has no established jurisprudence. A basic definition of 'personal' is that the defendant and the victim had a link or connection with each other including, but not limited to, an association for a common purpose. There is a familiar link between the individuals in question, and notions of common sense will help to shape the definition and jurisprudence here. A personal association may include familial, social, and employee relationships. An example helps to explain this:

> O is a friend of K. K attacks her 3 year old daughter, V, on a regular basis. O sees V covered in bruises, and although she has never witnessed any of the attacks on V by K, she suspects what is occurring, but does not know for sure. She does not think that V is at risk of serious harm, and thus she takes no steps to find out what is going on, and ignores V's injuries. V dies in an attack by K.

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[23] A point noted by Hayes, M., "Criminal Trials Where a Child is the Victim: Extra Protection for Children or a Missed Opportunity?" (2005) 17 *Child & Family Law Quarterly* 307 at pp. 317-8 in relation to family relationships and the 'household' provision in section 5.

[24] See, for example, Hawkins, K., "The Uses of Legal Discretion: Perspectives from Law and Social Science" in Hawkins, K., (ed) *The Uses of Discretion* (New York: Oxford University Press; 1992) pp. 11-46 and Schneider, C.E., "Discretion and Rules: A Lawyer's View" in Hawkins, K., (ed) *The Uses of Discretion* (New York: Oxford University Press; 1992) pp. 47-88.

O has a link with V. Although they are not related, the facts highlight that they have a personal relationship with one another. There is a familiar link between them. O sees V regularly, and the two have a social relationship. O would therefore fall within the scope of the personal association duty. She would fall outside the scope of section 5 however because she is not a member of the victim's household, which is problematic because she has the necessary culpability. Consequently, the personal association approach is a more principled approach towards liability.

Personal is not constrained to family relationships or to the artificial concept of 'household' in order to provide a more natural and clear approach to the law, and to increase protection for victims, as well as to include all potential blameworthy defendants within its ambit. Examples of personal relationships are included to add definition to this novel area of law, however. The examples are non-exhaustive because there are many unconventional personal associations, and an exhaustive definition would mean that these would fall outside the duty's ambit. The examples are:

i. A family relationship of any kind

ii. Individuals who care for the child in any capacity, for example babysitters, childminders and crèche workers. The location of the care is irrelevant, as the significance lies in the association

iii. Social relationships

The basic idea of 'personal' is that the relationship between the victim and the defendant must be stronger than merely two people whose paths often cross. The content of the relationship must be viewed. Factors such as the duration of the relationship, its nature, and its extent may be considered in order to determine whether the relationship is in fact a personal one. The frequency requirement, discussed below, indicates that the defendant must have regular contact with the victim, which aligns with this approach and helps to explain its meaning.

This definition accords with common sense as it incorporates the most common associations, and those which are most likely to occur in everyday life. Consequently, individuals will have a better idea of what is expected of them. Moreover, this approach is more straightforward than the artificial 'household' construct in section 5, as the current statutory definition encompasses those traditionally regarded as part of a household since it includes those who do not live there, and is thus counter-intuitive.

The second requirement of the new duty is that the defendant must have an 'association' with the victim. This will now be discussed.

ii. 'Association'

The personal relationship between the defendant and the victim must take the form of an 'association'. This means that there must be some familiarity between the parties, thus helping to respond to the liberty-based objections to the proposed duty which are considered below. Again, there is no set definition of this term as the notion is one based on common sense and each case will need to be assessed on its facts to ascertain whether it falls within the meaning of a personal association.

Although there must be a pre-existing relationship between the parties, this does not necessarily have to be extensive. This is because defendants may be culpable for their failure to protect the victim from the significant risk of harm even if they do not have a close relationship with him. The following example highlights the meaning and application of this aspect of the personal association duty:

> Four year-old V has a best friend, A. V and A play together twice a week, once at V's house and once at A's house. One day, whilst at A's house, V tells A's mother (O) that his stepfather hits him and shows her his bruises. O does nothing.

O has an association with V. They have a pre-existing relationship by virtue of the regularity with which they see each other and the nature of their association. Even though they may not have a close relationship, the link between them is sufficient to

warrant imposing liability on O for her failure to act. Their relationship is a social one, which as noted above is one example of a link which may be personal.

The approach towards definition of 'association' follows the definitional approach adopted above for 'personal', meaning that the jurisprudence on its meaning is to be developed judicially. This is for the same reasons as given above, namely that there are a number of different personal associations which may exist between defendant and victim, and to provide a comprehensive definition would inevitably exclude some of the more unconventional associations from the ambit of the duty.

The need for a personal association broadens the scope for applicability of the duty when compared to the current law. The defendant in the example above would, again, fall outside the scope of the section 5 duty even though she is culpable for her failure to act. Section 5 thus contradicts its own rationale of convicting culpable defendants for the victim's death. The increase in scope results in increased protection and redress being available for vulnerable victims and helps to ensure the conviction of culpable individuals. This aligns with the original aims of the legislation.[25]

The next aspect of the duty is the meaning of 'victim'.

iii. 'Victim'

According to section 5, an individual may be a victim of familial homicide if he is a child aged 16 or under or if he is a vulnerable adult. According to section 5(6), the victim is considered to be a vulnerable adult if he is aged 16 or over, and:

> [H]is ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise.

[25] See above and Chapter One.

The Court of Appeal in *Khan*[26] adopted a broad interpretation of 'otherwise', holding that such vulnerability may only be temporary, and could include young, healthy adults if they were dependent on others.[27] This accords with Parliament's intent for the offence to cover a wide range of victims,[28] and by increasing the scope of victims that the offence covers it also increases the scope for the offence to catch culpable defendants. Accordingly, the personal association duty will adopt the same definition of 'victim', but with one minor change.

Section 5 holds that a victim must be aged 16 or under if he is to be classed as a child. So, if he is 16 or 17 years old he must satisfy the requirements of 'vulnerable adult' before the defendant can be liable in relation to his death. This is problematic because it is a higher test to satisfy. It requires more than mere age; the victim must meet criteria of vulnerability. This is inappropriate because such victims are still legally children and should thus be afforded the necessary protection and retribution offered by the wider definition of 'child'.

Consequently, the approach adopted by the personal association duty slightly modifies the statutory approach, holding that a 'child' is an individual under the age of 18, whereas a 'vulnerable adult' is an individual aged 18 or over. This approach is also more straightforward, and accords with commonsense notions of 'child' and 'adult', thus making it more understandable and accessible to citizens.

The next requirement needed to establish a duty of personal association is that the defendant had regular contact with the victim.

iv. 'Regular contact'

Section 5(1)(a)(ii) currently holds that the defendant must have frequent contact with the victim. This limitation is too restrictive to catch all culpable defendants, however. This is highlighted by the following example:

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[26] *R v Khan* [2009] 1 Cr App R 28.
[27] *Ibid.*, at [25] – [27].
[28] See Morrison, S., "Allowing the Death of a Vulnerable Adult" (2009) 125 *Law Quarterly Review* 570 at pp. 570-1.

> O is a friend of K. She comes to stay with them once every two months for a few days. While she is there, she notices K hit and kick V, K's six year old son. On one occasion K injuries V so severely that he has to be taken to hospital. In a subsequent attack by K, V dies.

It is questionable whether O would meet the frequency requirement within section 5. Although *Khan* interpreted this requirement broadly, holding that it relates to the victim himself rather than the risk to which he is exposed, it is clear from the facts that O's contact with V is not frequent. This is because there is a relatively long period of time between the occasions when O is in contact with V. O is likely to fall outside the scope of the section 5 duty, which is problematic. Through her failure to protect V she indirectly causes his death. The facts indicate that she is aware, or ought to have been aware, of the risk to V, meaning that she is likely to have *mens rea*. She is in a position to act to protect V with whom she has a personal association, yet fails to do so.

Similar to the approach adopted towards 'personal association', and for the same reasons as highlighted above, the precise definition of this term will be explicated by the case law. However, the above example does indicate the type of situation in which the defendant will be held to have had regular contact with the victim. Although O's contact with V is not frequent, she nevertheless sees him on a regular, albeit infrequent, basis. The broader approach adopted by the personal association duty thus catches more culpable defendants within its ambit than the current form of familial homicide.

The above discussion has explained the first requirement of the personal association duty. It should be noted here that this duty will not oblige strangers to act in cases of familial homicide. This is because it requires a pre-existing personal relationship between defendant and victim. This approach is justifiable because strangers who witness a one-off instance of abuse without perceiving that the victim would die as a result do not have the necessary level of culpability for such a serious homicide offence.

The second limb of the personal association duty is that the victim was at significant risk of harm being caused by the unlawful act of the direct cause of death. This will now be explained in greater detail.

b. The victim was at significant risk of harm being caused by the unlawful act of the direct cause of death

There are four key requirements here: 'significant risk', 'harm', 'unlawful act' and 'direct cause'. The meaning of victim has already been explained above. This section will now outline each of these requirements in turn.

i. 'Significant risk'

This aspect of the personal association duty can be dealt with briefly because it follows the current statutory approach. It also ties in with the existing jurisprudence relating to the *de minimis* rule within the law of causation, whereby trivial harms are excluded. An analogy can therefore be made here with the well-established approach adopted by the court in the causation case of *Cheshire*.[29] According to this approach, the risk is a significant one if it is outside the *de minimis* range of risks.

The next requirement of this second limb of the personal association duty is that the victim must be at significant risk of 'serious harm' before the defendant is obliged to act to protect him from that risk.

ii. 'Serious harm'

The victim must be at risk of serious harm before a duty to protect him is imposed on the defendant. This contrasts to the current statutory approach. Section 5 imposes liability over a 'significant risk of serious physical harm.' However, the personal association duty imposes liability over a significant risk of any serious harm to the victim, whether mental, emotional or physical. Serious harm means any kind of injury. It can include physical harm such as bruises, mental harm such as depression,

[29] *R v Cheshire* [1991] 1 WLR. 844.

and emotional harm such as emotional abuse. This marks a departure from the visible harm required by section 5 which fails to place adequate weight on obliging action before it is too late.[30]

Mental and emotional harm are included to increase protection for victims and to punish culpable omitters. In practical terms, there is no difference between physical and other types of harm. Emotional and psychological harm give rise to the same issues within the familial homicide context.[31] The victim is still at significant risk of serious harm, whether mental, emotional, or physical, and this risk could lead to his death if the omitter fails to act. The defendant still fails to protect the victim from a significant risk of harm of which he is aware, or ought to have been aware, and he can easily act to affect. There is no practical reason for excluding other types of harm from a statute which already includes physical harm.

In terms of defining this requirement, the meaning of mental and emotional harm follows the jurisprudence of the Offences Against the Person Act 1861, under which cases such as *Ireland*[32] and *Dhaliwal*[33] held that psychological harm must consist of a medically recognised illness. The personal association duty adopts this definition in order to accord with existing jurisprudence, thereby making this novel duty accessible to citizens as it links with the current law.

Additionally, such an approach is sensible because to extend psychological harm to harm which does not consist of a recognised illness would allow individuals to be liable for homicide where there was merely a risk of the victim suffering, for example, mere upset prior to death. Broadening the law in such a way would be inappropriate because if the defendant had evidence of a significant risk of upset to the victim, he could be liable for a serious homicide offence. This would breach the principle of fair labelling, as the defendant would be labelled in accordance with a

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[30] Section 5 imposes liability where the victim has died, however, this was noted as unsatisfactory in another chapter and a middle tier offence of allowing harm was created to bridge the gap between section 5 and the child neglect offence in section 1 of the Children and Young Persons Act 1933.
[31] Woozley, A.D., "A Duty to Rescue: Some Thoughts on Criminal Liability" (1983) 69 *Virginia Law Review* 1273 at p. 1276.
[32] *R v Ireland; R v Burstow* [1998] AC 147.
[33] *R v Dhaliwal* [2006] 2 Cr App R 24.

homicide offence even though in actuality he contemplated that the victim would suffer mere upset.

However, as mental and emotional harm can be difficult to detect, it may be harder for the defendant to have evidence of this type of harm. Nonetheless, if the defendant does indeed have evidence of such harm he will be liable for failure to act, which is justifiable for the reasons given above.

a. Counterargument based on physical distinction

There is a counterargument which needs to be responded to here. Although there is no practical reason for distinguishing between physical and other types of harm for the purposes of the familial homicide offence, there is a key physical distinction between the different harms. Arguably physical harm may show a greater propensity to cause death, and thus only this type of harm should give rise to a duty to act on the defendant. Nonetheless, this can be dispensed with, indicating that it is in fact justifiable for harms other than physical ones to form the subject of the personal association duty.

Dhaliwal helps to dispense with this objection. Here, the defendant repeatedly inflicted emotional abuse on his wife, which eventually led to her taking her own life. Emotional harm proved to be fatal. The defendant was liable for his wife's death. Although this case differs to a familial homicide one because a familial homicide case may not involve the omitter herself inflicting the emotional harm, but merely witnessing it, the case does demonstrate the harm that emotional abuse causes. The infliction of emotional harm evinces the same kind of disregard for the victim's welfare as physical harm does; it is still the infliction of injury on a vulnerable individual. Accordingly, if the omitter in a familial homicide case fails to act in respect of witnessing repeated emotional abuse, and she was aware, or ought to have been aware of the significant risk that this posed to the victim, she should be liable for familial homicide provided that she could easily act to protect the victim.

b. Counterargument based on different types of harm

However, there is another potential objection here. This objection holds that there may be some cases where the defendant has evidence of a significant risk of harm X to the victim, when in fact it is harm Y which is taking place. Take the following situation:

> O lives with her husband, K. K regularly subjects their eight year old child, V, to emotional abuse. One day, while K is shouting abuse at V, he pushes V down the stairs, causing injuries so serious that V dies.

O has evidence of harm X, which is emotional abuse. Yet it is harm Y, which is physical abuse, that actually kills V. However, the mere fact that the harm which O has evidence of differs to the harm which fatally injuries V does not mean that O should not be held liable for V's death. She is culpable for V's death, so should be held as such. She has a personal association with the victim, and can easily act to protect V. She is an indirect cause of V's death and the facts demonstrate that she is aware, or ought to have been aware, of the significant risk of serious harm to V.

This example indicates how emotional abuse can progress into physical, even fatal harm. Even though no physical harm occurred prior to the fatal injuries inflicted on V, the example demonstrates how emotional abuse can be a sign of the defendant's propensity to kill the victim through his physical conduct, and thus that emotional and psychological harm should fall within the definition of harm.

c. Counterargument based on *Dhaliwal* itself

Yet another potential objection to adopting the *Dhaliwal* approach is based on the outcome of the case itself. This objection differs to the above two counterarguments. The above two counterarguments object to adopting mental and emotional harm as a basis for legal consequences because it is over-inclusive. However, the current objection to the *Dhaliwal* approach takes the opposite view and holds that the approach is too limited. Take the above example involving K, O, and their 8 year old child V. There, V does not suffer a recognised psychiatric illness, and would therefore fall outside of the scope of the duty discussed within this chapter.

Linked to this is the outcome in *Dhaliwal* itself. Here, the injuries the defendant inflicted on the victim were severe but were assessed to not amount to a recognised psychiatric harm. Accordingly the defendant was acquitted on appeal. This may be problematic because the defendant's conduct was held to have been a causal factor in the victim's death. The defendant was acquitted for the role he played in the death of the victim, which is problematic for justice.

However, this counterargument can be responded to. As discussed within this chapter and elsewhere within this thesis, the proposals advanced for reform of the omissions liability created by familial homicide aim to increase the duty proposed in an incremental fashion. For example, it broadens the meaning of victim slightly by changing the age required for a 'child' under the Act. It also changes the relationship required for imposition of the duty, broadening its scope. In order to ensure that the proposals advanced by this chapter have a chance at practical implementation, it is important that they do not contrast to an unduly large extent with the traditional doctrine of criminal law and its approach towards omissions liability.

Furthermore, to increase the meaning of emotional and mental harm to include that which falls short of recognised psychiatric illness would give rise to definitional issues as the point has not been explicated in the case law. Therefore, to link it with the meaning of the existing case law, at least for inception, would provide a more principled and accessible approach towards the issue.

Moreover, the law does not necessarily have to stay this way forever. If in the future it was determined that the duty was too narrow to include the harm which had occurred, it could be modified to include this. At inception, it is important that the duty of personal association is as clearly defined and linked to the existing case law as much as possible to aid understanding and implementation of such a novel duty.

Another requirement of this limb of the personal association duty is that the victim was at significant risk of harm being caused by the 'unlawful act' of the direct cause of death.

iii. 'Unlawful act'

This requirement can be dealt with briefly. This concept is well-established within the law, and means any unlawful criminal act of the direct cause.

The fourth requirement of this limb of the personal association duty is that the defendant was aware, or ought to have been aware, of the risk of harm posed by the unlawful act of the 'direct cause' of death.

iv. 'Direct cause'

The precise meaning of this requirement is explained in greater detail in the causation chapter, and defined in the Draft Bill, thus it will not be restated here.

The foregoing has explained the requirements needed to establish the duty of personal association. The next section explains when the defendant will breach this duty, and thus be liable for his omission to protect the victim.

c. The defendant's failure to act was unreasonable

Currently section 5 holds that the duty to act is breached when the defendant fails to take reasonable steps to protect the victim from a significant risk of serious harm.[34] The personal association duty similarly bases breach on the concept of reasonableness, in accordance with the underlying unreasonableness rationale of the familial homicide offence, but it modifies the approach to hold that the defendant is instead liable if his failure to act in respect of the unlawful act of another is unreasonable.[35] The two concepts are subtly different. Reasonableness focuses on the acceptability of the defendant's conduct, whereas unreasonableness shifts the focus

[34] S. 5(1)(d)(i)-(ii). The Law Commission's Draft Bill section 2 (1)(b) also adopted a 'reasonable steps' test. According to *R v Khan* [2009] 1 Cr App R 28 at [33], this 'requires close analysis of the defendant's personal position', meaning that the defendant's circumstances, for example domestic violence, can be considered when deciding whether failure to act was reasonable.

[35] For discussion of a 'reasonable man' standard specifically, see Forrell, C.A., & Matthews, D., *A Law of Her Own: The Reasonable Woman as a Measure of Man* (New York: New York University Press; 2000) and Nourse, V., "After the Reasonable Man: Getting Over the Subjectivity/Objectivity Question" (2008) 11 *New Criminal Law Review* 33.

slightly onto how unacceptable his conduct was. Determination of whether the conduct is unreasonable is easier as in a given situation it is likely to be more obvious whether the defendant's failure to act fell short of the standard of the reasonable man, sharing his circumstances and characteristics, than whether failure to act was reasonable.[36]

It is relatively easy to discharge the duty. This will hopefully encourage more people to act, as it does not require much effort. Further, the ease of discharging the duty helps to rebut the liberty objection, discussed below.

Prior to discussing when the duty will be breached, it will be useful to assess exactly what is meant by the notion of unreasonable.

i. The meaning of unreasonable

There are various different conceptions of this term within the law, so for clarity and certainty it is necessary to determine which applies within this context.[37] The conception of unreasonable adopted here is a qualified objective one. This means that although it assesses the defendant's conduct against an objective standard, it considers the defendant himself, and what was unreasonable for him in that specific situation. It thus shows sensitivity towards individual defendants, and so may be described as a 'qualified objective' standard.

As detailed in Chapter Six, this is the most appropriate standard to adopt in the familial homicide context because it couples the widely used and common-sense approach of reasonableness with a subjective sensitivity towards individuals. This ensures that there is a defined objective standard which individuals should live up to when interacting with other people, whilst taking characteristics and circumstances specific to individual defendants into account in order to make a fair assessment of their culpability.

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[36] For a similar point, see Ashworth, above at p. 455 where he considers that 'unreasonable' is more likely to meet concerns over fair labelling than 'reasonable.'

[37] This is discussed in further detail in Chapter Six. Wilson, W., "Murder by Omission" (2010) *13 New Criminal Law Review* 1 at p. 19 indicates that the issue of reasonableness in relation to omissions liability is particularly problematic.

Including such a condition attempts to balance the importance of rescuing the victim by those under a duty to act with the liberty of the rescuer. If this requirement was absent, liberty would be affected as the person under a duty would be forced to act even if it would endanger his own life, for example.

Feinberg considers the concept of unreasonableness within his work. He argues that failure to act violates the victim's rights to be saved by someone who can do so without unreasonable risk, cost or inconvenience, thereby setting back his interests and causing him harm.[38] He states that 'bad Samaritan' statutes should accordingly be formed 'on relatively vague terms that allow juries the discretion to apply standards of reasonable danger, cost, and inconvenience.'[39]

This approach ensures that liberty is only interfered with when the omitter's conduct can be carried out without unreasonable risk, cost, or inconvenience. Only minimal steps are necessary which, as noted above, is sensible. Moreover, Feinberg argues that juries are frequently entrusted with such duties, and that the approach minimises the risk of prosecutorial discretion used to prosecute 'decent but unheroic Samaritans'.[40] This seems correct, however, as considered below, the risk of prosecutorial discretion is minimised in any event for the proposed duty. Unreasonableness will be assessed judicially on a case-by-case basis for the personal association approach, as discussed below.

Although there are several positive aspects about Feinberg's conception of unreasonableness, his actual approach towards risk, cost and inconvenience is problematic. First, although 'risk' is important as it ensures that defendants are not obliged to act where to do so would put themselves in danger, this can be achieved by subsuming 'risk' under a general heading of 'unreasonable'. Second, 'cost' and 'inconvenience' are not of pivotal importance in the current context as the duty can be discharged by calling the police for example, which involves little or no cost or

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[38] Feinberg, J., *The Moral Limits of the Criminal Law: Harm to Others* (Oxford: Oxford University Press; 1984) at pp. 162-3. See Smith, P., "Feinberg and the Failure to Act" (2005) 11 *Legal Theory* 237 for discussion.
[39] *Ibid*, at pp. 156-7.
[40] *Ibid.*, at p. 157.

inconvenience. Moreover, these conditions can also be subsumed under 'unreasonable', which will help to keep the law clear and simple, and thereby also enable citizens to understand what is expected of them.

Additionally, Feinberg's approach is flawed because he opines that there are only three factors which determine whether failure to act was unreasonable, whereas in reality there could be any number of reasons. For example, the defendant might not have been bothered to act, or he might have thought it would be amusing not to act, or he may have valued his relationship with the person who was harming the victim over the victim's safety.

The personal association approach reflects this multitude of reasons, thereby achieving retribution against all those who fail to act to protect the victim from further harm, no matter what their alleged justification. This also makes this area of law less technical by having one heading and definition of unreasonable, thus ensuring that the law is easier to understand and apply.

To conclude, the personal association duty adopts a qualified objective conception of unreasonableness under which any reason for not acting may be considered unreasonable when assessing the defendant's failure to act.

ii. Breach of the duty

The defendant breaches his duty of personal association when it is unreasonable for him to fail to act. Whether such failure is unreasonable will be decided on a case by case basis, which is advantageous because the proposed duty is novel, and therefore needs judicial explication. Such expansion will eventually build up a principled judicial approach to the term, thereby clarifying the law.

Focusing on unreasonableness to determine whether the defendant breaches his duty to act is supported by Ashworth, who indicates that '[i]t seems virtually impossible

to draft offences of this kind without some reliance on the term "reasonable".'[41] However, this support is not advanced by all academics.

Malm argues that using reasonableness to assess breach is problematic because hindsight can be wrong. This is because it is based on intuition, which can be misjudged in the event.[42] This criticism is unsound, however, because all offences and duties are judged in hindsight. The issue is not unique to unreasonableness; whether there was a significant risk of harm to the victim must also, for example, be assessed in hindsight. Moreover, although assessment may be made on intuition, and deciding whether failure to act was unreasonable may be more difficult in hindsight, this does not mean it should not be used for the proposed duty. Malm focuses on 'easy rescues' which generally occur in emergencies.[43] However, the personal association duty does not depend on a split second decision which may prove difficult to judge in the event; rather, it occurs over the period of time during which the defendant associates with the victim, and is aware or ought to have been aware of the harm, making assessment a slower process and giving the defendant time to judge his actions. So even if Malm's criticism is generally valid, it is not applicable to the proposed duty.

Furthermore, adopting the concept of unreasonable in this context is not a contestable issue in any event. As discussed above, the notion of unreasonableness is an objective one which is nevertheless sensitive to individuality.

The next point to consider is how the defendant can discharge his duty of personal association.

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[41] Above, at p. 455.
[42] Malm, H.M., "Bad Samaritan Laws: Harm, Help, or Hype?" (2000) 19 *Law and Philosophy* 707 at p. 733. She also considers the issue of 'bad Samaritan' laws in Malm, H.M., "Liberalism, Bad Samaritan Law, and Legal Paternalism" (1995) 106 *Ethics* 4.
[43] See below for discussion of emergencies.

iii. Discharging the duty

It is relatively easy to discharge the duty, and the most obvious methods include contacting the emergency services,[44] social services, health authorities, or even removing the victim from the harmful situation. If the defendant realises his phone call has done nothing, failure to take further steps to protect the victim may be considered unreasonable, depending on the facts. So, in some situations the duty may be ongoing, and thus need to be discharged more than once.

Although discharging the duty by calling the police is the most practical method, it is not the only method available. However, as it is likely to be the most common, it is the one most often referred to within this thesis. All but the last method can be done with little or no cost because it requires a telephone call, and can be done anonymously, which helps to safeguard the omitter from retaliation by the killer. Moreover, making a telephone call is generally not difficult, and even if it is in a particular situation, failure to do so will not be unreasonable. Removing the victim from harm may appear controversial due to the potential risk, however this will most likely apply to parents, who are generally in a position to remove the child due to their proximity and relationship with the victim. Also, if it would be unreasonable to expect removal of the child, for example due to domestic violence, again failure to do so will not breach the duty.

The above discussion has outlined the rationale of the personal association duty, its terms, and when it will be breached. The next section outlines, and ultimately refutes, potential academic objections to this duty, concluding that none of them carry sufficient weight to object to this duty as a valid replacement for the current form of omissions liability within the familial homicide offence.

[44] There is academic support for the conclusion that failing to discharge a duty by calling the police will breach, indicating rationale for such an approach. See Ashworth, above at p. 448; Feinberg, above at p. 141.

3. Potential academic objections to the personal association duty

Despite the obvious need for a new duty to replace the current form of omissions liability in section 5, there are likely to be academic objections to the personal association approach. There are three overarching objections which may be levied against the personal association duty. First, it may adversely affect individual liberty. Second, it may raise practical concerns. Third, imposing such a duty may be considered an inappropriate use of the criminal law. These objections will now be discussed in turn.

a. The liberty objection

The overarching objection from liberty consists of two separate strands. The first relates to individual liberty in a general sense, whereas the second focuses on the more specific implications that the duty has for the traditional distinction between acts and omissions. This section will discuss these two liberty-based objections in turn.

i. Individual liberty

Academics may be concerned that the personal association duty adversely affects individual liberty. Many academics object to omissions liability on the grounds that prohibiting failure to act interferes with individual liberty to a much greater extent than prohibiting unlawful action.[45] However, this view is flawed. Take the work of Fletcher, for example. He argues that omissions liability is a greater interference with liberty because duties to act generally occur in emergencies, stating that '[t]here is nothing quite so unpredictable and insistent as having the circumstances determine when and how we must act.'[46] So on his view prohibitions against killing, for example, are less intrusive than obligations to act to prevent death in an emergency.

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[45] For example Dressler, above at p. 987; Simester, A.P., & Sullivan, G.R., *Criminal Law: Theory & Doctrine* (Oxford: Hart; 2nd edition; 2003) at p. 74; Simester, A.P., "Why Omissions are Special" (1995) 1 *Legal Theory* 311.

[46] Fletcher, G.P., *Basic Concepts of Criminal Law* (Oxford: Oxford University Press; 1998) at p. 49. This view is shared by Feinberg, above at p. 164 who states that omissions 'limit our ability to anticipate occasions on which legal duties may drop on us out of the blue, and consequently they weaken our control over our own affairs'.

Academic consensus is generally that duties to act are more intrusive than prohibitions against acting in emergencies because they remove individuals' control over their own conduct. However, this is not the case with the personal association duty, which obliges action only where there is a personal relationship between the defendant and the victim and the duty can be easily discharged. Even if the situation is an emergency, these elements must still be present. Also, it is uncommon for such duties to devolve upon individuals, which provides a temporal and practical rebuttal of this point. So, this objection does not displace the proposed duty, and even if the concern regarding emergencies stands, the duty is still justifiable because its safeguards ensure that even in emergencies such duties are not onerous.

Fletcher does, however, state that:

> [W]hether a statutory demand or prohibition is more noxious depends more on its content than the form (active or passive) of the duty imposed.[47]

This demonstrates that he recognises that it is impossible to generalise, thus meaning that the personal association duty could be justifiable even on his view. He opines that it is the content of the provision which is crucial when determining the impact on individual liberty, rather than the mere fact that it is a duty to act. The caveat to this is, as noted above, situations of emergency. This aspect of his approach is acceptable, as a general rule which states that omissions are greater interferences with liberty fails to account for the actual substance of the provision, so is not always accurate.

For example, although it is justifiable in terms of public policy and protection of security and individuals, the prohibition in section 18 of the Public Order Act 1986 criminalises the use of threatening words intended to stir up racial hatred, thus interfering with individuals' liberty of expression.[48] However, a requirement that the defendant must provide a specimen of breath at the roadside is not a great

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[47] Above, at p. 48.

[48] Although there are grounds for this provision, the example illustrates that prohibitions can interfere with liberty. See Fenwick, H., *Civil Liberties and Human Rights* (Oxon: Routledge-Cavendish; 2007) at p. 505 for discussion of the impact of this provision on freedom of expression, and her arguments for narrowing the provision so it has a more limited impact on freedom of expression.

interference with liberty because the duty can be easily discharged by breathing.[49] The general approach to omissions liability which holds that omissions are always greater interferences with liberty does not correlate with this conclusion. This conclusion is furthered by the following example of a potential familial homicide case:

> On several occasions during the summer months O1 and O2 (who live next door to K1, K2 and V) hear V in the garden screaming and K1 and K2 shouting at and threatening V and laughing. From their upstairs window they also see K1 trip V up and kick him and, on another occasion, throw V in the air and not catch him. They do nothing. V later dies in a severe attack by K1 and K2.

Here, the potential duty to act imposed on O1 and O2 could be easily discharged by them telephoning the police or social services, which is not a great interference with their individual liberty.

The personal association duty can be easily discharged. Furthermore, when it cannot be easily discharged for whatever reason, the defendant's failure to act may not be considered unreasonable, and thus he would not be liable. By viewing the content of the provision, it is clear that the personal association duty is not necessarily a greater interference with liberty than a prohibition.

However, the work of Moore needs to be considered here. He advances a different approach to the general liberty objection, arguing that because duties to act interfere with liberty to such a great extent, even morally culpable omissions should not be punished.[50] He opines that positive duties interfere with liberty because:

> [A] requirement that I do some act A effectively prohibits me from doing acts B, C, D, etc., whereas a requirement that I *not* do some act A only prohibits me from doing A.[51]

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[49] Section 7 of the Road Traffic Act 1988.
[50] Moore, M., *Act & Crime* (Oxford: Clarendon Press; 1993) at p. 48.
[51] Moore, M., *Placing Blame* (Oxford: Clarendon Press; 1997) at p. 278. A similar argument is made by Simester, above at p. 324, and Simester & Sullivan, above at p. 74. Moore's argument can be countered on the grounds that there has to be a link between act A and act B.

This would mean that the personal association duty is objectionable because it reduces individual options, thus being a great incursion on individual liberty. However, this 'reduced options' thesis is problematic. This is because it focuses on the practical effect of penalising omissions, rather than the wrongfulness of the omission, and whether the defendant *should* actually be under a duty to act.[52] It fails to consider the defendant's culpability in failing to act, which is concerning because he should be punished for his culpable conduct, whether act or omission. Moreover, if doing A is not onerous, the individual concerned may still be able to do B, C, and D, thus demonstrating that A does not interfere with his liberty to such great extent as claimed by Moore.

Another concern over Moore's thesis is that it links act and omissions. For example, it would compare the reduction of options in a prohibition against murder with a duty to act to prevent death, arguing that the latter restricts options to a greater extent than the former. Nonetheless, the two are not necessarily linked, and it does not make sense to base the justifiability of an act or omission on whether it reduces or increases more options than the alternative.[53] Prohibiting murder is not justified on the grounds that it restricts less options than failure to prevent death; it is justified because murder is in itself a free-standing wrong. This objection to the personal association duty can therefore be dismissed.

Yet Moore's objections to omissions liability continue. He also argues that:

> Drowning it [a child] makes the world a worse place, whereas not preventing its drowning only fails to improve the world.[54]

However, this argument is flawed. Arguing that all acts are inevitably worse than all failures to act is incorrect because it does not account for degrees, context or moral

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[52] Tadros, V., *Criminal Responsibility* (Oxford: Oxford University Press; 2007) at pp. 205-6 also makes the interesting point that increasing the options available to the defendant could actually have an adverse effect, as it increases stress and responsibility, through giving the defendant greater choice. However, as this does not directly respond to liberty concerns, it is not discussed.

[53] Indeed, Smith, P., "Omission and Responsibility in Legal Theory" (2003) 9 *Legal Theory* 221 at p. 222 indicates that there is no inevitable link between such aspects.

[54] Above, at pp. 58-9.

wrongness.[55] For example, failing to save a drowning child is more heinous than shoplifting chewing gum or littering. Failure to act is not necessarily less wrongful than acting.

Another reply to this liberty-based objection is that although the personal association approach may affect liberty, it is only for a limited time. The duty only restricts liberty when certain conditions are met, so it only affects liberty temporarily and in limited circumstances. This contrasts with a prohibition against harm, which is permanent. Duty obligations are temporary, whereas prohibitions last forever. Consequently, omissions are not necessarily a greater interference with individual liberty.[56]

Moreover, even if omissions are in fact considered greater intrusions into individual liberty, this just means that they may need stronger justification. The harm to be prevented must be proportionately greater than the interference with liberty. Even on this view the personal association duty is justifiable because it obliges action where the victim has suffered harm, or is at significant risk of harm, with the aim of preventing the victim's death. The duty can be easily discharged. The harm to be prevented is proportionately weightier, since great harm can be prevented by a slight interference with liberty.[57]

The foregoing has established that even though duties to act may impinge upon individual liberty to a greater extent than prohibitions against harm, this does not mean that the personal association duty is objectionable. The arguments that duties to act affect liberty much more than prohibitions are based on shaky foundations and even if they are shown to have validity, the concerns are not so prevalent in the familial homicide context due to the fact that great harm can be prevented by a minor

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[55] See Freeman S., "Criminal Liability and the Duty to Aid the Distressed" (1994) 142 *University of Pennsylvania Law Review* 1455 at p. 1463 who similarly states '[i]t is simply a false moral principle that all acts that make the world a worse place outweigh in wrongness all refusals to improve the world. Many failures to improve the world enormously outweigh in moral heinousness many acts that make it worse.'

[56] For a similar argument see Tadros, above at pp. 198-9.

[57] Ashworth, above at p. 448 makes a similar argument, stating that 'an apparent diminution of the freedom of one citizen (by requiring that citizen to take reasonable steps to prevent a harm or to call the emergency service) may be justifiable by reference to the augmentation of the freedom of another citizen (who is under attack or otherwise in danger).' A similar argument is made by Freeman, above at p. 1488-9, and Hughes, above at p. 634.

infringement of liberty. Consequently, this objection to the personal association approach can be dismissed.

However, another liberty-based objection relates to the distinction between acts and omissions.

ii. The distinction between acts and omissions

The distinction between acts and omissions is well-established within the criminal law, and is referred to as the 'act-omission distinction', or 'AOD'. The distinction between them means that it is justifiable to sanction prohibited acts using the criminal law, but that failures to act can only be criminally sanctioned in the limited circumstances when a duty to act arises. Although there is indeed a distinction between an act and omission because of their different physical and legal nature, the reasons for distinguishing between them does not provide grounds for objecting to the personal association duty, as this section will argue.

Dressler's arguments are relevant to the debate surrounding omissions liability in the familial homicide context. He is a key proponent of the argument that liability should be imposed for acts, rather than omissions, and states that equating inaction with action in cases of letting die 'undermines the concept of individual responsibility and authorship of conduct'.[58] He argues that the defendant's moral guilt in a case of letting die does not equal that of the actual killer. There are two key points which can be made in response to his argument.

First, as discussed in Chapter Five of this thesis regarding accessorial liability, the familial homicide offence does indeed have the potential to equate the liability of the killer and the omitter even in cases where the role of each party is clear. Yet as extensively argued within that chapter, this is a problematic feature of the current law, and needs to be amended. The proposals outlined within that chapter therefore seek to ensure that the killer and the omitter are in fact distinguished in cases where the role of each party is clear, thereby reducing the force of Dressler's objection.

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[58] Dressler, above at p. 978.

Second, as discussed in Chapter Two, omissions cause harm. Accordingly the omitter bears some responsibility and has authorship of the conduct. Moreover, in terms of moral guilt, both this chapter and Chapter Four conclusively argue that such a defendant does have the moral guilt necessary to be prohibited by the criminal law for failure to act in the homicide context. Merely because the omitter does not directly cause the victim's death does not mean that she is not criminally liable for her failure to protect the victim, or that her moral guilt does not equal that of the killer. Although the killer and the omitter may arrive at liability by different physical means, their moral guilt may in fact be equal. This is clear through the result in the *Gibbins* case,[59] in which both of the defendants were guilty of murder although one of the defendants owed a duty to the victim by virtue of the fact that she was his young daughter, whereas the other was liable under a duty of voluntary assumption of responsibility. Both defendants arrived at liability by different physical means, but this did not mean that they were not equally culpable for the victim's death.

Moreover, even if the culpability of the defendants is not equal, this does not mean that the omitter is not responsible for death, and should not be treated as such.[60] And, additionally, if there is a distinction between their culpability for the offence in question this can be reflected at the sentencing stage.

Dressler's arguments can thus be dismissed. Although there is a physical distinction between an act and an omission, this distinction does not provide grounds for objecting to the personal association duty. However, the arguments of Honoré also need to be considered here. Honoré argues that the AOD reflects the principle that acts are more harmful than omissions. He states that:

> Positive acts [...] are often worse than omissions [...] because they create the primary harms and risks of harm that omissions fail to remedy.[61]

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[59] Above.
[60] Indeed, as Wilson, W., "Murder and the Structure of Homicide" in Ashworth, A., & Mitchell, B., (eds) *Rethinking English Homicide Law* (Oxford: Oxford University Press; 2000) pp. 21-54 at p. 49 states 'deeds of omission are not easily distinguishable from deeds of killing at either the conceptual or moral level when they approach murder's focal case'.
[61] Honoré, T., *Responsibility & Fault* (Oxford: Hart; 1999) at p. 43.

He advances the distinct duties approach which holds that generally, omissions are less harmful than acts, unless the defendant owes a distinct duty to the victim, in which case the omission is equally harmful.[62] An example of a distinct duty is a parent owing a duty to his child. Honoré argues that positive acts directly threaten our security, whereas omissions do so indirectly, and are therefore less harmful.[63]

So, although Honoré opines that there is a distinction between an act and omission, he may object to the personal association approach because the scope of this duty is broader than those duties traditionally accepted as giving rise to omissions liability. The issue with his approach is the scope of the relevant duty to act. He adopts a narrow conception of the circumstances in which a duty to act may arise because a distinct duty must occur.

Yet as indicated above, more indirect omissions such as those within the familial homicide context, namely when the third party omitter fails to protect the victim from death inflicted by the direct killer, should justifiably form the subject of criminal liability. The broader form of omissions liability proposed by this chapter should not be prohibited on the ground of the AOD. The omitter is responsible for the victim's death, and causes it, thus he should be held liable. The fact that criminally sanctioning the defendant's failure to act may interfere with individual liberty to a greater extent than prohibiting his act is not a sufficient justification for restricting the scope of omissions liability, and consequently this potential objection to the personal association approach can be dismissed.

However, another potential objection here is based on practical concerns. This will now be considered.

b. The practical objection

There are four practical issues which arise from the personal association duty. These will now be discussed in turn.

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[62] *Ibid.*
[63] *Ibid.*, at pp. 63-4.

First, Williams argues that omissions liability should be exceptional.[64] He states that:

> [S]ociety's most urgent task is the repression of active wrongdoing. Bringing the ignorant or lethargic up to scratch is very much a secondary endeavour, for which the criminal process is not necessarily the best suited.[65]

However, the dichotomy that Williams creates between 'the repression of active wrongdoing' and 'bringing the ignorant or lethargic up to scratch' is not only restrictive but arbitrary. Moreover, the ignorant or lethargic may actually fall within the category of active wrongdoing, thus blurring the boundaries of his approach. This concern can therefore be disregarded.

However, Williams does raise another practical concern. He argues that it is difficult to determine who should be liable for an omission, and that it is harder to define crimes of omission than commission.[66]

This objection can be easily dismissed. All legal provisions, whether act or omission, require definition, and the mere status of the provision does not presuppose that it is harder to define.[67] It is the content of the provision which is crucial, rather than its status. Moreover, even if a crime of omission is harder to define than a crime of commission, this does not mean that such a task should not be undertaken. As shown by this thesis, omitters within the familial homicide context are culpable, and thus they should be punished by the criminal law, even if defining the legal duty which applies to their conduct may be a more arduous task than defining the prohibited act of the direct killer.

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[64] Williams, G., "Criminal Omissions – the Conventional View" (1991) 107 *Law Quarterly Review* 86 at p. 87. Also see Williams, G., "What Should the Code Do about Omissions?" (1987) 7 *Legal Studies* 92.

[65] *Ibid.*

[66] *Ibid.*, at p. 88.

[67] Indeed, Woozley, above at p. 1281 indicates that the vagueness problem is not unique to omissions. Further, he argues that whatever gaps are left by the definition can be filled by judicial explication. A related point is made by Ridolfi, K.M., "Law, Ethics, and the Good Samaritan: Should There Be a Duty to Rescue?" (2000) 40 *Santa Clara Law Review* 957 at p. 966 who argues that courts frequently make individualised judgments, and there is no reason to doubt their ability to do so in cases of omissions, thereby reducing the force of Williams' objection. Furthermore, Tadros, above at p. 190 argues that it can be difficult to define prohibitions, concluding that definitional difficulty does not preclude omissions liability.

A third practical objection which may be levied at the personal association approach again comes from Williams. He argues that the authorities are already overburdened by dealing with active wrongdoing and if the scope of omissions liability is increased, thereby punishing those who fail to produce 'a happier world', regulation would become impossible.[68] Such an increased administrative burden means that the scope of omissions liability should not be unnecessarily increased.

However, the inherent safeguards within the personal association duty, as extensively discussed above, ensure that such an increased administrative burden would not actually occur. Moreover, they ensure that only those who are culpable for their failure to act will be criminally sanctioned, meaning even if there is an increased administrative burden, which is questionable anyway, this is justifiable on the ground of convicting culpable individuals of the offence which most closely reflects their criminal responsibility.

Furthermore, administrative issues will also apply to criminal acts, yet Williams opines that it is justifiable to prohibit acts. This distinction is arbitrary, particularly as both acts and omission cause harm. To take this point further, the harm to be prohibited by the personal association duty is grave, whereas there are many criminal sanctions for more minor acts which do not cause the same level of harm. This is exemplified by the sheer volume of minor, regulatory-style offences within society, such as in relation to licensing. This diminishes the force of his argument here.

His objection can also be dismissed on another ground. He argues that a broad scope for omissions liability is problematic because omitters merely fail to produce 'a happier world'. Yet omitters do much more damage than this. They cause harm. Omissions liability has a more critical function than penalising those who fail to produce a happier world; it criminally punishes those who allow the death of a vulnerable individual.

A fourth and final practical objection arises however. This holds that omissions liability is open to prosecutorial discretion, and thus increasing its scope would be

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[68] Above, at p. 89.

objectionable because it would increase the scope for discretionary judgments to be made. The argument states that statutes which penalise omissions are generally so vague that prosecutorial discretion regarding whether and who to prosecute occurs.[69] This could result in prosecutions being based on attempting to respond to public outrage, which could lead to the prosecution of innocent individuals.[70] This is particularly concerning because even the mere process of a criminal trial could result in defendants losing their job or home.

This risk is reduced for the proposed duty. The risk of prosecuting innocent individuals is minimal due to the stringent pre-requisites of the duty. Moreover, the duty is defined as extensively as is appropriate, again reducing the risk of prosecutorial discretion causing adverse results for justice. Furthermore, in any event prosecutorial discretion occurs in all cases whether act or omission.[71]

So, although there are four potential practical concerns over adopting the personal association duty and thus increasing the scope of omissions liability, these have all been dispensed with above. And even if there are in fact practical difficulties with adopting such a duty, the benefits and definition of the duty countermand them. Indeed, as Woozley states:

> [A]ny objections of a generally *practical* kind are suspect, in view of the long and widespread use of the law in other, especially European, jurisdictions. The short and simple answer to the it-won't-work objection is to point out where and for how long it has been working.[72]

Nonetheless, there is a third overarching objection to the personal association duty. This is that adopting such a duty is an inappropriate use of the criminal law.

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[69] Dressler, above at p. 983.
[70] *Ibid.*, at p. 985. He states 'the decision to prosecute will be based on a prosecutor's perceived need to respond to public outrage, which in turn, may be based less on the merits of the case and more on media coverage [...] the process may result in prosecution of persons who, upon cooler reflection, we might realize are innocent'.
[71] Ridolfi, above at p. 967 makes this same point.
[72] Woozley, above, at p. 1290.

c. The criminal law objection

This objection holds that enforcing an obligation to act based on the personal association duty would not be an appropriate use of the criminal law. This is because it has been argued in the academic literature that omissions liability enforces a moral obligation to act, which is not the function of the criminal law.[73]

However, this is definitely not the case with the proposed duty. Failure to act in accordance with this duty should be subject to criminal, as well moral, condemnation. This is because such a failure actually causes harm to the victim.[74] Furthermore, imposing criminal sanctions on those who fail to act in accordance with a personal association duty is necessary, and is therefore an appropriate use of the criminal law. This is because prior to the existence of such schemes as the current familial homicide one, and the modifications for this offence proposed by the personal association duty, culpable individuals escaped liability in cases where it could not be shown which of them actually killed the victim, or that they were acting in concert. This means that the issue here is not merely a moral one; it is criminal as well. Those responsible for the victim's death should be punished by the criminal law for their omission.

However, it has been argued that legislation which introduces new duties to act 'must be phrased as precisely as possible, and must be supported by a programme of education and information.'[75] This is because individuals do not generally consider that they have duties to others. This makes sense; individuals need to know when their conduct will be criminal, as required by the principle of legality. Applied to the personal association duty, it will need to be ensured that citizens are made aware of their novel obligation, and that the legislation is framed in clear terms. As highlighted by the foregoing, the approach of the personal association duty has endeavoured to do this.

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[73] See Weinrib, E., "The Case for a Duty to Rescue" (1980) 90 *Yale Law Journal* 247 at pp. 262-4 for discussion.
[74] See Chapter Two for further detail on this argument.
[75] Above at p. 431.

Accordingly, the criminal law objection to the personal association duty can be dismissed, along with the liberty-based objections and the practical objection. The personal association duty stands as a necessary replacement for the current form of omissions liability within the familial homicide offence.

Conclusion

There is a definite need for the personal association duty for three key reasons. It will help to ensure the conviction of culpable defendants, help to protect victims, and it better reflects the unreasonableness rationale for the familial homicide offence.

The main changes made by this duty as contrasted to the current duty are summarised in the below table:

Current Duty under Section 5	**New Duty of Personal Association**
The victim was a child aged 16 or under, or was a vulnerable adult	The victim was a child aged 18 or under, or was a vulnerable adult
The defendant was a member of the victim's household and had frequent contact with him	The defendant had a personal association with the victim and had regular contact with him
The significant risk was one of serious physical harm	The significant risk was one of serious harm
The defendant failed to take reasonable steps to protect the victim from the risk of harm	The defendant's failure to act in respect of the risk of harm was unreasonable

It can be seen from the above table that these proposals do broaden the scope of omissions liability for familial homicide, in particular by removing the artificial and unjustifiably restrictive household concept and replacing it with a new duty based on personal association. This conclusion is furthered by the proposals advanced within the causation chapter and the accessorial liability chapter, Chapters Two and Five respectively, which also aim to increase the scope for omissions liability for this offence where appropriate. The duty in section 5 should be replaced with the personal association duty in order to fully achieve the legislation's aims.

Chapter Four

Is the *Mens Rea* Required for Familial Homicide Appropriate?

Introduction

Section 5(1)(d) of the Domestic Violence, Crime and Victims Act 2004 holds that the defendant satisfies the *mens rea* requirements of familial homicide if:

> i) he was aware, or ought to have been aware, of a significant risk of serious physical harm being caused to the victim by the unlawful act of another person;
>
> ii) he failed to take reasonable steps to protect the victim from that risk; and
>
> iii) the act occurred in circumstances of the kind that he foresaw, or ought to have foreseen.

This chapter will refer to the term 'significant risk of serious physical harm' as 'the risk' for ease of discussion.

There is academic debate surrounding the appropriate test for *mens rea* within this context. Herring and Hayes raise questions over whether the above test should be used here.[1] However, Griffin argues that the combination of subjective and objective limbs is beneficial because it couples a test which is evidentially difficult to satisfy with a more easily satisfied test for blame.[2] This chapter aims to settle the academic debate. It adopts the latter stance, arguing that the statutory test for blame is the most appropriate for familial homicide, and that other tests would be unsatisfactory.

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[1] Hayes, M., "Criminal Trials where a Child is the Victim: Extra Protection for Children or a Missed Opportunity" (2005) 17 *Child and Family Law Quarterly* 307 at p. 322; Herring J., "Mum's Not the Word: an Analysis of Section 5" in Clarkson, C.M.V., & Cunningham, S., *Criminal Liability for Non-Aggressive Death* (Hampshire: Ashgate; 2008) pp. 125-153 at pp. 135-7. For an interesting discussion of negligence and responsibility generally, see Raz, J., "Responsibility and the Negligence Standard" (2010) 30 *Oxford Journal of Legal Studies* 1.

[2] Griffin, L., "Which One of You Did It? Criminal Liability for "Causing or Allowing" the Death of a Child" (2004) 15 *Indiana International and Comparative Law Review* 89 at pp. 103-4.

This chapter focuses solely on the first *mens rea* requirement as detailed consideration is given to the second requirement in the domestic violence chapter. Moreover, once it is accepted that the first limb of the fault test is the most appropriate, the third limb ceases to be contentious. And, in any event, the below discussion is equally applicable to the third test.

There are many different tests for *mens rea* within the law. In order to settle the above academic debate, this chapter discusses a number of these to conclusively establish that only the current statutory approach is completely acceptable. There are nine tests to discuss, some of which can be grouped together into categories. The six categories are:

1. Tests based on advertence

    a. The defendant chose to take the risk
    b. The defendant was aware of or foresaw the risk

2. The defendant deliberately closed his mind to an obvious risk

3. Tests based on belief and suspicion

    a. The defendant believed the risk
    b. The defendant suspected the risk

4. Tests based on the reasonable man

    a. The risk would have been obvious to the reasonable man
    b. The risk would have been obvious to the reasonable man subject to an individual capacity exception

5. The defendant was practically indifferent to the risk

6. The defendant was aware, or ought to have been aware, of the risk

Each of these tests will now be analysed in turn.

1. Tests based on advertence

There are two tests based on advertence within this category; choice, and awareness and foresight of the risk. Although this section criticises the awareness and foresight test for blame, which is part of the statutory test proposed as the most satisfactory for familial homicide, the problems highlighted with this test are ameliorated when paired with the objective limb of 'ought to have been aware', or 'ought to have foreseen' as discussed below. The reasons for this will become clear when the statutory test is considered.

The first test for blame holds that the defendant has *mens rea* if he makes a conscious choice to take the risk of harm. The second test holds that the defendant has *mens rea* if he was aware of, or foresaw, the risk. This will be referred to as the awareness test for ease of discussion. Although at first sight the choice and awareness tests seem identical, this is not the case. The choice test has two requirements for liability; the defendant must be aware of or foresee the risk, and he must choose to take it. However, the awareness test only has one requirement for liability; the defendant must be aware of or foresee the risk. This is clearly a broader test.

An advantage of these subjective tests relates to the principle of maximum certainty. This principle requires that the law should be as clear as possible so that individuals know what is expected of them, and accordingly when their conduct will be held criminal.[3] The three subjective tests are clear and defined; if the defendant meets the precise narrowly defined requirements of these tests he will be held liable. Norrie makes a similar point regarding the subjective concept of recklessness, stating that:

> The orthodox subjectivist account may be too narrow, but it does enjoy a degree of precision that tests based on inadvertent risk taking do not. The focus on what the individual actually foresaw, without reference to the evaluative questions of the greatness of harm caused or the obviousness of

[3] For further detail on this principle, see Ashworth, A., *Principles of Criminal Law* (Oxford: Oxford University Press; 6th edition; 2009) at pp. 63-6.

> the risk, anchors liability in a question of fact about what the accused knew at the time of his acts.[4]

Norrie's statement can be applied to these two tests for blame; they both focus on what the defendant actually perceived, whether this takes the form of choice, awareness, or foresight. Consequently, they avoid difficult evaluative questions, making them easily understandable and clear. They simply focus on the defendant's factual appreciation of the situation. Take the awareness test for example. In *Su Hua Liu*,[5] the victim was repeatedly attacked by her husband's mistress, suffering injuries such as severe bruising, head injuries and a stab wound. The husband witnessed some of the attacks, and knew the extent of his wife's injuries.[6] He was advised by a third party to involve the police and get medical attention.

The husband meets the straightforward requirements of the awareness test as he was aware of his wife's injuries.[7] This demonstrates how clear and defined the test is, and that it provides a measurable standard against which to assess blame. It thus respects the principle of maximum certainty, and the same argument can be extended to the choice and foresight limbs.

However, despite this advantage, the advertence-based tests suffer from the same weaknesses, thus meaning that neither of them is suitable as the *mens rea* for familial homicide.

a. Scope

The advertence-based tests are too narrow in scope to catch all culpable defendants. Individuals may be responsible if they fail to protect the victim from a risk of harm even if they do not make a conscious choice to do so, they are not aware of the risk, or they do not foresee the risk.[8] On the grounds of individual responsibility for culpable omissions which they have caused, defendants should protect victims with

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[4] Norrie, A., *Crime, Reason and History* (London: Weidenfeld & Nicolson; 1993) at p. 68.
[5] *R v Su Hua Liu & Lun Xi Tan* [2007] 2 Cr App R (S) 12.
[6] *Ibid.*, at [10], [21].
[7] Provided, of course, that the other conditions for liability are satisfied.
[8] See Chapters Two and Four for further detail.

whom they have a personal association from risks of harm which they can easily prevent.

The tests here require the defendant to advert to the risk, which restricts the scope for blame to those who actually perceived the risk, thereby excluding culpable individuals. Take the following scenario:

> O is a friend of K. K attacks her 3 year old daughter, V, on a regular basis. O sees V covered in bruises, and although she has never witnessed any of the attacks on V by K, she suspects what is occurring, but does not know for sure. She does not think that V is at risk of serious harm, and thus she takes no steps to find out what is going on, and ignores V's injuries. V dies in an attack by K.

O suspects that V is at risk of harm but does not know for certain. Despite being culpable for the offence because she could have easily acted to protect V from a risk of harm to which she was exposed yet she failed to do so, and had a causal role in death, O would not be liable for familial homicide if the choice, awareness or foresight approaches were adopted. She does not choose or foresee the harm that occurs to V, nor is she aware of it.

These tests are unsatisfactory for familial homicide because they would not hold a defendant such as O liable for the offence despite the fact that she is culpable. They require a particular cognitive process to have taken place despite the fact that there may be blameworthy reasons for why this process did not occur,[9] and they oversimplify the character of the blame element which should be required in order to punish all those who should be criminally sanctioned.[10]

Although some academics would advocate subjective tests for blame for reasons of responsibility as indicated above, another problem with such tests based on advertence relates to welfare.

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[9] Nonetheless, although the awareness test itself is unjustifiably narrow, such an approach is justifiable when coupled with the broader 'ought to have been aware' test as in the statutory framework. This is discussed in greater detail below when the statutory test is considered.

[10] Hart, H.L.A., *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: Clarendon Press; 1968) at p. 152. Also see some of the arguments in Birch, D.J., "The Foresight Saga: the Biggest Mistake of All" [1988] *Criminal Law Review* 4.

b. Welfare

Protecting vulnerable victims is an important social and moral obligation on all individuals, and one which can become criminal if citizens do not live up to acceptable standards of behaviour in relation to one another. It is important to safeguard the welfare of vulnerable victims, particularly in the familial homicide context.

The advertence tests are problematic for welfare. This is because they fail to adequately protect victims. As it is unlikely that most defendants will consciously choose to take the risk of harm, be aware of it, or foresee it because cases frequently involve the omitter simply not caring about the victim's welfare or not directly putting the victim at risk, these tests would leave a number of victims without effective legal protection.[11] This point is neatly summarised by Ashworth, who states that:

> Subjective tests heighten the protection of individual autonomy, but they typically make no concession to the principle of welfare and the concomitant notion of duties to take care and to avoid harming the interests of fellow citizens.[12]

These tests have an adverse effect on victim protection because they are so tightly linked with the defendant's thought processes, despite the fact that, as detailed above, defendants can be sufficiently culpable even when they do not advert to the risk of harm. The failures of such approaches are demonstrated by the following example:

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[11] Regarding victim protection, if the test for blame in the statutory framework was replaced with the choice test, the issue of victim protection would not be wholly relevant because the familial homicide statute only applies where victims have died. However, as argued in Chapter One a more tiered approach to this area of law is needed, which would convict defendants of failing to protect vulnerable victims prior to death, thereby achieve the aim of victim protection. An analogous general point is made by Robinson, P., "Criminalization Tensions: Empirical Desert, Changing Norms, and Rape Reform" in Duff, R.A., *et al* (eds) *The Structures of the Criminal Law* (Oxford: Oxford University Press; 2011) pp. 186-202 in which he argues that the criminal law has the ability to get out in front of the criminal law and change our conceptions of what is condemnable. The test for blame which should be adopted in the familial homicide statute is also the most appropriate for the lesser offence of failing to protect the victim from harm. Thus, it is important to discuss the victim protection issues arising from the tests for blame in this chapter.

[12] Ashworth, above at p. 189.

> O delivers and collects catalogues from K's house. When K answers the door, O sees 18 month old V with a serious head injury. O takes no notice of the injury, and so takes no action to protect V from the risk of harm. She visits the house on a few more occasions, during which V is distressed, crying, and suffering from various injuries such as a broken arm and numerous bruises. V dies from injuries sustained in a particularly serious attack by K, her mother.

By definition O does not choose the risk of harm as she takes no notice of it. This also indicates that she is not aware of the risk, nor does she foresee it. However, she is culpable for V's death because the injury is obvious. O could have easily acted to protect V from the risk of harm, and was in a position to do so.[13] Since the advertence-based tests would exclude her from liability they are unsatisfactory on the grounds of victim protection. Such a narrow scope excludes culpable individuals from criminal censure. It excludes the indifferent and the apathetic as well, for example, yet such individuals may be culpable for the victim's death. Indeed, O in the above example could be described as both indifferent and apathetic. Consequently, this test would be inappropriate for familial homicide.

Another problem with tests based purely on advertence is that they have evidential issues.

c. Evidential issues

An issue with advertence-based tests is that they focus on what was in the defendant's mind at the time of the offence.[14] This inevitably requires proof of what the defendant actually thought; an exercise which may prove evidentially difficult.[15] An example demonstrates the issues here:

> K, O and V live together. K attacks V on several occasions. O is not present during the attacks, and K tries to avoid causing visible injuries to V, hitting him in places which are not always visible. However, V does suffer some

[13] See Chapter Two for the requirements of liability.
[14] A similar argument is made by Gordon, G.H., "Subjective and Objective Mens Rea" (1975) 17 *Criminal Law Quarterly* 355 at p. 371 who states that '[o]ne of the problems of an excessively "subjective" approach is that it is likely to feed what I often fear is an unfounded conceit in our ability to gauge a witnesses' truthfulness by his demeanour'.
[15] This is particularly problematic in the current context as the familial homicide statute was developed in response to evidential issues, albeit different ones to those in the present discussion.

> visible injuries on occasions, such as a bruise to his face and a cut on his arm. V dies from injuries inflicted in a particularly brutal attack from K.

It is uncertain whether the prosecution would be able to satisfy the advertence-based tests since K specifically tried to avoid causing V visible injuries and there is no indication that O chose, was aware of, or foresaw the risk. O may not have adverted to the risk for various reasons, such as not seeing the full injuries, disregarding the visible injuries, failing to appreciate the danger V was in, or adverting to the harm that V suffered but not adverting to the risk of further harm. This test requires proof that O actually adverted to the risk, requiring determination of what she actually thought. This is difficult on these facts. The evidential flaws here mean that culpable individuals would escape conviction if any of these tests were adopted following the above noted academic objections to the current statutory approach.

For the three reasons given above, tests based solely on advertence would be inappropriate for the familial homicide context. The next section will discuss the test of deliberately closing one's mind to an obvious risk.

2. The defendant deliberately closed his mind to an obvious risk

Parker developed a test for blame based on the concept of a defendant 'deliberately closing his mind to an obvious risk'.[16] The court stated that:

> A man is reckless in the sense required when he carries out a deliberate act knowing or closing his mind to the obvious fact that there is some risk of damage resulting from that act but nevertheless continuing in the performance of that act.[17]

According to *Parker*, deliberately closing one's mind to an obvious risk is blameworthy. The defendant is liable if the risk was obvious, yet she did not advert to it because she shut her mind to it. This approach bridges the gap between the subjective approaches of choice, awareness and foresight, and the more objective approaches which focus on what the defendant ought to have done. However, to

[16] *R v Parker* [1977] 1 W.L.R. 600.
[17] *Ibid.*, per Lord Lane LJ at p. 604.

replace the test for blame within the familial homicide offence with the *Parker* test would be inappropriate for a number of reasons.

a. Scope

At first glance, the scope of this test appears beneficial. This is because it is fairly broad, which means that culpable defendants are likely to fall within its ambit. Familial homicide cases frequently involve consistent physical abuse from one of the defendants whilst the other defendant does nothing, despite the obvious risk, demonstrating a deliberate shutting of the mind to the risk.[18] Accordingly, this test would catch those who do not care about the obvious risk faced by victims, or fail to find out the facts, or turn a blind eye to harm around them.

However, overall the scope of this test is objectionable. In order to 'deliberately' close one's mind to the risk of harm, a degree of awareness of the harm is required, yet in the familial homicide context some defendants will lack this awareness. For example, a defendant who witnessed the injuries to the victim but did not actually advert to the risk of harm would not fall within *Parker* because he could not deliberately close his mind to a risk which he did not advert to. The test requires a level of advertence which some culpable defendants may lack. Moreover, there may be blameworthy reasons for a defendant failing to advert to the risk in the first place.

Another reason for why adopting the *Parker* test would be problematic relates to intellectual honesty.

b. Intellectual honesty

The *Parker* test is not intellectually honest because it is highly artificial. 'Deliberately closing one's mind to an obvious risk' is a false construct because the defendant can be held to have consciously taken a risk of harm when he did not consciously take it. A similar point is made by Ashworth, who states that the *Parker*

[18] See for example *Su Hua Liu,* above.

decision 'involves some stretching of the awareness element which is thought to be central to advertent recklessness.'[19]

A final reason for why this test would be inappropriate for familial homicide is based on evidential issues.

c. Evidential issues

This test has evidential difficulties. It requires proof of a subjective level of awareness, because for the defendant to close his mind to an obvious risk he must first be aware that it exists. This is the case even though the defendant does not actually advert to the risk by virtue of his deliberate closing his mind to it. The test requires the prosecution to prove exactly what was in the defendant's mind at the time of the offence, which may be difficult. This is particularly true of the current context because the facts would merely demonstrate that the defendant failed to act in respect of an obvious risk. The facts would not necessarily show that he deliberately closed his mind to this risk.

Moreover, *Parker* requires proof of two different subjective elements. First, it must be shown that the defendant adverted to the risk. Second, it must be shown that he deliberately closed his mind to it. Whether he satisfied these conditions is to be determined objectively, yet even objectively establishing these two subjective elements in relation to each individual defendant is likely to be problematic due to the inherent evidential issues with this approach as outlined above.

For the three reasons given above, the *Parker* test must be dismissed from consideration as a test for blame for familial homicide. The next category of tests to discuss is based on belief and suspicion.

[19] Ashworth, above at p. 179.

3. The defendant believed or suspected the risk.

There are two tests within this category of blame; the defendant believed the risk or the defendant suspected the risk.

a. The defendant believed the risk

This test holds that the defendant has *mens rea* if he believed that there was a risk of harm to the victim and he failed to protect the victim from that risk. The defendant does not have to have such a high level of advertence as the aforementioned tests.

This test can be quickly dismissed as a test for blame for familial homicide on the grounds of scope. It is under-inclusive because it does not catch all those who should be held liable. As discussed extensively above in relation to the tests based on advertence, a defendant may be culpable for familial homicide even if he does not advert to the risk in question, and thus the arguments do not need to be restated here. It is sufficient to state that because the belief test requires a level of advertence higher than that needed for culpability for the offence it would be inappropriate to adopt this test for familial homicide.

b. The defendant suspected the risk

According to this test, the defendant may not realise the exact circumstances giving rise to the abuse, but he will be liable if he has an inkling about what is going on, although no concrete proof.

There are certain advantages of this test. For example, it satisfies the requirements of the principle of maximum certainty because it is clear and easily understandable. It focuses purely on the defendant's factual appreciation of the situation. Another advantage relates to welfare. As discussed below, the scope of this test is very broad, which will include more individuals within its ambit, thus punishing those who do not meet an acceptable standard of victim protection.

Yet despite these advantages the suspicion test can be dismissed from consideration as a potential replacement for the test within section 5 on the grounds of scope. The suspicion test is too broad. It requires the least degree of certainty from the defendant when compared to the tests discussed above. Merely suspecting that the victim is at risk with little supporting evidence establishes culpability. This will catch those who should not be liable as demonstrated by the following example:

> O is the mother of A, V's best friend. A and V play together a few times a week. V has a broken arm on one occasion. O asks K, V's father, about the injury when he drops V at O's house, but K mumbles something vague about V falling down the stairs and makes his excuses to leave. O suspects that K is not telling the truth but decides not to pry. V later dies from injuries sustained in a physical attack by K, his father.

Holding O liable for familial homicide would extend the scope of liability too far. This is because witnessing a broken arm on one occasion with little idea of how the injuries actually occurred or that they were an indicator that V would die is too little evidence on which to ground a conviction for a severe homicide offence. Moreover as indicated by Beldam LJ in *Forsyth*, suspicion may confuse juries because it can be so broadly construed, and is open to interpretation.[20]

Neither the belief nor the suspicion tests are acceptable within this context. If they were adopted in response to academic objections to the current test they would create significant problems of their own. The next category of tests is based on the concept of the reasonable man.

4. Test based on the reasonable man

There are two tests within this category. The first is based on a purely objective conception of the reasonable man which assesses the defendant's liability solely on the basis of whether he failed to live up to the standard of the reasonable man to the exclusion of his individual capacity. The second is a test based on the reasonable

[20] *R v Forsyth* [1997] 2 Cr App R 299. He states, for example, at p. 321 that '[b]etween suspicion and actual belief there may be a range of awareness. In the present case, to say that mere suspicion is not enough could have been taken by the jury to imply that great suspicion, coupled with an inability to believe that the money was stolen, was equivalent to belief which it plainly is not.'

man which does take the defendant's individual capacity into account. These will be considered in turn.

a. The risk would have been obvious to the reasonable man

This test marks a shift in focus from the previous tests. It centres on the reasonable man's perception of the risk, whereas the previous tests focus on the defendant's perception of the risk. If the defendant falls below the standard expected of the reasonable man, he will be liable. Although this test is inappropriate for familial homicide for reasons of scope and gender-bias, it does nonetheless have a benefit in terms of welfare.

i. Welfare

As noted above, safeguarding victims is an important feature of society. There is a certain standard of behaviour that all individuals must meet. The advertence-based tests discussed above place responsibility on defendants, whereas this reasonable-man based test takes this a step further. It obliges citizens to live up to the easily attainable standard of the reasonable man. This is positive in terms of welfare because it provides a basic standard which citizens should attain. If individuals fall below the easily attainable standard of the reasonable man, thereby failing to protect the victim from a risk of harm in a situation where they can easily do so,[21] they will be liable for familial homicide.

However, there are two overriding weaknesses of this test for blame.

ii. Scope

The scope of the purely objective conception of the reasonable man test is problematic. It catches a wider range of culpable individuals within its ambit when compared with the previously discussed tests because it does not require advertence;

[21] See Chapters Three and Six for further discussion of the reasonableness point generally. For a general overview of the reasonable man test and its different conceptions, particularly for the test of negligence, see Simester, A.P., "Can Negligence be Culpable?" in Horder, J., (ed) *Oxford Essays in Jurisprudence* (Oxford: Oxford University Press; 4th series; 2000) at pp. 85-106.

however, its scope is overly inclusive. This is because it judges liability on what the reasonable man would have foreseen, rather than what the defendant himself actually foresaw or ought to have foreseen. This reduces the link between the defendant's responsibility and the offence itself, thereby also adversely affecting individual autonomy because it does not take the defendant's individual capacity into account when assessing liability. The scope of the reasonable man test does, however, become acceptable in scope when a capacity-based exception is added to it. This point will be considered when the next test is discussed.

Another issue with the reasonable man test is that it is gender-biased.

iii. Gender-bias

The reasonable man test is gender-biased in favour of men.[22] This is clear if the old provocation defence to murder is considered. This defence required two limbs to be satisfied: the defendant must have been provoked to lose his self-control; and the provocation must have been sufficient to make the reasonable man lose his self-control.[23] The test therefore consisted of a subjective limb and an objective limb. Both limbs are problematic in terms of bias; however, it is the latter objective limb which is obviously subject to greater scrutiny here so it will be the focus of the present discussion. Yet as a basic analysis it can be stated that the subjective limb is unacceptable for female defendants because it requires the defendant to have suffered a 'sudden and temporary' loss of self-control. It has been extensively argued in the academic literature that male defendants are more likely to satisfy this limb of the test because women tend to have a slow-burn reaction, and would thus find it harder to satisfy the 'sudden and temporary' requirement of provocation.[24]

The objective limb was also gender-biased towards men. This is because the case law refused female-specific conditions such as 'battered woman syndrome' to be

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[22] For extensive discussion of this point, see Forrell, C.A., & Matthews, D., *A Law of Her Own: The Reasonable Woman as a Measure of Man* (New York: New York University Press; 2000).
[23] Section 3 of the Homicide Act 1957.
[24] See, for example, Nourse, V., "Passion's Progress: Modern Law Reform and the Provocation Defense" 106 *Yale Law Journal* 1331; Wells, C., "Battered Woman Syndrome and Defences to Homicide: Where Now?" (1994) 14 *Legal Studies* 266 and Power, H., "Provocation and Culture" [2006] *Criminal Law Review* 871 for further detail on the old provocation defence to murder.

taken into account when deciding whether the defendant fell below the standard of the reasonable man. The conduct of a defendant suffering from this syndrome who killed their abuser was viewed as disproportionate.[25] Men were more likely to satisfy the 'reasonable man' limb of the provocation test.[26] Assessing female defendants against a reasonable man standard is thus unfair. The fact that the reasonable man test favours men is problematic in the current context because cases of familial homicide frequently involve domestic violence against women.[27]

Consequently, this conception of the reasonable man test must be dismissed from consideration as a test for blame for familial homicide.

b. The risk would have been obvious to the reasonable man subject to a capacity exception

According to this test, the defendant is liable if he falls below the standard expected of the reasonable man, subject to the defendant's individual circumstances and characteristics. There is a key advantage of this test when compared to the previous reasonable man-based test in terms of scope.

i. Scope

Although this test shifts the focus from the defendant to the reasonable man, it still ensures that the defendant has responsibility. This is because if he fails to live up to the attainable standard of the reasonable man, taking into account his individual circumstances and characteristics to ensure that he can in fact meet this standard in the first place, he will be held liable. This standard does not put heavy demands on individuals, and is based on standard notions of everyday citizens. If the defendant can excuse himself from liability by using a defence which takes account of his individual circumstances, an approach towards blame which focuses on what the

[25] See, for example, *R v Thornton (No. 2)* [1996] 2 All ER 1023. This issue was particularly prevalent in the context of domestic violence which frequently occurred in such cases.
[26] For example, see Horder, J., *Provocation and Responsibility* (Oxford: Oxford University Press; 1992).
[27] See cases such as *R v Ikram & Parveen* [2008] 2 Cr App R 24. Herring, J., "Familial Homicide, Failure to Protect and Domestic Violence: Who's the Victim?" [2007] *Criminal Law Review* 923 highlights similar arguments concerning the approach of section 5.

reasonable man would have known is justifiable. The link to individual responsibility is present not through the general objective standard which he must attain, but in the availability of defences which link to his individual circumstances. As Fletcher states:

> So long as the defendant is excused on the basis of objective, conduct-influencing factors, such as physical impediments, the standard of responsibility remains attentive to individual capacity. The standard can be properly individualized, be fair and sensitive to differences that matter, and still provide a proper standard of judgment.[28]

This makes sense, because even though the defendant may not have any characteristics or circumstances which result in the defence actually having to be considered, the mere fact that it is available ensures that individual responsibility is present. In such cases the defendant does not have any differing characteristics or circumstances which need to be taken into account; he fits neatly into the objective standard against which he is assessed.[29]

This test has an acceptable scope as it catches those culpable defendants who ought, but fail, to live up to a recognised standard of care, causing further harm to the victim, as well as not being unduly harsh by not allowing the defendant to defend himself when there is a case for allowing him to do so.[30] An example helps to explain this:

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[28] Fletcher, G.P., *Basic Concepts of Criminal Law* (Oxford: Oxford University Press; 1998) at p. 120. For a similar point, see Hart, above at p. 154 who states: 'If our conditions of liability are invariant and not flexible, i.e. if they are not adjusted to the capacities of the accused, then some individuals will be held liable for negligence though they could not have helped their failure to comply with the standard.'

[29] However, it must be ensured that there is not an overly broad scope of defences which would defeat the point of a broader test in the first place.

[30] For related arguments, see the extensive literature surrounding cases such as *R v Caldwell* [1982] AC 341 and *Elliot v C (A Minor)* [1983] 1 WLR 939. Examples include Crosby, C., "Recklessness – the Continuing Search for a Definition" (2008) 72 *Journal of Criminal Law* 313; Halpin, A., "Definitions and Directions: Recklessness Unheeded" (1998) 18 *Legal Studies* 294; Halpin, A., *Definition in the Criminal Law* (Oxford: Hart Publishing; 2004) at chapter 3; Ibbetson, J., "Recklessness Restored" (2004) 63 *Cambridge Law Journal* 13; Kimel, D., "Inadvertent Recklessness in Criminal Law" (2004) 120 *Law Quarterly Review* 548; Keating, H., "Reckless Children" [2007] *Criminal Law Review* 546; Stannard, J., "Subjectivism, Objectivism, and the Draft Criminal Code" (1985) 101 *Law Quarterly Review* 540; Williams, G., "The Unresolved Problem of Recklessness" (1988) 8 *Legal Studies* 74.

> K and O live together with their son, V. K is abusive towards both O and V, physically attacking them on several occasions. O knows about the serious injuries to V, but does not realise he is at risk of further harm. V dies from injuries inflicted by K.

The risk here would have been obvious to the reasonable man due to the repetition of abuse and the severity of V's injuries. O ought to have been aware of this risk as she knew about the injuries to V and their severity. Consequently, her failure to act shows her failure to reach an acceptable standard of conduct. However, to stop here would mean that an individualised test of responsibility is not adopted as the impact of domestic abuse on O is not considered. This is unjust because such abuse may affect her criminal responsibility.[31] The physical abuse may have an adverse impact on her ability to foresee what would otherwise be an obvious risk.[32] This conception of the reasonable man test has an appropriate scope as it only holds individuals culpable in cases where they have individual responsibility.

Another benefit of this test relates to welfare.

ii. Welfare

For the same reasons as discussed for the other reasonable man-based test, this conception is beneficial in terms of welfare because it punishes individuals if they fail to live up to an easily attainable standard.

Yet despite these two advantages, this capacity-based conception of the reasonable man test must be dismissed on the grounds of gender-bias.

iii. Gender-bias

For the same reasons as above, this conception of the reasonable man test is gender-biased. Even though it has a capacity exception, it still focuses on the gender-biased conception of the reasonable man, and assesses the defendant's liability based on

[31] For further detail, see Chapters Two and Six.
[32] There is academic support for the argument that victims of domestic violence cannot appreciate risk of harm in certain cases. See Hoyano, L., & Keenen, C., *'Child Abuse'* (Oxford: Oxford University Press; 2007) at p. 165 and Herring, above at p. 928.

whether he fell below this standard. Accordingly, it must be dismissed from consideration as an appropriate test for familial homicide.

The next test for blame is that the defendant was practically indifferent to the risk.

5. The defendant was practically indifferent to the risk

The concept of 'practical indifference' has been developed by Duff. In contrast to the traditional approach towards recklessness where the defendant must be aware of the risk of harm and then unjustifiably go on to take it, the defendant need not be aware of the risk. He incurs liability if he is practically indifferent to it. This is an attitude-based test. As Duff states:

> [D]id the agent's conduct (including any conscious risk-taking), any failure to notice an obvious risk created by her action, and any unreasonable belief on which she acted display a seriously culpable practical indifference to the interests which her action in fact threatened?[33]

Inadvertence to the risk occurs because of the defendant's indifferent attitude towards it, demonstrating culpability. As Norrie explains:

> A subjective element is present because we are concerned with the attitude of the accused and what it manifests and this can be evidenced as much by lack of awareness of risk as by its presence.[34]

The test comprises both subjective and objective elements. The decision as to whether the defendant was practically indifferent focuses on the audience's opinion of his conduct, rather than the defendant's opinion, yet it is the defendant's subjective attitude which causes his inadvertence.[35] This test focuses on the

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[33] Duff, R.A., *Intention, Agency and Criminal Liability* (Oxford: Blackwell; 1990) at p. 172. Also, in Duff, R.A., "*Caldwell* and *Lawrence*: the Retreat from Subjectivism" (1983) 3 *Oxford Journal of Legal Studies* 77 at p. 94 he states '[a]n agent is reckless if his actions show him to be indifferent to the risks which he creates, and to the interests which he endangers'. For discussion of certain aspects Duff's argument, see Brady, J.B., "Recklessness" (1996) 15 *Law and Philosophy* 183.

[34] Norrie, above at p. 73. Similarly, as Duff *ibid.*, at p. 94 states '[s]ome failures of attention or realisation may manifest, not mere stupidity or "thoughtlessness", but the same indifference or disregard which characterises the conscious risk-taker as reckless'.

[35] Norrie, *ibid.*, at pp. 76-7 makes this point. He makes a similar point in Norrie, A., "Subjectivism, Objectivism and the Limits of Criminal Recklessness" (1992) 12 *Oxford Journal of Legal Studies* 45 at p. 48

defendant's attitude, an aspect which the other tests do not regard as fundamental to the question of blame. It shifts the focus from the defendant's advertence to the defendant's attitude. This test is inappropriate for familial homicide for various reasons.

a. Scope

In the familial homicide context, cases frequently involve defendants who do not care about the risk of harm, or turn a blind eye to what is occurring, or are indifferent to what may happen. Such an attitude manifests itself by leaving the victim in the dangerous situation to suffer further harm and death. This occurred in *Lewis*.[36] Such defendants should be liable for familial homicide because this attitude is so reprehensible that it justifies criminalisation.[37] Due to the frequency of such situations in this area of law, the practical indifference test is beneficial because it ensures that such criminally reprehensible behaviour is punished,[38] thereby also protecting vulnerable victims and achieving legal redress for victims' families. An example demonstrates this:

> O is a friend of K, and visits K and her infant daughter, V, once a month. K repeatedly attacks V, causing her visible injuries, which O sees but does nothing about. V dies from her injuries.

Although O may not be aware of the risk, she sees V's injuries and does nothing about them, demonstrating disregard for the harm that V has suffered and the further harm that she is at risk of. Such disregard evinces an unacceptable attitude. This test catches those who display a reprehensible attitude towards victims in line with the aims of the legislation.[39]

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[36] BBC News Online, "Mother Jailed after Baby's Death", 15th December 2006 <http://news.bbc.co.uk/1/hi/wales/south_west/6181051.stm> accessed 21st May 2012.
[37] See the Introduction and Chapter Three.
[38] For further detail on what makes this criminally reprehensible, see Chapter Three.
[39] Law Commission, *Children: their Non-Accidental Death or Serious Injury* (Law Commission No. 282; 2003) at p. 34, [5.20] summarises the aim of the legislation, stating 'our legal system is currently doing a grave disservice to society and in particular its most vulnerable members. It is presently failing to provide an effective mechanism for bringing to justice those who are responsible for committing grave crimes against children, often their own.'

Yet upon closer inspection, the scope of this test is unsatisfactory. Punishing individuals for indifference is not an appropriate use of the criminal law. For example, Hall states that criminalising indifference to social values is unacceptable because:

> Although these characteristics are to be deplored, they do not amount to voluntary harm-doing. Such an insensitive person is by definition *not aware* of his dangerous behavior. Calloused character cannot be identified or equated with voluntary misconduct.[40]

This test casts the net of liability too widely. It is almost impossible to determine the exact parameters of such an attitude-based test. Also, 'indifference' is highly subjective, with definitions varying according to individual conceptions.[41] Another reason for why this test is inappropriate here is the maximum certainty principle.

b. Maximum certainty

The test for practical indifference is:

> [D]id the agent's conduct [...] display a seriously culpable practical indifference to the interests which her action in fact threatened?[42]

This test does not satisfy the maximum certainty requirements of the law for four reasons. First, its terms are imprecise, meaning that individuals will not know what is expected of them. An individual is liable if his conduct displays 'seriously culpable practical indifference'. When taken cumulatively, these four terms establish practical indifference, meaning that the jury must answer four questions. First, was the defendant indifferent to the risk of harm? Second, was this indifference culpable? Third, was this culpable indifference serious? Fourth, did this seriously culpable indifference practically manifest itself? Each question adds another layer of

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[40] Hall, J., "Negligent Behavior Should Be Excluded from Penal Liability" (1963) 63 *Columbia Law Review* 632 at p. 637.

[41] For a similar argument, see Norrie, above at p. 75 who states 'the concept of practical indifference rests upon an indeterminate conception such that one person's indifference will be another's negligence, stupidity or thoughtlessness. Like the division between negligence and gross negligence, there is nothing in the concept to help the jury make up its mind.' So, he considers the concept to have weaknesses both in scope, and vagueness.

[42] Duff, above at pp. 172-3.

complexity to the law. Furthermore, none of these terms are defined. Such definitional imprecision and complexity means that individuals will not know when their conduct reaches the level of 'seriously culpable practical indifference' sufficient to impose criminal liability.

Second, the test is attitude-based. Such an attitudinal approach is highly variable as attitudes are individualised and vary according to characteristics and viewpoints. Moreover, the meaning of indifference can change according to the perspective of the onlooker.[43] This test would therefore breach the principle of maximum certainty because it is vague and depends on the variable conceptions of the public and individuals.[44]

Third, this test requires the defendant's attitude to manifest itself in a practical way. This necessitates a link between the defendant's attitude and his action.[45] In this context, the defendant must manifest his indifferent attitude by his failure to act. It is likely to be difficult to link the two together and prove that his failure to act is a result of this attitude because this test is individualistic and the correlation between the two may not be easily determinable. This causes problems with convicting culpable defendants and results in uncertainty.

Fourth, the concept criminalises the defendant's character.[46] This is because the defendant's indifference is the result of characteristics, environment, attitudes and viewpoints. This approach is subjective, and depends on the individual nature and characteristics of each defendant. This again raises issues for maximum certainty.

The practical indifference test would be inappropriate for familial homicide as it does not satisfy the principle of maximum certainty, and its scope is problematic.

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[43] For a similar point, see Galligan, D.J., "Responsibility for Recklessness" (1978) 31 *Current Legal Problems* 55 at p. 72 who states '[t]he concept of indifference is itself loose and ambiguous.'
[44] See, for example, the rejection of the Law Commission's proposal to adopt 'reckless indifference' as a blame element for homicide: Law Commission, *Murder, Manslaughter and Infanticide* (Law Commission No. 304; 2006) at pp. 39-40.
[45] For similar arguments see Ferzan, K.K., "Opaque Recklessness" (2000) 91 *Journal of Criminal Law & Criminology* 597 at p. 618.
[46] See the useful discussion in Simons, K.W., "Does Punishment for "Culpable Indifference" Simply Punish for "Bad Character"?" (2002) 6 *Buffalo Criminal Law Review* 219.

None of the aforementioned tests are appropriate for this context. The final test to discuss is the current statutory approach.

6. The defendant was aware, or ought to have been aware, of the risk

The statutory test has two limbs. The defendant may incur liability if he is either aware of the risk of harm, or if he ought to have been aware of the risk. If the defendant does not satisfy the more stringent test of awareness, he may nonetheless be convicted if he satisfies the lower test of 'ought to have been aware'. This section will analyse the statutory framework. It demonstrates that the current approach towards blame is the best one to adopt for several reasons, thereby helping to satisfy the academic debate surrounding what the test for familial homicide actually is, and why it is not as contentious as certain academics perceive it to be. The statutory approach is actually a strength of the current law, rather than a weakness as argued within the majority of the academic literature.

a. Scope

All of the tests discussed above apart from the 'reasonable man' test are unacceptable in terms of scope. The two tests in the advertence-based category are too narrow because they would not catch all culpable individuals. The same is true of the belief test and the *Parker* test, whereas the tests based on suspicion and practical indifference are over-inclusive. Although the reasonable man-based tests were acceptable in terms of scope, they had to be disregarded principally on the grounds of inherent gender-bias.

This test catches the widest range of culpable defendants within its ambit by ensuring that not only those defendants who were aware of the risk will be liable, but also those who ought to have been aware. It broadens the scope of liability by adopting a dual-pronged approach towards blame, whilst ensuring that only those defendants who are culpable will fall within its ambit through its restriction to what the defendant himself was aware of, or ought to have been aware of. This also respects individual capacity.

The statutory test ameliorates the harshness of the pure subjective tests discussed above by coupling the awareness requirement with the more easily satisfied limb of 'ought to have been aware'. A strict subjective approach is problematic in terms of protecting vulnerable victims, and conflicts with a key underlying rationale of the offence. Moreover, the scope of this test is limited to what that actual defendant was aware of, or ought to have been aware of. Take the following example:

> O is an employee of the leisure centre crèche, where K takes V three times a week for two hours while she goes to the gym. O sees severe bruising on V's body but takes no notice. The bruises are caused by K, and V eventually dies from her injuries.

O would not be liable under the awareness test because she dismisses V's injuries, demonstrating that she was not aware of the risk. However, she will incur liability under the 'ought' limb. This is because O herself ought to have been aware of the risk, as in the situation with O's knowledge of the severe bruises she ought to have known V was at risk. This respects individual responsibility because liability hinges on what she herself ought to have foreseen. Moreover, she is culpable for the crime because in that situation, witnessing the injuries, she is accountable for failing to protect V where she could easily do so.

However, there is a potential problem with the scope of this approach. Arguably defendants who ought to have been aware of the risk are not as blameworthy as those who are actually aware of it,[47] yet the statutory approach implies equal culpability. Nonetheless, this objection can be responded to.

First, although culpability may differ between the defendant who is aware of the risk and the defendant who ought to have been aware of the risk, this does not mean that the latter should not be liable solely on the grounds that his route to culpability differs from one who is aware of the risk.[48] The defendant who ought to have been aware of the risk is still culpable. An example helps to explain this:

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[47] For a similar point, see Ashworth, above at p. 179.

[48] For a related point, see Fletcher, above at p. 116. Also, as Hart, above at p. 152 states, 'in some cases at least we may say 'he could have thought about what he was doing' with just as much rational confidence as one can say of any intentional wrongdoing 'he could have done otherwise'.'

> K is V's father. He physically attacks V on a regular basis, causing injuries such as bruises and cuts. O1 is V's mother. She witnesses the attacks, yet remains with her son in that situation. O2 is a guest at the house. She does not witness the attacks, but sees V's injuries on several occasions. However, she takes no notice of V's injuries. V later dies in a particularly brutal attack from K.

O1 would be liable under the awareness approach as she is aware of the injuries inflicted on V. O2, however, is not aware of the injuries. Nonetheless, she would be liable under the ought to have been aware approach, as she sees the injuries on several occasions, and, as a guest in the house, was in a position to easily take action to protect V from the risk.[49] Although her route to culpability differs from O1 this does not mean that she should not be liable.

Second, even if individual culpability may differ, there is a band of culpability which is always caught by the statutory test. This ensures that each individual must attain the necessary level of culpability in order to be liable. This is true of all offences. Take theft, for example. According to section 1 of the Theft Act 1968, the defendant is liable if he dishonestly appropriates property belonging to another with the intention of permanently depriving the other of it. One of the *mens rea* requirements here is 'dishonesty'. There will be different levels of dishonesty which may suffice for theft liability, but provided that the defendant meets the minimum requirements as laid down by *Ghosh*,[50] he will satisfy this test. Moreover, distinctions in individual culpability can be reflected at the sentencing stage.

Another benefit of this test is that it respects the principle of maximum certainty.

b. Maximum certainty

As noted above, the 'awareness' limb of the test respects the principle of maximum certainty. This leaves the 'ought to have been aware' limb to be discussed.[51] There

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[49] Galligan, above at p. 64 makes a related point which supports imposing criminal sanctions in such situations. He states '[i]n certain situations there is clearly a strong case for assigning criminal responsibility to agents who inadvertently take unacceptable risks.'

[50] *R v Ghosh* [1982] QB 1053.

[51] The necessary 'risk' has a specific meaning in this context, which means that it respects the maximum certainty principle as it is clearly defined. See Chapters One and Three.

are two issues here. The first is the meaning of 'ought', and the second is the fact that this test hinges on the defendant himself.

The meaning of 'ought' causes problems because, as a moral concept, there are many ways that it can be construed. It is situational and individualistic, meaning that what defendant A ought to do in a particular situation is not necessarily the same as what defendant B ought to do, or defendant C ought to do, and so on. However, although 'ought' is evaluative, this is not necessarily a problem for maximum certainty.[52] Provided the term is a fixed, measureable standard against which liability can be assessed, the fact that it is evaluative is irrelevant. The test remains the same. Although there may be different outcomes in different cases, this is not due to the concept changing, but rather the defendant and the situation changing.

The statutory approach towards blame respects the maximum certainty requirements of the law. Moreover, it is evidentially sound.

c. Evidential issues

The statutory test has the least evidential issues of all the tests discussed. This is because it couples a subjective test, and its related evidential concerns, with a fall-back test which is easier to prove. Culpable defendants will fall under at least one of the limbs. An example demonstrates its evidential strengths:

> K is friends with O. O and K meet twice a week at a restaurant for lunch. K often has her two year old daughter, V, with her. K frequently attacks V in their home, and V has severe bruising on a couple of occasions when K and O meet. O takes no notice of V's injuries. V dies in an attack by K.

It would be difficult for the prosecution to prove that O has awareness of the injuries to V because although she witnesses them, she takes no notice. However, O would be caught under the 'ought to have been aware' limb as she is friends with K, and has contact with V and V's injuries.

[52] See *R v Misra* [2005] 1 Cr App R 21.

However, a potential objection is that the statutory test is too easily satisfied. Section 5 has been criticised because defendants do not actually have to be aware of the risk of harm before they can incur liability.[53] This can be easily rebutted. Defendants who ought to have been aware of a risk to a victim with whom they have a personal tie are sufficiently culpable to warrant a homicide conviction if they take no reasonable steps to protect the victim when they are in a position to easily do so.[54] There are several safeguards built into the offence to avoid those who are not culpable being convicted, such as the tests for duty and breach.

Another strength of this test relates to welfare.

d. Welfare

The statutory approach protects victims. The two-pronged approach ensures the maximum level of protection as it couples a subjective test with an objective test for blame, thereby convicting a wide range of culpable individuals. This links to the above discussion regarding evidential benefits.

The above has demonstrated that the statutory test for blame is the most appropriate for familial homicide liability, contrary to some academic concerns, and that none of the other tests are acceptable. However, there is a key issue which needs to be discussed. This is the fact that familial homicide is an offence of constructive liability.

e. Constructive liability

Constructive liability means that the *mens rea* required for the crime relates to a lesser harm that that required by the *actus reus*. The *mens rea* of familial homicide is that the defendant was aware, or ought to have been aware, of a significant risk of serious physical harm to the victim. However, the *actus reus* is death. The *mens rea* relates to a lesser harm than that required for the offence. Constructive liability is objectionable because it means that criminality depends on luck rather than

[53] See, for example, Hayes, above.
[54] See Chapter Three.

culpability.[55] Imposing familial homicide liability on a defendant who is aware, or ought to have been aware, of a risk of harm is arguably unfair because liability depends on luck as to whether the victim dies.

There are two counterarguments here. First, even though the offence is one of constructive liability, the defendant is still culpable for the victim's death. This is because he is aware, or ought to have been aware, of the risk of harm, and thus he has responsibility for the consequences which occur in respect of this risk. It is justifiable to impose constructive liability on such a defendant not only because of the blame requirements, but also because he can easily act in respect of this risk to a victim with whom he has a personal tie, so should be liable for the consequences of his culpable failings.[56]

Second, the change of normative position justification for constructive liability holds that the morally crucial step taken by the defendant is when he 'intentionally wrongs a person by directing conduct against a particular type of interest'.[57] Ashworth highlights an example of this. If a defendant commits an assault against another individual, for example, he changes his normative position, meaning that he is 'open to criminal liability for a more serious harm than was foreseen.'[58] This makes sense. If a defendant engages in criminal conduct, it is fair and morally just that he should be liable for any further, perhaps unintended, consequences of his criminal venture.

This argument has particular validity for the familial homicide context. Such cases frequently involved repeated abuse towards the victim by one party while the other fails to protect him.[59] Thus, in moral terms, he should be liable if the abuse does worsen and materialise into death. By failing to act in respect of a significant risk of harm the defendant changes his normative position, meaning that it is morally fair for him to be held responsible for any further consequences of his failure to act.

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[55] See, for example, Ashworth, above at p. 78

[56] Simester, A., "Four Functions of *Mens Rea*" (2011) 70 *Cambridge Law Journal* 381 at p. 383 states that '[s]ometimes constructive liability may be justified'.

[57] Ashworth, A., "A Change of Normative Position: Determining the Contours of Culpability in Criminal Law" (2008) 11 *New Criminal Law Review* 232 at p. 233.

[58] *Ibid.*

[59] See, for example, the cases of *Su Hua Liu,* above and *Lewis*, BBC News Online, "Mother Jailed after Baby's Death", 15th December 2006 <http://news.bbc.co.uk/1/hi/wales/south_west/6181051.stm> accessed 21st May 2012.

The constructive liability objection to the statutory test for *mens rea* can be dismissed.

Conclusion

There is currently academic debate over whether the current test for *mens rea* for familial homicide is appropriate. This chapter has settled the debate, arguing that the existing statutory approach should indeed be adopted here. The following table summarises the above findings in relation to each *mens rea* test, indicating why that particular test is inappropriate for the familial homicide context:

Test	**Reason(s) for why it is not appropriate as the *mens rea* for familial homicide**
The defendant chose to take the risk	• Too narrow to catch all culpable defendants within its ambit • Fails to adequately protect vulnerable victims • Focuses solely on what was in the defendant's mind at the time of the offence, which is an evidentially difficult task
The defendant was aware of or foresaw the risk	• As above
The defendant deliberately closed his mind to an obvious risk	• Requires a level of advertence which some culpable defendants may lack • Intellectually dishonest • Evidential issues
The defendant believed the risk	• Under-inclusive as it does not catch all those who should be held liable
The defendant suspected the risk	• Over-inclusive, thereby catching those who should not be held liable
The risk would have been obvious to the reasonable man	• Over-inclusive • Gender-biased
The risk would have been obvious to the reasonable man subject to a capacity exception	• Gender-biased
The defendant was practically indifferent to the risk	• Over-inclusive, again catching those within its ambit who should

	not be liable • Breaches the maximum certainty principle

As discussed above, the statutory approach does not suffer from the same weaknesses as the aforementioned tests. The dual approach of the current statutory test is the most appropriate because it has an appropriate scope, it meets the maximum certainty requirements of the criminal law, it has few evidential issues, and it is beneficial in terms of welfare. It should therefore be upheld.

Chapter Five

Familial Homicide and the Issues it Raises for Accessorial Liability

Introduction

This chapter highlights the key issues with accessorial liability as it applies to the familial homicide context. The familial homicide offence may apply in two broad situations, and each of these gives rise to separate concerns regarding accessorial liability. The first situation is where it is unclear who is the victim's killer and who is the omitter. The second situation is where the role of each individual is clear. This chapter will discuss each of these situations separately as they give rise to different issues.

Part A discusses the first situation. It argues that the current familial homicide approach, which inevitably blurs the distinction between the killer and the omitter, is appropriate where the defendant's role in death is unclear. However, this is not the case regarding the second situation. Here, it is important that the distinction is maintained. Part B discusses this. Part B1 outlines the reasons behind maintain the distinction and Part B2 proposes reform of the law to enable these distinctions to be taken into account more fully than is currently the case. It argues that a more structured approach towards accessorial liability is needed.

Part A – the *Lane*-type situation

The first situation in which the familial homicide offence may apply is exemplified by cases such as *Lane* in which it could not be proven that one party killed the victim and the other at least culpably failed to protect him from death.[1] Accordingly both defendants were acquitted.

There are two problems evident from the type of situation in *Lane*. First, evidential issues mean that it is not physically possible to identify the actual killer because the

[1] *R v Lane & Lane* (1986) 82 Cr App R 5.

role of each party cannot be proven. This will be referred to as 'the first *Lane* problem'. Second, the threshold for secondary party liability is too high. Even though it may be clear that both parties were at least culpable for failing to protect the victim, this would still not satisfy the requirements needed to establish accessorial liability. This is because the law required that it must be proven which of the parties killed the victim or, if this could not be shown, that they were both acting in concert to cause the victim's death. This will be referred to as 'the second *Lane* problem'. A combination of these two issues resulted in the acquittals in *Lane*.

As outlined in Chapter One, *Lane* was a key catalyst for the familial homicide offence. The offence addresses the second *Lane* problem because defendants can be convicted even when it is not proven that they were acting together to cause death. This lower evidential burden means that the prosecution does not have to show whether the defendant caused or allowed the death in order to secure a homicide conviction. However, it fails to address the first *Lane* problem regarding physical impossibility. In cases where it cannot be shown who is the killer and who is the omitter this issue will persist; it will still remain impossible to prove the precise role of each party. This issue is irresolvable, and cannot physically be resolved by the familial homicide offence, or any other offence.

However, although the familial homicide offence responds to the second *Lane* problem because it permits individuals to be convicted even when their precise role in the victim's death is unknown,[2] there are issues with the way in which the law works. Where it is not possible to distinguish between the killer and the bystander, it is appropriate to blur the distinction between these parties in order to ensure that those defendants who are culpable for the victim's death are convicted of a homicide offence. This also ensures justice for the victim. Such cases are relatively rare, as only a few cases of evidential difficulty have arisen under the new statute.[3] Consequently, the distinction between the killer and the bystander will only be blurred in limited circumstances.

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[2] Section 5 (1)(d) refers to 'causing or allowing'. Section 5 (d) holds that the prosecution does not have to prove which alternative applies.

[3] *R v Ikram & Parveen* [2008] 2 Cr App R 24 and *R v Owen (Jason)* [2009] EWCA Crim 2259 are the two key examples of such cases arising under the new legislation.

This part of the chapter outlines the reasons for why it is appropriate to uphold the current familial homicide approach in cases of evidential uncertainty. There are three key reasons; to ensure the conviction of culpable omitters, to achieve justice for victims, and for labelling reasons. Each of these reasons will be discussed in turn, thus demonstrating conclusively that in cases of evidential uncertainty familial homicide is an appropriate charge.

1. Conviction of culpable omitters

The first reason for why it is acceptable to use the familial homicide offence to resolve the first *Lane* problem is to ensure the conviction of culpable bystanders. Familial homicide states that the defendant may be convicted of causing or allowing the victim's death, and it does not have to be shown which alternative applies for a prosecution to succeed.[4] This is an acceptable approach in cases where it cannot be shown who killed the victim and who failed to protect him. This can be explained by contrasting the previous approach under the law of accessorial liability with the current law of familial homicide.

Lane itself highlights the approach taken by the previous law. Even though both defendants were culpable for the victim's death, either by killing her or failing to prevent her death, they were acquitted.[5]

The severity of this outcome has been ameliorated by the familial homicide offence.[6] This can be demonstrated by the case of *Owen*.[7] Here, it could not be proven beyond reasonable doubt which of the defendants actually killed the victim, nor that they were at least acting in concert. The defendants did, however, all at least culpably fail to protect the victim.[8] Consequently, all were convicted of familial homicide. This case exemplifies the shift in the law brought about by section 5 of the Domestic Violence, Crime and Victims Act 2004 (DVCVA). Prior to this offence, all involved would have been likely to escape liability, as shown by *Lane*. The familial homicide

[4] Section 5(2).
[5] Cf Williams, G., "Which of You Did It?" (1989) 52 *Modern Law Review* 179.
[6] See Law Commission, *Children: Their Non-Accidental Death or Serious Injury* (Law Commission No. 279; 2002) which details the objectives of the legislation.
[7] Above.
[8] Above, at [8].

approach ensures that those who have culpability in the victim's death will justifiably be convicted of a homicide offence, rather than being completely acquitted. The second *Lane* problem persists as in such cases it will still not be possible to precisely demarcate who is the killer and who is the bystander, but as noted above this problem will remain irresolvable. The important point is that culpable defendants are no longer escaping liability.

However, commentators may object that if it cannot be shown which role the defendant played in death then they should be acquitted rather than being charged with a serious criminal offence. This is because criminal penalties have a massive impact on key areas of life, so should not be taken lightly.

Nonetheless, it is appropriate to use the offence in this way. This is because the terms of the offence ensure that the defendant must have been aware, or ought to have been aware, of the significant risk of harm to the victim, and he must have failed to take reasonable steps to protect the victim from this risk. He must breach his duty of care owed to the victim and be a cause of death. This ensures that the defendant has culpability for his failure to protect the victim, and thus it is appropriate to impose liability on him. Consequently, although in cases where it is clear who was the killer and who was the bystander this must be clearly demarcated in law as discussed below, in cases of evidential uncertainty it is appropriate to charge both parties with familial homicide.

The offence ensures ease of prosecution, proof and conviction. Take the case of *Ikram*,[9] where fatal injuries were inflicted on the victim by either his father or his father's partner,[10] but it could not be shown which of them actually killed him.[11] Both individuals knew of the prior injuries to the victim, and the severity of them.[12] By not requiring the court to establish which defendant caused the death and which allowed it, the statute permits these two individuals to be convicted of a homicide offence for which liability is well-deserved.

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[9] Above.
[10] *Ibid.*, at [27].
[11] *Ibid.*, at [43].
[12] *Ibid.*, at [11], [12], [18], [36].

Linked to this rationale for charging familial homicide in cases of evidential uncertainty, even though it blurs the distinction between the killer and the omitter, is the justice for the victim rationale.

2. Justice for the victim

Lane helps to explain this rationale. The result in this case is problematic because it does not achieve justice for the victim. Someone has killed the victim and someone else has culpably failed to intervene, but no one is liable for a homicide offence.

The law has now been changed by section 5 as shown by cases such as *Owen*. There is an issue here because no liability for murder or manslaughter is imposed, meaning that the first *Lane* problem has not been resolved because the exact wrong which each individual has caused is not necessarily reflected by the conviction imposed on her. However, as indicated above this physical impossibility of identification is irresolvable. The offence does address the second *Lane* problem because convictions for familial homicide are obtained, indicating that the law has been improved by the introduction of the offence. The victim has died, and this should be reflected in the charge against the defendants where possible in order to ensure justice is done for the victim.

As familial homicide imposes liability even in cases of evidential uncertainty, it achieves this level of justice through securing homicide liability because this is the harm that occurs to the victim. Consequently, using this offence in such circumstances is an appropriate use of the statute, and is a satisfactory approach where the precise role of the parties is unclear.

Another reason for why adopting the familial homicide approach in cases of evidential uncertainty is appropriate relates to the principle of fair labelling.

3. The fair labelling principle

The fair labelling principle is discussed in greater detail in Part B. However, it can be briefly stated here that this principle holds that the label given to the offence should

fairly reflect the harm committed in order to accurately communicate the nature of the criminal conduct.[13] This is for a number of reasons, such as fairness to the defendant, fairness to the victim, and for the high public interest involved in offence labels. As argued below, the fair labelling principle is an important reason for maintaining the distinction between the killer and the bystander, however, it is also an important reason for why familial homicide, which blurs this distinction, should be used in cases of evidential uncertainty.

This is because convicting two or more parties of familial homicide when their precise role in the offence is unclear is a closer match to the harm that has actually occurred than complete acquittal of the parties involved, or conviction of a much lesser offence. An example helps to explain this:

> A, B and C live together with A's daughter, V. V is repeatedly subjected to physical attacks, although the evidence does not clearly show which of the defendants actually inflict the injuries. V eventually dies from injuries inflicted in a particularly brutal attack.

Under the previous law, if it could not be shown that A, B and C were acting together to cause V's death, all three defendants would be acquitted of murder or manslaughter liability. This is unacceptable in labelling terms because all of the defendants are involved in the victim's death, whether by inflicting the injuries or by failing to protect the victim. They should all be labelled for a homicide offence.

Under the current law, it is likely that all defendants will be convicted of familial homicide, provided that they were aware, or ought to have been aware, of the significant risk of harm to the victim, and they failed to take reasonable steps to protect him from this risk. Indeed, this result was achieved in the *Owen* and *Ikram* cases. They were all at least indirect causes of death, and this should be reflected in a homicide label attached to their conduct. So, in cases of evidential difficulty involving culpable individuals familial homicide is, in labelling terms, a more appropriate legal framework than the pre-2004 position.

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[13] Ashworth, A., *Principles of Criminal Law* (Oxford: Oxford University Press; 5th edition; 2006) at p. 88.

4. Summary

The familial homicide approach should be adopted in cases of evidential uncertainty for the three reasons given above: to ensure the conviction of culpable bystanders; to achieve justice for victims; and for labelling reasons.

Before the second type of situation in which familial homicide may apply is discussed, there is a point which needs to be discussed. Familial homicide has a lower standard of *mens rea* than murder or manslaughter, and also it need not be shown definitively whether the defendant caused or allowed death. Where it is not wholly clear who is the killer and who is the bystander, but there is some indication as to who actually killed the victim, the prosecution may charge familial homicide, rather than murder or manslaughter, in order to improve the chances of securing a conviction. Alternatively, they may accept a plea bargain for familial homicide as opposed to attempting to secure a conviction for murder or manslaughter. This is an issue because defendants may not be prosecuted according to their exact culpability, and justice is not fully achieved for the victim because the precise harm which has been inflicted on her is not reflected in the offence with which her killer, or killers, is charged.

However, in cases such as *Owen* and *Ikram* where the precise role of each party is unclear, familial homicide removes the incentive for one of the culpable parties to stay silent. This is because if they remain silent, they will be convicted of familial homicide rather than one party being convicted of murder and the other acquitted, for example.[14] If one party is not culpable for death, such as in a case where one party is the victim of domestic violence, the prospect of facing a familial homicide conviction provides a great incentive for them to tell the truth. If both parties expect to be convicted, they have less reason not to give their side of the story. This in turn gives the prosecution the incentive to find out what has actually happened, thus offsetting the potential pressure of expensive trials and plea bargains, for example.

[14] As stated by Ormerod, D., "Trial: Discretion to Permit Recall of Defendant as Witness" [2008] *Criminal Law Review* 912 at p. 914, '[u]nder the old law the defendants could be confident that their combined silence would result in the case being stopped at the end of the prosecution case. Now there is a greater likelihood that they will offer an explanation by being put under pressure to testify.'

It is now necessary to consider the different approach taken to situations where the precise role of the defendants is clear. In those cases, the distinction between the killer and the omitter must be demarcated.

Part B – the non-*Lane* situation

This part argues that where the role of each party is clear, effect should be given to this in the convictions and labels applied to each due to the moral distinction between them. If the defendant directly kills the victim, he should be liable for murder or manslaughter. If he does not directly kill the victim, he should incur accessorial liability for murder or manslaughter, or be liable for familial homicide.[15]

Part B1 outlines the reasons for maintaining the distinction between the parties where their role is known. Part B2 proposes reform of the law.

Part B1

There are two reasons for why the distinction between the killer and bystander should be maintained. The first is the derivative principle and the second is the fair labelling principle.[16] These will be outlined in turn.

1. The derivative principle

The first argument for upholding the distinction between the killer and the bystander is a moral and conceptual one based on the traditional derivative principle. This holds that the liability of the killer is direct, whereas that of the bystander is derivative.[17] The boundary between the two must accordingly be maintained.

There is a distinction between how the derivative principle applies to accessorial liability generally, and how it applies to the familial homicide offence when the role

[15] This is also the approach adopted within Chapter Two, and the proposals for reform advanced therein.
[16] For discussion of problems within the law of accessorial liability generally, and general proposals for reform, see Law Commission, *Participating in Crime* (Law Commission No. 305; 2007).
[17] See Fletcher, G.P., *Rethinking Criminal Law* (Oxford: OUP; 2000), Chapter 8.

of each party is clear. This is because the defendant in a case of familial homicide is convicted as a principal offender, whereas the defendant in a case of accessorial liability is convicted as a secondary party to the principal's offence. Although the derivative principle does not directly apply to familial homicide, an analogy can be made in order to explain why the distinction between the killer and the omitter should be respected when the role of each party is clear. The current form of familial homicide does not respect this distinction. Even when it is clear who has killed the victim and who has failed to protect him, section 5 1(d) and section 5(2) DVCVA may be used to group the parties together and convict them of familial homicide. The defendant should be punished as a principal for murder or manslaughter, or as an accessory to this offence, or for familial homicide according to his precise role where the harm that he caused to the victim is clear. Accordingly, the current law is problematic for two reasons.

a. The moral argument

The traditional derivative principle reflects the importance of ensuring that the distinction between the killer and the omitter is clearly demarcated in the law when the role of each party is known. This principle holds that there is a conceptual distinction between the conduct of the killer and that of the bystander. The liability of the direct cause is direct, whereas that of the bystander is derivative.[18] The moral distinction between their conduct is sufficient to treat them differently in law.[19] Both principals and accessories make a difference to the outcome. However, they do it in different ways. Principals make their difference by committing the primary offence. Accessories make their difference through the conduct of principals. They make 'a difference to the difference that principals make.'[20] This moral distinction is highlighted by the following example:

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[18] *Ibid.*

[19] Williams, G., "*Finis* for *Novus Actus*?" (1989) 48 *Cambridge Law Journal* 391 at p. 398 neatly summarises this distinction with his statement that '[t]he final act is done by the perpetrator, and his guilt pushes the accessories, conceptually speaking, into the background. Accessorial liability is, in the traditional theory, "derivative" from that of the perpetrator.'

[20] Gardner, J., *Offences and Defences: Selected Essays in the Philosophy of Criminal Law* (Oxford: Oxford University Press; 2007) at p. 58.

> O is a lodger in K's house. She witnesses K hitting and kicking V, and notices that V suffers from severe bruising and a broken wrist. She sees the attacks becoming more frequent and intense, until K eventually kills V.

K's liability is direct. He commits the *actus reus* of murder or manslaughter.[21] O's liability, however, is derivative. It derives from her complicity in K's crime. She fails to prevent the death of V from the direct killing by K. There is a clear conceptual distinction between their conduct. Accordingly, the conduct of each party should be treated differently in law where their role in death is obvious.

However, familial homicide allows both the killer and the bystander to be equally convicted even when it is clear which of them actually killed the victim.[22] In the example given, this fails to respect the moral, and also conceptual, distinction between the different parties to the killing, which is problematic by analogy to the traditional derivative approach.[23] Moreover, it contravenes the very purpose for which the offence was developed.[24] The legislation was not intended to collapse the distinction between the principal offender and the secondary party in these types of situations. As indicated in the Introduction and Chapter One, it was in fact designed to be used in cases of evidential difficulty where it was unclear who killed the victim and who failed to protect him. Using it in cases where the precise role of each party is known is inappropriate because it unjustifiably collapses the distinction between the different parties even though there is no need to do so.

b. The individual autonomy argument

The distinction between the killer and the omitter must also be maintained for reasons of individual autonomy. Adopting the derivative approach respects the parties' individual autonomy.

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[21] See, for example Ormerod, D., *Smith & Hogan: Criminal Law* (Oxford: Oxford University Press; 12th edition 2008) at p. 180 who indicates that the principal is the person who commits the *actus reus*. Ashworth, above at p. 411 states that the principal is the party whose conduct falls within the legal definition of the crime.

[22] Section 5(2) DVCVA.

[23] Smith, K.J.M., *A Modern Treatise on the Law of Criminal Complicity* (Oxford: Clarendon Press; 1991) at p. 3 highlights the traditional approach towards accessorial liability.

[24] See the Introduction and Chapter One for further detail on the evidential reasons for why familial homicide was developed.

The individual autonomy argument holds that individuals are responsible for their own freely chosen behaviour, so must be treated as such.[25] This is a vital principle to uphold within the criminal law because it ensures that individuals are only held liable for conduct that they are responsible for, and choose to engage in.[26]

The derivative principle ensures that individuals are only liable for their voluntary conduct. It holds the direct cause liable for murder or manslaughter, thus reflecting his voluntary choice to kill the victim. It holds the indirect cause derivatively liable for the relevant offence, which not only respects his choice to voluntarily become involved in the killing, but also his choice not to commit the crime himself.

This can be demonstrated through the example discussed above. There K chooses to commit the murder or manslaughter of V. The derivative principle holds him directly responsible for this crime, thus respecting his individual choice to commit the offence, and punishing him for the crime that he is responsible for. Holding O derivatively liable for her omission to protect V respects her individual autonomy because she chooses to be complicit in the crime, rather than commit it herself. She is, however, voluntarily involved in the killing. This is reflected by holding her secondarily liable. Consequently, by recognising the important differences between K and O's freely chosen behaviour, the derivative principle respects the individual autonomy of the different parties to the victim's death.

Familial homicide, however, does not respect individual autonomy to the same extent. This is because it groups all of the parties together even when the precise role of each is clear. Although the offence distinguishes between 'causing' and 'allowing' the death of the victim, it is not always clear which of these applies in a particular case. The offence itself specifies that the prosecution does not have to prove which alternative applies,[27] and in cases such *Su Hua Liu*[28] it was not specified which alternative the defendants were liable for. Although this is an advantage in cases of evidential difficulty as discussed above, it is a major flaw when the statute is applied in cases of evidential clarity.

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[25] Ashworth, above at p. 25.
[26] See Chapter Three for further discussion of voluntariness and individual liberty.
[27] Section 5(2).
[28] *R v Su Hua Li & Lun Xi Tan* [2007] 2 Cr App R (S) 12.

The current law must be reformed in order to better reflect the distinction between the killer and the omitter in cases where the role of each party is known. This is due to the issues highlighted by the derivative principle, and the conceptual and individual autonomy-based reasons underlying it. However, there are potential objections to the derivative approach. The next section will outline these objections, ultimately dismissing them and concluding that the derivative approach is, in fact, an appropriate one to adopt.

2. Potential objections to the derivative principle

There are two potential objections to the derivative thesis. These will be considered in turn.

a. The legality objection

There are two legality-based objections.

i. The derivative principle infringes the principle of legality

The first legality-based objection is that the derivative principle infringes the principle of legality. This principle holds that the law should be clearly defined so that individuals know when their conduct will be criminal,[29] and to ensure that it does not infringe Article 7 of the European Convention of Human Rights.[30] As stated in the *Sunday Times* case:

> [T]he law must be adequately accessible: the citizen must be able to have an indication that is adequate in the circumstances of the legal rules applicable to a given case.[31]

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[29] For further detail on the principle of legality, see Herring, J., *Criminal Law: Text, Cases and Materials* (Oxford: Oxford University Press; 3rd edition; 2010) at pp. 11-12, and Ashworth, above at pp. 68-83.
[30] As imported into domestic law by the Human Rights Act 1998.
[31] *Sunday Times v UK* (1979) 2 EHRR 245 at [49].

The derivative thesis may be objected to on the grounds that the accessory does not actually commit the crime for which he is held liable; he is in fact liable for failing to act in respect of the offence of another. He is liable for the offence of the direct cause. This arguably results in a lack of clarity because his liability is not self-standing; it depends on the criminal conduct of another. Arguably, it also causes 'grammatical inaccuracy' because it does not make grammatical sense to hold the indirect cause liable for 'killing' the victim when he did not actually do so.[32]

This objection can be dismissed. It is justifiable to hold the bystander liable for the offence of the killer, and accordingly the principle of legality is not infringed. The defendant must still have *mens rea*, and be involved in the offence, even though she may not have directly committed it herself. No confusion should thus result from holding an accessory responsible for the relevant crime. No 'grammatical inaccuracy' occurs, and the law remains as clear as possible, thus aligning with the requirements stated in the *Sunday Times* case.

However, there is a second legality-based objection to the derivative thesis.

ii. The defendant will not know that his conduct is criminal

This objection holds that because the derivative principle imposes liability on the bystander for the conduct of the killer, the bystander will not know that his conduct is criminal because he does not commit the crime himself. Consequently, the derivative approach infringes the principle of legality because individuals may not know that their conduct is criminal.

This objection can be dismissed using the 'thin ice' principle. This holds that individuals who know that their conduct may be criminal take the risk that it will indeed be criminal.[33] As stated in *Knuller*:

> [T]hose who skate on thin ice can hardly expect to find a sign which will denote the precise spot where he will fall in.[34]

[32] Dressler, J., "Reforming Complicity Law: Trivial Assistance as a Lesser Offense?" (2007) 5 *Ohio State Journal of Criminal Law* 427 at p. 433.
[33] For further detail on the 'thin ice' argument see Ashworth, above at pp. 73-4.

Within the current context, individuals who witness a victim being subjected to physical attacks over a period of time know or reasonably foresee that failure to protect him may be illegal. By failing to protect him they take the risk of criminal punishment. *Su Hua Liu* is an example of this. Although the victim's husband did not assault her himself, he was aware of the physical attacks inflicted on her.[35] By failing to act, he took the risk of criminal liability.

The thin ice principle demonstrates that in the familial homicide context, criminalisation of the bystander's conduct is justifiable because such individuals should know their failure to act may be criminal. Moreover, in order to actually be held derivatively liable as an accessory to the direct cause's offence, the bystander must intend to assist or encourage the principal.[36] Alternatively, in order to be liable for familial homicide she must be aware, or ought to have been aware, of the risk of harm to the victim. Therefore, it is justifiable to hold her liable for whichever offence most closely reflects her liability.

As this legality-based objection can be dismissed, the principle stands as a valid reason for explaining and maintaining the distinction between the killer and the omitter in the familial homicide context when the precise role of each party is known. It indicates why the distinction between them must be maintained for accessorial liability, and by analogy also applies to the familial homicide offence.

The reforms proposed in Part B2 further reduce the force of any such legality objections. This is because they aim to clarify the law, thereby making it clear exactly when an individual will be liable as the direct cause, the indirect cause, or no cause. Also, within the indirect cause category of liability, the reforms permit two different offences to be charged, thus making it even clearer what the individual is liable for.

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[34] *Knuller v DPP* (1973) AC 435 per Lord Morris.
[35] Above, at [12]-[15].
[36] The jurisprudence on accessorial liability demonstrates this point. See Smith, above, for more general detail.

However, although the legality objections to the derivative principle have been dispensed with, there is another objection to this thesis.

b. The practical objection

There is a practical objection to the derivative principle, based on the fact that the principal offence must actually occur before the omitter can theoretically be held liable as an accessory. This is because the omitter's liability derives from the killer's offence. If the killer is not liable for murder or manslaughter because he has a defence, or is acquitted by the jury, or lacks *mens rea*, the derivative principle might appear to mean that the bystander must also be acquitted. Her liability cannot derive from the killer because the killer himself is not liable.[37] This is an issue because acquittal of the killer does not change the culpability of the bystander, so allowing her culpable failure to act to remain unpunished would be problematic for justice and criminal responsibility.[38]

However, this problem exists more in theory than practice. The courts have ensured that this theoretical limitation is not a practical bar to prosecution and conviction.[39] The courts have even held that it may be appropriate to convict the secondary party of a higher offence than the principal,[40] meaning that they definitely do not consider acquittal of the principal a bar to imposing liability on the secondary party.

In situations where the killer is not convicted, the omitter may still be convicted because the *actus reus* of the offence has occurred,[41] meaning that she can be convicted as an accessory to it. Indeed, this is the approach taken by the reforms outlined in Part B2, which hold that acquittal of the killer is not a bar to the omitter's liability because the offences with which the omitter may be charged stand alone.

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[37] For a similar point, see Ashworth, above at p. 434.
[38] As stated by Kadish, S.H., "Complicity, Cause and Blame: A Study in the Interpretation of Doctrine" (1985) 73 *California Law Review* 323 at pp. 341-2, '[t]he secondary actor's culpability is surely unaffected by the fact that the principal has an excuse.' However, he opines that this problem is solved by the doctrine of causation. See Chapter Two for further detail on causation.
[39] See, for example, cases such as *R v Cogan & Leak* (1976) 1 QB 217; *DPP v K & B* (1997) 1 Cr App R 36 and *R v Millward* [1994] Crim LR 527.
[40] *R v Burke* [1987] AC 417 at p. 458 per Lord Mackay.
[41] Clearly, if the principal offence does not occur, the law of attempts and inchoate liability comes into effect.

This approach is justifiable for reasons of individual criminal responsibility. This practical objection to the derivative approach can thus be rebutted.

In conclusion, although there are potential objections to the derivative principle, these are not sufficient to displace it as a strong reason for maintaining the distinction between the killer and the bystander when the role of each party is known. It is vital to uphold this principle as a basis of distinction for reasons of conceptual clarity and individual autonomy.

Another key principle which justifies maintaining the distinction between the killer and the bystander is the fair labelling principle.

3. The fair labelling principle

The fair labelling principle supports upholding the distinction between the killer and the omitter because there is a sharp moral distinction between the conduct of each party. Morals and the criminal law are inextricably linked.[42] Due to the conceptual and moral distinction between the parties, different labels should be applied to the conduct of each party where their precise role in the offence is clear for reasons of fairness.

The fair labelling principle complements the derivative principle as a basis for maintaining the distinction between the killer and the omitter. Through labelling the killer as directly liable and the bystander as derivatively liable the fair labelling principle reflects the harm which each individual has committed, neatly tying together the two underlying rationales for distinguishing between the killer and the omitter. Take, for example, a case of murder, involving one party who kills the victim and one who fails to protect him.[43] Labelling the killer for murder is

[42] Lord Devlin, *The Enforcement of Morals* (Oxford, Oxford University Press, 1965). Lord Devlin's work has been heavily criticised by Hart in two of his texts. See Hart, H.L.A., *Law, Liberty and Morality* (Oxford, Oxford University Press, 1962) and Hart, H.L.A., *The Morality of the Criminal Law* (London, Oxford University Press, 1965). However, more recent work also recognises the role of moral judgment. See, for example, Husak, D.N., *Philosophy of Criminal Law* (New Jersey: Rowman & Littlefield; 1987).

[43] This type of situation is typical of the context under discussion. See *R v Stephens & Mujuru* [2007] 2 Cr App R 26 and BBC News Online, "Mother Jailed after Baby's Death", 15th December 2006 <http://news.bbc.co.uk/1/hi/wales/south_west/6181051.stm> accessed 21st May 2012.

appropriate because he directly kills the victim. The omitter is derivatively liable, for example as an accessory to murder. Labelling her as such reflects the harm that she has brought about.

There are several reasons for why offences should be labelled fairly, and thus for why the killer and the bystander must be labelled differently where their precise role is clear. These will now be discussed.

a. Fairness to the victim and the victim's family

The first reason for why crimes should be labelled fairly is due to fairness to the victim and the victim's family. It is important that the harm suffered by the victim is adequately reflected in the label given to the offender's crime. It is important for justice to the victim and her family, and for retributive purposes, that the offender is labelled according to the harm that he has actually inflicted. If the defendant steals from the victim he should be labelled for theft; if he rapes the victim he should be labelled for rape. Another example relates to property damage. It is unfair to equate vandalism with negligent damage because although property damage is the same end result, 'vandalism expresses a certain sort of contempt for society and the victim that negligent damage does not.'[44]

As shown by the above discussion, crimes must be labelled fairly for reasons of morality. Regarding the property damage example, the distinction between labelling a defendant for negligent damage or for vandalism is a moral one.[45] This is because the physical harm caused in each case is the same, yet the moral difference between deliberately vandalising another's property and negligently causing property damage justifies labelling each crime differently.[46] In moral terms, it is important to reflect the exact harm to the victim in order to allow justice and retribution to occur, and so

[44] Simester, A.P., Spencer, J.R., Sullivan, G.R., & Virgo, G.J., *Simester & Sullivan's Criminal Law: Theory & Doctrine* (Oxford: Hart; 4th edition; 2010) at p. 32.

[45] Similarly, Herring, above at p. 17 discusses the distinction between theft and criminal damage, arguing that there is a moral distinction between the two because although property is lost in both offences, the way the property is lost 'matters in moral terms'.

[46] There is also a distinction in the *mens rea* for each offence. However, the importance of distinguishing between the different forms of *mens rea* relates to the defendant's culpability, and therefore this aspect of labelling relates to fairness to the defendant. Consequently, it is not discussed here. The fairness to the defendant rationale for fair labelling is discussed below.

that the victim and her family know that the defendant will be labelled according to the harm that he has inflicted on her. The defendant must be labelled according to whether he is a direct cause, an indirect cause, or no cause at all because there is a sharp distinction between the conduct of each, and this must be reflected in the labels applied to each party to ensure moral justice and retribution.[47]

This sense of morality, justice and retribution regarding the fair labelling of crimes is one of the arguments used to uphold the distinction between rape and other sexual offences on the grounds that rape is regarded as the most heinous form of sexual assault.[48] The labelling contained within the Sexual Offences Act 2003 reflects the different types of harm which may be caused to the victim, with the distinctive harm of rape reflected by labelling rape and sexual assault differently even though there is no distinction between the maximum penalties for each offence.[49] Maintaining a separate label for the offence of rape helps to achieve moral justice and retribution for rape victims.[50]

However, it has been argued that fairness to the victim is an insufficient rationale for fairly labelling crimes. Chalmers and Leverick state that this rationale is questionable because:

> One might suspect that more important to the victims than the name of the offence is whether the offender is convicted at all and the magnitude of the sentence passed. Indeed, there is no guarantee that victims or their families will use or even be aware of the legal term for the offence.[51]

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[47] See, for example, Law Commission, *Murder, Manslaughter and Infanticide* (Law Commission No. 304; 2006) at pp. 25-6 for discussion of the importance of clear and fair labelling in the homicide context.

[48] Labelling concerns also influenced the Law Commission in its report on homicide, *ibid.*

[49] A point mentioned by Simester *et al*, above at pp. 423-4.

[50] Loh, W., "What Has Reform of Rape Legislation Wrought? A Truth in Criminal Labelling" (1981) 37 *Journal of Social Issues* 28 also argues that convictions for sexual assault for those who have actually committed rape is unfair to the victim. See Chalmers, J., & Leverick, F., "Fair Labelling in Criminal Law" (2008) 71 *Modern Law Review* 217 at pp. 235-6 who detail the contrasting Canadian position.

[51] Chalmers & Leverick, *ibid* at p. 236.

They conclude that the fairness to the victim rationale for fair labelling adds nothing when compared with the perspectives of other interested parties, such as the offender and agencies operating within the criminal justice system.[52]

However, their arguments are flawed. First, their statement that any conviction is more important to the victim than the label of the offence is problematic. This is because if the defendant is convicted of a lesser offence than the one actually committed, justice is not done since he is not labelled according to the harm that he caused. In cases where it was clear who killed the victim and who failed to protect him, labelling the direct killer for familial homicide, for example, does not do justice for the victim and his other family members as the individual who killed him is not held liable for murder. He escapes punishment and judgment for the harm that he caused.

Second, their judgment that victims will not use or be aware of the label for the offence is difficult to accept. They underestimate the public. Take the offences of murder and manslaughter. Even though convictions for both murder and manslaughter could result in a life sentence, to convict a murderer for manslaughter is unacceptable. This is because the label 'murder' has a symbolic function in contrast to 'manslaughter.'[53] It conveys the unique nature of murder and its severity, and explains to the public the exact harm that the defendant has committed. For declaratory and symbolic reasons it is necessary to distinguish between the different offences.

Throughout the criminal process the defendant is charged and prosecuted for certain offences and the label given to these offences is made clear to the public, including victims and their families. For example, if the defendant is arrested on suspicion of theft contrary to section 1 of the Theft Act 1968, this will be stated publicly. Victims and their families have an interest in the prosecution and conviction of the offender, so it is naive to claim that such parties will not be aware of the offence label. The distinction between the killer and the omitter must be maintained because the

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[52] *Ibid.*, at pp. 236, 238.

[53] See Select Committee, *Murder and Life Imprisonment* (HL 1988-89, 78) and the commentary by Ashworth, A., "Reforming the Law of Murder" [1990] *Criminal Law Review* 75.

victim's family will be aware of the exact harm which each defendant is prosecuted for, and the harm caused by the killer differs to that of the omitter.[54]

Finally, the authors' conclusion that the victim's perspective adds little when compared to the perspectives of other parties is problematic. This is because it is unfair to compare and contrast the parties to whom the labelling of an offence is important. Each party has an interest in fair labelling.

Another reason for labelling crimes fairly is fairness to the defendant.

b. Fairness to the defendant

There are two main arguments regarding the fairness to the defendant rationale for fair labelling, and thus for distinguishing between the direct cause and the indirect cause. These will be considered in turn.

i. The educative argument

The first argument is that crimes must be labelled fairly because the offence label explains to the defendant what harm he is being punished for.[55] So if the defendant intentionally kills the victim, the label attached to his conduct should be murder. The label helps the defendant to understand exactly why he is being punished, meaning that fair labelling is crucial.

It has, however, been argued that the label itself does not have a vital educative function; what is more effective is the magnitude of the sentence and the explanation behind this.[56] Yet this argument conflates the distinction between the offence label and sentencing. This is incorrect. The label attaches to the defendant's conduct, explaining what he has *done*. The sentence, and its severity, punishes him for the *extent* of the harm. Accordingly the offence label does have an important educative role, and in fact this role is a stronger educative one than the sentence handed down

[54] This conclusion was reached above in relation to the derivative principle, but see also Chapter Two for detail on how the causal contribution of each party differs.
[55] For a similar point, see Simester *et al*, above at pp. 30-31.
[56] Chalmers & Leverick, above at p. 229.

because it conveys what the defendant is being punished for, not how severe his crime was. Fairness to the defendant is a key rationale for fair labelling, and thus for distinguishing between the labels attached to the killer and the omitter where the precise role of each party is clear.

ii. Declaratory

The second argument is the declaratory function of the label. The label communicates to the defendant's family, friends, employers, and the general public what harm he has caused. He is judged and stigmatised according to this, and as outside parties may not be privy to the sentencing explanation, the offence label performs this important declaratory function. It must therefore reflect the exact harm he has caused. If he commits murder, his conduct must be labelled as murder. Conversely, if he commits a more minor offence, such as failing to provide a specimen of breath at the roadside,[57] his conduct should be labelled as such to communicate the more trivial nature of his wrongdoing.

The above reasoning demonstrates that the distinction between the killer and the bystander must be maintained in the current context where the role of each party is clear. The direct cause, or causes, must be labelled for murder or manslaughter,[58] and the indirect cause, or causes, as well as non-causes, for a secondary offence.[59]

Another reason for maintaining this distinction on the grounds of fair labelling is individual autonomy.

iii. Individual autonomy

The principle of individual autonomy holds that individuals are responsible for their own behaviour.[60] The labels attached to defendants' wrongdoing must reflect this choice to engage in criminal conduct, and exactly what harm they have caused

[57] Contrary to the Road Traffic Act 1988.
[58] Problems which arise when it cannot be proven who actually killed the victim are dealt with by the reforms in Part B2.
[59] The offences that should be applicable to secondary parties in this situation are outlined in Part B2.
[60] Ashworth, above at pp. 25-6.

thereby. Accordingly, direct causes must be labelled differently to indirect causes and non-causes.

The autonomy rationale for labelling the parties fairly can be demonstrated by the case of *Su Hua Liu*. The victim died from injuries inflicted by her husband's mistress.[61] The victim's husband knew what was occurring.[62] He failed to prevent the death, but did not appear to inflict the injuries himself, although the victim was kept as a slave in his house.[63] The husband's mistress was convicted of manslaughter. The victim's husband was convicted of familial homicide.

This case highlights that there is a difference in each party's conduct sufficient to warrant labelling their conduct differently. The mistress directly inflicted the injuries on the victim, resulting in death, so her conduct should be labelled as murder or manslaughter. This reflects her responsibility for the death, and her autonomous choice to kill the victim. The husband allowed the victim to be killed by the actions of a third party, which indicates that his conduct should be labelled differently. He did not directly kill the victim, rather, he chose to allow his mistress to kill her, and therefore he should be liable as an accessory to manslaughter, or for familial homicide, in order to reflect this difference in choice.[64]

Another key reason for upholding this distinction is the public interest rationale for labelling crimes fairly.

iv. Public interest

The public interest rationale holds that it is in the public interest to label offenders fairly. This is because the offence label communicates to employers, friends, and the general public how dangerous the offender is. This is vital. For example:

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[61] Above at [17].
[62] *Ibid.*, at [11], [15].
[63] *Ibid.*, at [5], [6].
[64] The exact nature of the label for his conduct is considered in Part B2, which discusses reform.

> While an employer may have few qualms about hiring a convicted fraudster as an orderly in a children's hospital, it would be an entirely different matter to contemplate employing someone who has been in jail for paedophilia.[65]

The label of the offence may help to avoid future danger. Indeed, because the familial homicide context is so serious, it is definitely in the public interest that defendants within this sphere are fairly labelled. Accordingly, the law must distinguish between the killer and the omitter. There may not necessarily be a difference in culpability between the two parties, but there is a distinction between killing the victim and failing to prevent him from dying which the public will recognise.

c. An objection to the fair labelling principle

Offences must be labelled fairly for the four reasons outlined above. However, there is an objection to this line of argument. This holds that it is unnecessary to differentiate between the parties in labelling terms. This is because the bystander may be as culpable as the killer, or more culpable.[66] Particularly in the current context there may be little difference between the culpability of the individual who kills the victim and the individual who allows death.

Nonetheless, although in certain cases there may be little distinction between the culpability of the killer and the omitter, it does not automatically follow that there is no need to label the parties differently. The physical harm brought about by each individual varies, and this must be reflected in different offence labels applied to each. There is a parallel here with the law of attempts. Labelling X for murder and Y for attempted murder reflects the physical distinction between their conduct even though there may be little or no difference in their respective culpability as both X and Y must have had an intention to kill.

Nevertheless, there is a related objection which also needs to be responded to here. This is the argument that it could come down to chance as to which of the defendants

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[65] Simester *et al*, above at pp. 30-1.

[66] Simester, A.P., "The Mental Element in Complicity" (2006) 122 *Law Quarterly Review* 578 at p. 579 discusses the possibility that the secondary party may be at least as culpable as the principal.

actually kills the victim. A typical scenario in this context could be where the victim is subjected to repeated abuse by two or more defendants, and eventually dies from a fatal blow inflicted by one of them. It could have been either of them which eventually inflicted the fatal blow.

This argument, however, is flawed. First, in such a case both abusers would most likely be liable as joint principals. This minimises the element of luck. Second, there is a physical difference between the conduct of the abuser who inflicts the fatal blow and the abuser who does not. The former is, physically, the direct cause of death, and should therefore be liable for murder or manslaughter according to his *mens rea*. The latter is not physically the direct cause of death; she is an indirect cause of death and therefore should be liable as an accessory to murder or manslaughter, in accordance with the proposals outlined in the causation chapter. Such convictions, and the resultant labels, reflect the similar level of culpability between the different defendants, as well as the physical distinction between their conduct.

As the above objections to the fair labelling principle can be dismissed, this principle stands as a valid reason for maintaining the distinction between the parties.

4. Summary

Two main reasons have been advanced for maintaining a clear distinction between the killer and the bystander when the role of each party is known. In order to fully respect the derivative and fair labelling reasons for distinguishing between them, the law needs to be reformed slightly. This is because, as noted above, the terms of the statute permit the parties to be convicted of familial homicide even when their role is clear, and this does not give adequate weight to the distinction between the different individuals.

Part B2 will now outline the proposals for restructuring the law to take greater account of the distinction between the killer and the omitter.

Part B2 – reform of the law

The proposals for reform adopt the same three-part structure as the current law. However, they promote clearer demarcation between who should be liable for each offence. The structure which exists is:

1) Murder or manslaughter
2) Accessory to murder or manslaughter
3) Familial homicide

The first offence is murder or manslaughter. The proposals hold that where it is known who is the victim's killer, or killers, they should be convicted of murder or manslaughter provided that they have *mens rea* and are a direct cause of death. The exact requirements for liability are laid down in the Draft Bill.[67] The direct cause or causes should only be convicted of familial homicide in cases of evidential difficulty, and the arguments for adopting this approach have been detailed above. This is a major change from the current law which allows the direct killer of the victim to be convicted of familial homicide even when the requirements for murder or manslaughter may be met, and their precise role in death is known.

The second and third offences apply to the indirect causes. Having two categories which the indirect cause may fall into more adequately reflects the fact that such individuals may have different levels of culpability. Thus, it helps to ensure that the offence labels more fairly reflect the defendant's wrongdoing. The difference between the two secondary offences is based on *mens rea*. The *mens rea* for an accessory to murder or manslaughter is intention to assist or encourage the principal offender and foresight that the principal may go on to commit the offence with these acts of assistance.[68] However, the *mens rea* for familial homicide is that the defendant was aware, or ought to have been aware, of the significant risk of serious harm being caused to the victim, he failed to take reasonable steps to protect the victim from that risk and the offence occurred in circumstances of the kind that the defendant foresaw or ought to have foreseen.

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[67] This is set out in Appendix Five.
[68] This accords with the views of the Law Commission, above at p. 2.

It must be noted that acquittal of the direct cause, or non-conviction for whatever reason, is not a bar to convicting the indirect cause. The offences stand alone. If the direct cause is not convicted of murder because he has a defence, for example, the indirect cause may still be liable as an accessory to murder, or for familial homicide. This is because the indirect cause is still culpable and the *actus reus* of the principal offence occurred. The indirect cause is no less culpable than she would be if the killer was convicted.[69]

The approach for reform more satisfactorily respects the two principles outlined above for maintaining the distinction between the direct cause and the indirect cause, as will now be discussed. As highlighted in the Draft Bill and Chapter Two, the proposals for reform alter the dynamic of the current law and its structure to better reflect the precise role that each individual has in the victim's death.

a. The derivative principle

The proposals for reform give greater weight to the derivative principle, which holds that there is a conceptual distinction between the conduct of the principal and that of the secondary party. This is because they ensure that the direct cause and the indirect cause are held liable for different offences where it is appropriate to do so. This reflects the aforementioned distinction because it holds the direct cause directly liable for murder or manslaughter, and the indirect cause either derivatively liable as an accessory to the principal's conduct, or for a lesser offence, thereby reflecting the moral, and conceptual, difference between their conduct.

b. The fair labelling principle

Where the role of each party is known, the reforms ensure that this is reflected in the label attached to the offence that each individual is liable for. Contrary to the current law which permits the boundaries to be blurred, the reforms provide that the direct cause is to be charged with a different offence to the indirect cause where it is appropriate to do so according to their causative role and their *mens rea*. There are

[69] For a similar point, see Ashworth, above at p. 434.

different offences with which the defendant may be convicted according to the harm that he has caused the victim. The offence label is more likely to adequately reflect his wrongdoing, and this is vital for the reasons detailed above.

Conclusion

There is a distinction regarding how accessorial liability principles apply to the situation where the role of each party in death is unclear, and where the role of each defendant can be clearly identified. In relation to the first situation, the current familial homicide approach is the most appropriate. This is because it resolves the two *Lane* problems as best it can, meaning that culpable individuals are no longer escaping homicide liability. In relation to the second situation, however, the familial homicide offence has gone too far. This is because it allows the roles of the parties to be blurred even where their role in death is obvious, and this is inappropriate by virtue of the derivative and fair labelling principles. Accordingly, the law should be tightened up in the ways suggested above in order to give greater weight to these principles. The law should move forward in this manner in order to fully attain justice for victims and achieve appropriate convictions for culpable individuals.

Chapter Six

Why a Specific Domestic Violence Defence to Familial Homicide is Unnecessary

Introduction

Section 5 of the Domestic Violence, Crime and Victims Act 2004 (DVCVA) does not contain a specific defence for defendants who have been victims of domestic violence. Certain academics have argued that this is unsatisfactory, and that a specific domestic violence defence is necessary.[1] This is because the severe psychological impact of domestic violence on individuals may leave them unable to perceive the risk of harm that they are held liable for. However, other academics opine that the legislation is satisfactory because the reasonable steps test adequately safeguards victims of domestic violence.[2] This debate over whether the test within section 5 does in fact safeguard victims of domestic violence indicates the need for the statutory approach towards such cases to be considered in greater detail.

This chapter argues that a specific domestic violence defence is not necessary, settling the law. Once the reasonable steps test is clarified, this becomes clear. In order to conclusively settle the debate and demonstrate why the law does not need to be changed, this chapter clarifies the structure of the reasonable steps test, indicating that contrary to traditional doctrine which keeps *actus reus* and *mens rea* separate, the reasonable steps test forms part of both the *actus reus* and the *mens rea* of familial homicide. It also clarifies the test itself, arguing that it is a qualified objective test.

There are four reasons for why a specific defence is not needed; the breach of duty test safeguards against non-culpable defendants being held liable; the *mens rea* test

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[1] See, for example, Herring, J., "Mum's Not the Word: an Analysis of Section 5" in Clarkson, C.M.V., & Cunningham, S., (eds) *Criminal Liability for Non-Aggressive Death* (Hampshire: Ashgate; 2008) pp 125-153.

[2] Griffin, L., "Which One of You Did It? Criminal Liability for "Causing or Allowing" the Death of a Child" (2004) 15 *Indiana International and Comparative Law Review* 89 at p.102 discusses the familial homicide legislation itself, whereas Enos, V.P., "Prosecuting Battered Mothers: State Laws' Failure to Protect Battered Women and Abused Children" (1996) 19 *Harvard Women's Law Journal* 229 considers a reasonableness-based test generally, arguing that this test should be adopted for such cases.

provides a similar safeguard; a domestic violence defence would be discriminatory; and such a defence may exonerate culpable defendants.

This chapter will first highlight the psychological impact that domestic violence has on victims in order to contextualise the issues here. It will then clarify both the structure and meaning of the reasonable steps test, and then discuss the four reasons for why a domestic violence defence is not needed.

1. The psychological impact of domestic violence on victims

Domestic violence has a well-documented psychological impact on victims.[3] It affects their perception of the abusive situation and how to respond to it, and their perception of risk to others. As stated by Walker:

> Repeated batterings, like electric shocks, diminish the woman's motivation to respond. She becomes passive. Secondly, her cognitive ability to perceive success is changed. She does not believe her response will result in a favourable outcome, whether or not it might.[4]

Walker highlights the way in which physical violence actually changes how individuals think. She explains how the abuse has a physiological impact, thus demonstrating how defendants in failure to protect situations may not fully appreciate the risk that they, and other victims, may face. This is supported by the work of Miccio, who states that:

> Domestic violence conditions the survivor's existence upon the good will of the batterer. Survivors exist below the surface, where life is a day-to-day struggle and where violence is the only constant. In a world where terrorism is a daily occurrence, notions of privacy, bodily integrity and personal autonomy are illusory. [...] Such violence distorts reality. An "Alice through the looking glass" logic prevails, where conceptions of right, wrong and indifference hold no tangible meaning.[5]

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[3] See, for example, Walker, L., *The Battered Woman Syndrome* (New York: Harper & Row; 1979) and Wells, C., "Battered Woman Syndrome and Defences to Homicide: Where Now?" (1994) 14 *Legal Studies* 266.

[4] *Ibid.*, at p. 45.

[5] Miccio, G.K., "A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings" (1999) 22 *Harvard Women's Law Journal* 89 at p. 92.

This again demonstrates the psychological impact that domestic violence has. Violence may affect victims' thought processes and the way they perceive reality and risk, thus highlighting the issues faced by defendants in failure to protect situations. Also, as stated by Herring:

> Domestic violence suffered by the defendant will impact on the woman's awareness of the situation; the alternatives open to her and the risks to the children. It can distort a person's perception of reality and sap their energy to do anything more than survive.[6]

Discussion of the academic literature has shown that domestic violence can have an extensive impact on victims' abilities to perceive risk. This is because it distorts reality, because it affects their understanding of what is right and wrong, and because it affects their ability to perceive alternatives available to them. This severe effect of domestic violence on victims will be referred to as the 'perception impairment' effect throughout this chapter.

Due to the perception impairment effect of domestic violence, academics have argued that the reasonable steps test in the familial homicide legislation is inappropriate.[7] This test states that the defendant may be liable if he fails to take reasonable steps to protect the victim. Academics opine that the test is inappropriate because the concept of reasonableness is not readily applicable to victims of violence, and so assessing them against such a standard may be unfair. This will be discussed in further detail below, however, prior to this discussion an important point of clarification regarding the reasonable steps test is necessary.

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[6] Herring, J., "Familial Homicide, Failure to Protect and Domestic Violence: Who's the Victim?" [2007] *Criminal Law Review* 923 at p. 929. This is supported by Tadros, V., "The Distinctiveness of Domestic Abuse: A Freedom-Based Account" in Duff, R.A., & Green, S.P., (eds) *Defining Crimes – Essays on the Special Part of the Criminal Law* (Oxford: Oxford University Press; 2005) pp. 119-142 at pp. 127-8. Jacobs, M.S., "Requiring Battered Women Die: Murder Liability for Mothers Under Failure to Protect Statutes" (1998) 88 *Journal of Criminal Law & Criminology* 579 at p. 637 states '[i]t is no more the intention of battered mothers that their children be killed than it is the intention of battered women to be beaten.' For discussion of domestic violence generally, see Dempsey, M.M., "What Counts as Domestic Violence: A Conceptual Analysis" (2005) 12 *William and Mary Journal of Women and the Law* 301. See Dunlap, J.A., "Sometimes I Feel Like a Motherless Child: the Error of Pursuing Battered Mothers for Failure to Protect" (2004) 51 *Loyola Law Review* 565 generally for discussion of failure to protect statutes.

[7] Herring, above.

Some academics have argued that the reasonable steps test forms part of the *actus reus* of the offence,[8] while others have argued that it forms part of the *mens rea*.[9] In fact the reasonableness test forms part of both its *actus reus and* its *mens rea*. It is important that the law avoids the confusion that occurs by stating that the reasonable steps test is either *actus reus* or *mens rea*; in fact it is both. This will now be discussed.

2. The reasonable steps test

There are two key points of clarification which need to be made about the reasonable steps test. First, its structure needs explaining. Second, the actual conception of the reasonable steps test as a qualified objective one needs to be understood.

a. Structure of the reasonable steps test

Viewing the reasonable steps test contained within the familial homicide offence as part of its *actus reus* as well as its *mens rea* is a unique approach. This section will outline the two key reasons for why the reasonable steps test should be characterised as both *actus reus* and *mens rea*. First, it will explain the factual reason for why it should be so characterised. Second, it will explain the principled reason for adopting such an approach.

i. The factual reason

This section explains why, in fact, the reasonable steps test is unique and should thus be characterised as both *actus reus* and *mens rea*. The uniqueness of the familial homicide approach can best be illustrated by comparing the novel offence of familial homicide with the well-established law surrounding gross negligence manslaughter.

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[8] See Ashworth, A., *Principles of Criminal Law* (Oxford: Oxford University Press; 6th edition; 2009) at p. 285 who discusses this aspect of the offence in the language of omission, indicating that it is part of the *actus reus*.

[9] Herring, J., *Criminal Law: Text, Cases and Materials* (Oxford: Oxford University Press; 3rd edition; 2010) at p. 281.

The court in the gross negligence manslaughter case of *Adomako* stated that there are four requirements needed to establish liability.[10] First, the defendant must owe a duty of care to the victim. Second, he must breach that duty of care. Third, the breach of duty must cause the victim's death. Fourth, the breach of duty must be so severe as to amount to gross negligence, and thus justify a criminal conviction. The court does not look at the defendant's mindset until the fourth requirement. Thus, *mens rea* does not come in to the question of liability until the three *actus reus* requirements have all been established. The breach of duty requirement in gross negligence manslaughter does not require the court to look at the defendant's mindset; it is purely factual. It asks the court to determine whether the defendant fell below the standard of the reasonable man, so in *Adomako* the court had to determine the purely factual question of whether the defendant fell below the standard of the reasonable anaesthetist, and thus breached the duty of care he owed to the victim. The issue of *mens rea* was only considered once the breach of duty test was satisfied, which illustrates that the reasonableness test for breach of duty and the fault requirement of whether the negligence was so bad as to amount to gross negligence are completely separate.

Moreover, the court's approach towards breach of duty within gross negligence manslaughter is purely factual. It requires the court to look at facts external to the defendant. For example, the court did not consider the impact that the defendant's lack of training had on him when determining breach of duty. Familial homicide adopts a different approach to such questions.

Within familial homicide the reasonable steps test has a dual function. It applies to determine whether there has been a breach of duty, and it also applies to determine fault, thus requiring the court to look at both the facts and the defendant's thoughts when considering whether he has failed to take reasonable steps to protect the victim from the risk in question. This creates an overlap between the breach of duty test and the fault requirement test. This is a marked contrast to gross negligence manslaughter where these requirements are completely separate. Unsurprisingly, the familial homicide approach has confused academic commentators. Some have

[10] *R v Adomako* [1995] 1 AC 171.

presented the test as *actus reus*, whereas some have presented it as *mens rea*.[11] Traditionally *actus reus* and *mens rea* are distinct, which means that the approach adopted within familial homicide which conjoins the two will inevitably cause confusion.

The test establishes when the defendant will breach his duty to act under section 5 DVCVA. It should be partially characterised as breach of duty because it is part of the omission for which the defendant incurs liability. It should also be characterised as *mens rea*. This is because it focuses on the defendant's fault, and this is obviously the essence of *mens rea*.[12] The reasonable steps test focuses on what was in the defendant's mind at the time of the offence because it looks at the defendant himself and his perception of the situation in order to actually determine reasonableness.

In addition to the factual reason for characterising the reasonable steps tests as the test for both breach of duty and fault, there is a principled reason for so doing.

ii. The principled reason

The reasonable steps test should be considered as part of both the *actus reus* and the *mens rea* of the offence for reasons of principle and fair labelling. An example illustrates this:

> O lives with her husband, K, and their baby daughter, V. K severely attacks both O and V on a regular basis, causing severe injuries to both on a number of occasions. O is so badly assaulted that she does not realise V is at risk, and therefore does nothing to protect V. V later dies in a serious attack by K.

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[11] Hayes, M., "Criminal Trials Where a Child is the Victim: Extra Protection for Children or a Missed Opportunity?" (2005) 17 *Child and Family Law Quarterly* 307 at pp. 320-1, for example, states that '[t]he question for the court is what steps could the defendant reasonably have been expected to take to protect the child from risk. The test appears to be that of ordinary negligence rather than gross negligence. [...] Their culpability lies in failing to take steps which a reasonable person would have taken. Although she makes this point when discussing the *actus reus* of the offence, she clearly confuses the reasonable steps test as being one of *mens rea* rather than *actus reus*. This is because she uses the language of *mens rea,* such as negligence and culpability, when discussing it. To avoid such confusion, it is important to understand that the reasonableness test is in fact used to determine the question of whether the defendant has breached his duty as well as the question of whether he has *mens rea*.

[12] Simester, A.P., Spencer, J.R., Sullivan, G.R., & Virgo, G.J., *Simester and Sullivan's Criminal Law Theory and Doctrine* (Oxford: Hart Publishing; 4th edition; 2010) at p. 125.

There are two possible ways to explain how O may escape liability. The first is that O lacks fault or does not breach her duty, or both. The second is that O has both the *actus reus* and *mens rea* for familial homicide, but that she has a domestic violence defence to the charge. Although this second option is pragmatic because it helps to achieve the desired outcome for O in terms of the fact that liability is not unjustifiably imposed on her due to the abuse she has suffered, the first approach is preferable for reasons of principle and labelling. If the defendant did not fail to take reasonable steps then there was no wrong committed, and thus no *actus reus*. It also follows that the defendant was not at fault, meaning that there is no *mens rea*. The second approach implies that both *actus reus* and *mens rea* are present because it holds that the defendant has the requirements for liability, but is able to exonerate himself with a defence. This does not accord with what actually happens, and thus it is problematic for the principle of fair labelling. Although the defendant has neither *actus reus* nor *mens rea*, this approach implies it.

The above discussion has explained why it is important to construe the reasonable steps test as part of both the *actus reus* and *mens rea* of familial homicide. Before this chapter goes into detail about the four key reasons for why a specific domestic violence defence is not needed, the precise meaning of 'reasonable' needs to be clarified in order to facilitate understanding of the correct approach.

b. The reasonableness concept

The concept of reasonableness has a key role in establishing familial homicide liability. However, the precise meaning of 'reasonableness' may take four different forms. It is important to define exactly which concept applies in the current context for reasons of clarity and standardisation.

Concept one is a purely objective concept, which holds that no concession at all may be made for individual circumstances or characteristics. It does not look at the defendant's thought processes.

Concept two is a qualified objective concept. This measures the defendant against an objectively reasonable standard, sharing the defendant's characteristics. The focus

shifts from what could reasonably have been expected of the hypothetical normal person to what could reasonably have been expected of this particular defendant. He is liable if he falls short of this standard, and it looks at his circumstances and characteristics in order to determine this question.

Concept three is a qualified subjective concept. It holds that the defendant is liable if he fell short of the unqualified reasonable man standard, and realised that his actions were unreasonable by this standard. This is analogous to the *Ghosh* test used to determine whether the defendant has been dishonest for the purposes of property offences. According to *Ghosh*, the test for dishonesty is:

> [W]hether according to the ordinary standards of reasonable and honest people what was done was dishonest. If it was not dishonest by those standards, that is the end of the matter and the prosecution fails. If it was dishonest by those standards, then the jury must consider whether the defendant himself must have realised that what he was doing was by those standards dishonest.[13]

The same basic construction applies to determine a qualified subjective concept of reasonableness within this context.

Concept four is a purely subjective concept, which holds that the defendant is liable if he believes that his conduct is unreasonable. *Ghosh* also helps explain the meaning of this concept. In *Ghosh* Lord Lane CJ highlighted an example of a purely subjective concept of dishonesty which can be directly applied to define a purely subjective concept of reasonableness:

> It is dishonest for a defendant to act in a way which he knows ordinary people consider to be dishonest, even if he asserts or genuinely believes that he is morally justified in acting as he did. For example, Robin Hood or those ardent anti-vivisectionists who remove animals from vivisection laboratories are acting dishonestly, even though they may consider themselves to be morally justified in doing what they do, because they know that ordinary people would consider these actions to be dishonest.[14]

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[13] *R v Ghosh* [1982] QB 1053 at p. 1064.
[14] *Ibid.*

A purely subjective concept of reasonableness is one which focuses solely on the defendant's perception of his conduct.

The approach adopted within familial homicide is concept two; the qualified objective approach. Although some academics have argued that the statute adopts concept one because it is purely objective, this is not actually the case. The statute, and subsequent judicial interpretation of it, quite clearly adopts concept two. This is demonstrated by *Khan*.[15] The court stated that because the legislation stipulates that the test focuses on whether 'he', namely the defendant, failed to take reasonable steps to protect the victim, this 'requires close analysis of the defendant's personal position'.[16] Moreover, the court indicated that the statute:

> [M]akes clear that the protective steps which could have been expected of the defendant depend on what reasonably have been expected of him or her.[17]

So, the test is not purely objective; it requires some sensitivity towards each individual defendant in order to assess his liability.[18] Accordingly the presence of domestic violence and its impact on the defendant will be taken into account. This point was explicitly stated in *Khan*,[19] and it demonstrates that although the reasonableness test in section 5 is objective, such an objective standard is qualified to allow for sensitivity towards individual defendants. As discussed in greater detail below, this is positive in terms of fairness to the defendant due to the perception impairment effect that domestic violence has.

This judicial movement away from the first, unqualified, conception of reasonableness is also evident in other contexts. Take the criminal damage case of *R v G*.[20] Here, the House of Lords moved away from a purely objective conception of recklessness. The relevant statutory test was section 1(1) of the Criminal Damage Act 1971, which states that the defendant is liable if he recklessly damages property belonging to another. The court interpreted this test as one which is sensitive to

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[15] *R v Khan* [2009] 1 Cr App R 28.
[16] *Ibid.*, at [33].
[17] *Ibid.*
[18] *Ibid.*
[19] *Ibid.*
[20] *R v G & R* [2003] UKHL 50.

individual defendants and their ability to perceive damage. The court held that the defendants would not be reckless if they did not foresee the risk of harm. The defendants, aged 11 and 12, stated that they did not realise the risk that their actions would create. Consequently, the court held that they were not reckless. This case therefore supports the arguments made above because it demonstrates that the courts will show sensitivity towards individual defendants. A purely objective conception of reasonableness within familial homicide would be at odds with other cases and the general trend within the law; in *R v G* the House of Lords criticised the objectivity of the previous law.[21]

The conception of reasonableness adopted in the familial homicide statute as a qualified objective one will be adopted throughout this chapter. Now that both the structure and meaning of the reasonable steps test have been clarified, the next section will explain why this means that a domestic violence defence to familial homicide is unnecessary.

3. Reasons for why a domestic violence defence is not needed

Certain academics believe that a domestic violence defence is crucial. However, this chapter argues that such a defence is not required. This is for four reasons. First, the breach of duty test provides an important safeguard against such defendants being wrongly held liable. Second, the *mens rea* test also provides such a safeguard, ensuring that familial homicide liability is not unjustifiably imposed on such defendants. Third, a domestic violence defence would be discriminatory. Fourth, the defence may exonerate culpable defendants. This section will discuss each of these in turn.

a. Breach of duty

The test for breach of duty is the 'reasonable steps' test, which holds that the defendant only satisfies the *actus reus* of the offence if she breaches her duty of care to the victim by failing to take reasonable steps to protect him. Whether the

[21] Most notably *R v Caldwell* [1982] AC 341.

defendant fails to take reasonable steps to protect the victim is a qualified objective standard.

Under the modified version of section 5 outlined in the omissions liability chapter, the defendant breaches his duty when his failure to act is unreasonable, again assessed by a qualified objective standard. The court may decide that the defendant's failure was not unreasonable for any reason, such as danger to life, or due to the perception impairment effect of domestic violence, thus demonstrating their sensitivity to individual characteristics and circumstances. Indeed, this was shown in *Khan*, discussed above. This aspect of omissions liability within familial homicide helps to explain why a domestic violence defence is unnecessary. It provides a key way in which a defendant who is a victim of domestic violence can excuse herself from liability when, due to the abuse suffered, she does not meet the conditions for criminality.

The breach of duty test takes into account the defendant's circumstances, thereby assessing when it was not unreasonable for her to fail to act. This will obviously include the impact of domestic violence. An example helps to explain this:

> O lives with her husband, K, and their three year old daughter V. K assaults both V and O on a regular basis. Despite the frequency and severity of abuse, O remains in the house with K and V as she loves K and does not think he would do anything to seriously injure V. V later dies in particularly brutal attack by K.

The question of whether O's failure to act was unreasonable, and therefore whether she breached her duty of care towards V, will consider the impact of domestic violence on O. This is because the test is whether O's failure to act was unreasonable for 'any' reason, thus giving permission for the court to consider factors such as the perception impairment effect of domestic violence. The court may assess that due to the impact of domestic violence the defendant's failure to act was not unreasonable. However, they may alternatively conclude that failure was unreasonable, and O should be liable. The breach of duty test allows the court to assess all relevant circumstances and decide liability either way, thus encouraging a fair decision over culpability.

However, academics are concerned about applying a standard reasonableness-based test to victims of domestic violence. Miccio, for example, criticises failure to protect statutes on the basis that they either judge the defendant against what she terms a 'wholly reasonableness' test, or a 'hybrid test'.[22] The wholly reasonableness test is one which can be characterised as purely objective. The hybrid test is one which can be characterised as a qualified objective standard. She opines that neither is appropriate due to the unique harm that domestic violence causes to individuals, specifically within the failure to protect context. This is because such tests fail 'to acknowledge adequately how violence conditions responses and shapes decisions.'[23]

Miccio thus proposes a specific test for defendants who have been victims of domestic violence, arguing that they should be judged against the standard of the 'reasonable battered mother'.[24] This means that although failure to protect may be considered 'unreasonable behaviour', when the impact of domestic violence on a defendant is considered it is transformed into appropriate conduct.[25] Her conception of the reasonableness test differs to those discussed above because it specifically makes provision for defendants who have been victims of violence, whereas those discussed above implicitly make provision for such defendants. So, she would consider the section 5 test to be unacceptable because it does not specifically mention domestic abuse. As noted above, section 5 holds that the defendant is liable when she fails to take reasonable steps to protect the victim from the risk of harm. This is a qualified objective test, meaning that the defendant is assessed against the standard of the reasonable man, but with sensitivity shown towards the individual defendant's circumstances and characteristics.

However, Miccio's criticism of wholly or qualified objective tests which do not particularly provide for the perception impairment effect of domestic violence can be responded to. First, the basis of her view is flawed. She states that:

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[22] Miccio, G.K., "A Reasonable Battered Mother? Redefining, Reconstructing, and Recreating the Battered Mother in Child Protective Proceedings" (1999) 22 *Harvard Women's Law Journal* 89 at p. 119.
[23] *Ibid.*, at p. 95.
[24] *Ibid.*, at pp. 118-9.
[25] *Ibid.*, at p. 95.

> [W]hat appears as unreasonable behavior to society at large, is transformed into appropriate conduct when violence is given its due weight.[26]

This argument is too generalised, which is ironic considering her detailed arguments for a particularised approach. She argues for greater sensitivity to be taken towards domestic violence within the legislation, and specific terms to provide for this. However, she makes sweeping generalisations, such as her use of the word 'violence' in the above quotation. What exactly this would consist of is unclear. By making such broad statements, with broad definitions, she does not achieve what she sets out to achieve, namely greater specificity within the law to account for the perception impairment effect of domestic abuse.

The extensive generalisation of her approach is problematic for another reason. It assumes that the mere existence of domestic violence changes the defendant from culpable to non-culpable. This will not always be the case. There will be situations where even though violence is present, the defendant should still be liable for failure to protect. If Miccio's approach was used in these situations, culpable defendants would escape liability. Take the following example:

> K and O are sisters. They live together with K's daughter, V. K repeatedly attacks V, causing injuries such as a fractured rib and a head wound. K also attacks O twice, causing minor bruising. Although O is concerned about how K is treating V, she does not take action to protect V because she is worried about legal and social implications. One day, K attacks V so seriously that V dies.

O's failure to act is not based on her perception of risk or psychological abilities being affected by two isolated incidents of violence; it is because she is worried about the impact disclosing the abuse may have on her future. These concerns can be considered trivial when compared to the consequence of her failure to act: V's death. The fact that she is 'concerned' about how K is treating V shows that she is aware of the abuse. She fails to act despite this awareness. Consequently, she is culpable for familial homicide, so should be held as such.

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[26] *Ibid.*

However, if Miccio's approach is adopted, O's conduct would be considered acceptable. This is because she is a victim of violence, and although her conduct would previously be considered unsatisfactory, it will be transformed to acceptable due to the abuse she has suffered. This is problematic for justice and fair labelling.

Moreover, when applied to the familial homicide context Miccio's argument does not carry such weight. This is because she assumes that a standardised approach towards culpability for failure to protect offences is problematic as it does not specifically take the impact of domestic violence into account. She states that such a test fails:

> [T]o acknowledge adequately how violence conditions responses and shapes decisions. Hence, absent application of a particularized test, *any* reasonableness determination is internally incoherent since it fails to consider the constitutive nature of domestic violence in shaping maternal conduct.[27]

However, her argument can be dismissed. She argues that a test based on a standard concept of reasonableness is inappropriate because it does not allow the impact of domestic violence on defendants to be taken into account effectively. The breach of duty test does, however, give such impact sufficient weight. This is because, as noted above, it allows violence to be taken into account when assessing liability, albeit implicitly. The terms of the legislation may not particularly state that domestic violence is to be considered, but in reality it is.

Another problem with Miccio's argument is that she feels such a test should incorporate the experiences of abused mothers and their children to specifically allow these issues to be taken into account.[28] Thus, she believes that defendants should be assessed against the standard of the reasonable battered woman when determining liability for failure to protect. However, this is not viable. It would be difficult to foresee every possible situation and circumstance which would exist to clearly define and apply her test. This means that her approach is unrealistic, and has legal certainty issues. Moreover, in any event the reasonable steps test is more sensitive to such circumstances than she perceives it to be.

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[27] *Ibid.*
[28] *Ibid.*

Nonetheless, it may be countered that although a standardised reasonableness test may be positive in other contexts, it is inappropriate for familial homicide because of the prevalence of domestic violence. This prevalence arguably provides the very reason for why not all defendants should be assessed in the same way as domestic violence has such an intense psychological impact. However, the two are not mutually exclusive. Having a standardised test does not necessarily mean that domestic violence is not taken into account when assessing liability. It also does not mean that a standardised test should not be used in the familial homicide context.

Another flaw with Miccio's approach is that she disregards wholly or hybrid objective tests partially on the grounds that they are too genderised for such contexts as the present one. Yet she argues that such tests should be replaced with one entitled 'the reasonable battered mother test'. This, by its very definition, is genderised. It would exclude 'reasonable battered fathers' for example. Due to the many arguments against Miccio's approach towards failure to protect legislation, her views can be dismissed.

However, Herring also criticises the reasonable steps test for breach of duty. He argues that this test is inappropriate because it 'indicates that although D may have taken some steps to protect V, these may not be sufficient.'[29] This is an issue because it means that even though domestic violence victims may have done everything in their power, their failure to act may still be considered unreasonable. Although the steps the defendant took may have been objectively minimal, they were in fact major steps for the defendant herself. As Herring states:

> What also may be so easily overlooked by juries and prosecutors, at least without expert assistance, are the myriad of ways that abused mothers do seek to protect their children: placing themselves as a buffer or alternative source for the abuser's violence; seeking to ensure that the child is alone with the abuser as little as possible; cutting back on working hours to be present with the child. To some such protection or coping may appear feeble, but they may be the best that can be offered.[30]

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[29] Herring at p. 137.

[30] *Ibid.*, at p. 144. Also see Murphy, J.C., "Legal Images of Motherhood" (1998) 83 *Cornell Law Review* 668 at p. 720 who states that '[c]riminal prosecution based only upon failure-to-protect

Yet Herring was writing before the important decision in *Khan* in which the court held that such violence will definitively be considered when determining whether the defendant took reasonable steps to protect the victim. Both the way the legislation is framed and the way in which it has been interpreted by the case law indicates that courts will take such factors into account.

The way the test is worded permits factors such as the impact of domestic violence to be taken into account. The defendant breaches his duty when:

> *[H]e* failed to take such steps as *he* could reasonably have been expected to take to protect V from the risk.[31]

Similarly, the reforms to section 5 outlined in Chapter Three hold that the defendant breaches his duty when his failure to act was unreasonable. As detailed above, these tests permit the defendant's personal circumstances to be taken into account. The legislation itself, and judicial interpretation of it, adopts a broader reading of the reasonable steps test. This is further supported by the Court of Appeal's statement in *Khan* that even after applying the reasonableness test it could still be held that it was reasonable for the defendant not to take any steps at all to protect the victim.[32] For example, if the impact of domestic violence on the defendant's situation was assessed, it may be permissible to hold that her failure to act was not unreasonable.

However, Herring does raise another issue with the reasonableness test. He states that:

> Too easily the explanation of what 'any reasonable mother' would do is based on white, middle-aged, middle-class expectations. This case appears to indicate an extra-ordinarily high standard of care for the child. The father of the child goes unmentioned. His absence, his neglect, ignored, unpunished.[33]

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statutes may carry the greatest potential for unfairly punishing mothers. Most statutes fail to take into account the context within which a mother exercises her caretaking responsibilities'.

[31] Emphasis added.

[32] Above at [33].

[33] Herring at p. 150. A similar argument is made by Panko, L., "Legal Backlash: the Expanding Liability of Women who Fail to Protect their Children from their Male Partner's Abuse" (1995) 5 *Hastings Women's Law Journal* 67.

So, the test is unsatisfactory when applied to victims of domestic violence because it is inevitably biased and based on stereotypes. This is unfair because not everyone fits the stereotypical mould, and so allowances should be made for this in the legislation. Herring is concerned that using a reasonableness test to assess liability in familial homicide cases would lead to injustice because it is based on stereotypes. If this is the case, however, this will have implications for other areas of law which also use reasonableness-based tests, including duress (would the reasonable man sharing the defendant's characteristics have responded in the same way), recklessness (was the risk an unreasonable one for the defendant to take), negligence (did the defendant fall below the standard of the reasonable man), theft (was the defendant's conduct dishonest according to the standards of reasonable and honest people), harassment (would a reasonable person in possession of the same information think the course of conduct amounted to harassment), loss of control (would a person of the defendant's age and sex with a normal degree of tolerance and self-restraint have reacted in the same way), gross negligence manslaughter (did the defendant fall below the standard of the reasonable person), rape (did the defendant reasonably believe that the victim consented), and self-defence (did the defendant use such force as was reasonable in the circumstances). If in fact juries do have stereotypical views of defendants, this will affect other areas of law, giving rise to more general issues.

A linked concern relates to this being a much broader issue than just domestic violence in familial homicide, especially within the current legislative framework which also involves other homicide offences. If Herring's approach was adopted and a domestic violence defence was introduced, this would result in a homicide structure which has a domestic violence defence to familial homicide, but not to gross negligence manslaughter for example, which is the closest alternative offence. This is unfair, and potentially discriminatory. Also, if there is a specific defence to familial homicide and not gross negligence manslaughter, in cases such as *Lewis*, discussed below, prosecutors may charge gross negligence manslaughter instead of familial homicide as they may think that there is a better chance of conviction. This is problematic because it may be less likely to accord with what actually occurs and would circumvent the reasons for adopting a domestic violence defence in the first place.

The above discussion demonstrates that although the breach of duty test does not make provision for domestic violence, it does allow it to be considered because of the way the legislation is drafted, meaning that section 5 does not require a specific defence. Another reason for why this defence is unnecessary is the *mens rea* test.

b. Mens rea

The defendant satisfies the *mens rea* for familial homicide if he was aware, or ought to have been aware, of the risk of harm to the victim; he failed to take reasonable steps to protect the victim from that risk; and the act occurred in circumstances of the kind that the defendant foresaw, or ought to have foreseen. It was argued in Chapter Four that this is the most appropriate test for the current context. However, academics have argued that this test is inappropriate when applied to defendants who have been victims of domestic violence. This section will discuss these arguments. However, it will not focus on the reasonableness aspect as that has been considered above.

One concern with the *mens rea* in section 5 is that it imputes awareness through the 'ought to have been aware' limb even when the defendant was unable to perceive the risk. Consequently, the section 5 test is argued to be unfair and unjust because the defendant's actual mental state does not correlate with the one imputed to her. As Herring states:

> Domestic violence very often has a significant adverse psychological impact on the victim. This can mean that little or no blame should attach to a victim of domestic violence in a failure to protect case. [...] Domestic violence suffered by the defendant will impact on the woman's awareness of the situation; the alternatives open to her and the risks to the children. It can distort a person's perception of reality and sap their energy to do anything more than survive.[34]

Whilst it is accepted that domestic violence has a well-documented perception impairment effect on victims, the statute does makes concessions for such individuals. The *mens rea* of the offence safeguards against such defendants being wrongly held liable. This can be explained through the following example:

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[34] Herring, above at pp. 928-9.

> K repeatedly abuses his partner, O, and their child, V, over a sustained period of time. O does nothing to protect V. V later dies in a particularly severe attack from K.

If the psychological impact of domestic violence on O is such that she is unable to perceive risk, she will not be liable under the 'awareness' limb of section 5 as she is not aware of the risk. She will also not be liable under the 'ought to have been aware' limb. This is because if a defendant is so badly abused that it alters her thought processes, leaving her unable to appreciate risk of harm, then it is unlikely that she 'ought to have been aware' of the risk. This can be supported by analogy with *R v G,* which demonstrates that the courts do show sensitivity towards the circumstances of individual defendants. Moreover, it would be inconsistent and incoherent to have a purely objective approach towards the 'ought to have been aware' limb of the *mens rea*, but a qualified objective approach towards the reasonable steps test.

So the standard in section 5 is in fact appropriate. Moreover, the test focuses on what the defendant herself was aware or ought to have been aware of. Not only is this positive for individual responsibility,[35] it also fairly assesses the liability of defendants who have been victims of violence. This point was made forcefully in *Khan.*

The perception impairment effect is considered when assessing culpability. In the above example the violence inflicted on O by K, and the resulting fears and worries, will be considered when assessing her culpability as the test focuses on what she herself was aware, or ought to have been aware, of. It requires analysis of the whole situation, and that will inevitably include the existence of abuse and the psychological impact it has. Defendants who have been victims of violence and did not appreciate the risk of harm, or ought to have appreciated the risk of harm, will justifiably avoid liability.

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[35] See Chapter Four for further detail.

Consequently, for the various reasons discussed above, academic concerns over this *mens rea* test can be dismissed. The *mens rea* of the offence provides a strong reason for why a specific domestic violence defence is not needed. Another key reason for why this defence is unnecessary is because it would be discriminatory.

c. A domestic violence defence would be discriminatory

Providing for this group of vulnerable defendants in the legislation to the exclusion of other vulnerable defendants would be discriminatory.[36] This is because defendants who are vulnerable due to age or mental illness, for example, may be psychologically unable to perceive risk in the same way as those who are vulnerable due to domestic violence. Yet these defendants could be at risk of familial homicide liability whilst those who were victims of domestic violence could have a possible defence if such a defence was introduced.

A domestic violence defence would discriminate against defendants on the basis of *why* their ability to perceive risk was impaired. There are a group of reasons for why perception was affected which are valid to excuse liability, and a group which are not valid. For example, if perception of risk was affected due to mental illness, this may be a valid reason to excuse liability. If perception of risk was affected due to drug or alcohol abuse, this may not be a valid reason to excuse liability because it is self-induced.

Discriminating between defendants within the group of valid reasons for excusing liability is unfair. This is because all of those within this group of reasons should be allowed an equal chance to excuse themselves from liability without having any discrimination between them. This point becomes clear through contrasting the following two examples:

> Example one: O is repeatedly assaulted by K, her husband, and suffers injuries such as bruises and fractured ribs. K also attacks V, their two year old son on two occasions. O stays with K because she loves him, and leaves

[36] This argument was made in the Parliamentary debates leading up to the enactment of section 5. See for example Domestic Violence, Crime and Victims Bill HC Deb 22nd June 2004, col 56 at col 75 per Paul Goggins.

> V in his care while she goes to work because she trusts him. One day while O is out, K assaults V in such a ferocious attack that V later dies. When interviewed by police, O states that she did not realise K would kill their son.
>
> Example two: O often visits her daughter, K, and her grandson, V. O suffers from schizophrenia, meaning that she is unable to appreciate risk in the same way as individuals who do not suffer from schizophrenia. K repeatedly attacks V in O's presence. However, O does nothing to protect V as she does not realise V is at risk. K eventually causes such severe injuries to V that he dies.

In both examples O does not appreciate the risk that V faces. In example one this is because O is a victim of domestic violence, whereas in example two it is because O suffers from schizophrenia. Both of these reasons may be valid ones for failing to appreciate the risk that V faces. Although their reasons for failing to appreciate the risk to V differ, both defendants may similarly lack the necessary level of culpability.

In example one, O has suffered such intense abuse that it has affected her psychological ability to perceive risk.[37] Consequently she does not realise that V is at risk. This will be taken into account when assessing whether O has *mens rea*, and because of the abuse she has suffered she may lack *mens rea* as she may not be aware, or ought to have been aware of the risk.

In example two, O's schizophrenia has had a psychological impact on her ability to perceive risk. Even though V is repeatedly attacked in O's presence, she still does not appreciate the risk that V faces. Again, this will be considered when applying the *mens rea* test.

Two issues result from the above analysis. First, a domestic violence defence is unnecessary because such defendants will be able to defend themselves by arguing lack of *mens rea*. Second, both the above defendants have a similar level of culpability. However, if a domestic violence defence was introduced, the reasons used by the first defendant to defend herself against a familial homicide charge may

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[37] See Brown, G., "When the Bough Breaks: Traumatic Paralysis – an Affirmative Defense for Battered Mothers" (2005) 32 *Womens Mitchell Law Review* 189 who highlights the severe psychological impact that domestic violence can have.

have an elevated status when compared to the second defendant. This is because there are two mechanisms by which she could defend herself, in contrast to the second defendant who would only have one. The first defendant could claim both lack of *mens rea* and invoke the domestic violence defence, whereas the second could only claim lack of *mens rea*. This is unfair as it would alter the dynamic of the current legislation which puts both vulnerable defendants on an equal par. The current approach is the most appropriate because both defendants, as well as all other potential defendants, are assessed against the same standard of liability, thus ensuring fair outcomes. The test allows all relevant circumstances to be taken into account, whether these are related to domestic violence or not.

The above analysis has demonstrated that introducing a domestic violence defence into the familial homicide legislation would have a discriminatory effect. However, the fact that domestic violence is so prevalent in familial homicide cases needs to be considered.[38] This prevalence is argued as a key reason for why a domestic violence defence should be available.[39] As it is so common it may affect many defendants' abilities to perceive risk, and so if a specific domestic violence defence is unavailable injustice may occur.

Nonetheless, this argument can be dismissed on two grounds. First, the defence has been shown above to be unnecessary. Making specific provision for this group of defendants on the basis of frequency does not make sense as it is not needed in the first place, and would in fact have an adverse discriminatory effect.

Second, the argument that the mere prevalence of domestic violence warrants a specific defence is flawed. Although domestic violence may be a factor in several cases, there is nothing to say that it is, or will be, more prevalent than other situations or conditions, for example schizophrenia. It cannot be predicted exactly what factors will need to be taken into account when assessing whether the defendant is culpable for familial homicide. Take the case of *Vestuto* where the court mentioned the defendant's 'unhappy childhood'. The defendant was also of 'borderline

[38] See, for example, J. Fugate "Who's Failing Whom? A Critical Look at Failure-to-protect Law" (2001) 76 *New York University Law Review* 272 and Herring who highlight the frequency of domestic violence in failure to protect law.
[39] Herring, above at p. 928.

intelligence'.[40] Factors such as these do not necessarily mean that the defendant is not culpable for familial homicide; it just means that all relevant factors should be taken into account when assessing perception of risk and liability. If a specific domestic violence defence was introduced, it may lead the jury, and thus mean that these factors are overlooked.

It may also give rise to a practical issue. Take, for example, a schizophrenic defendant who was also a victim of domestic violence. Having a specific domestic violence defence would overcomplicate the law in such cases because it would require the jury to distinguish between these two factors and ultimately assess whether the defendant failed to act because of the schizophrenia or because of the perception impairment effect of violence; if it was the former they may still be liable for familial homicide, but if it was the latter they may not be liable. This is obviously arbitrary, highly subjective and could lead to unfair and skewed outcomes. Alternatively, it could mean that the jury would be directed to disregard the schizophrenia when determining if the domestic violence defence is applicable; in which case the court is asking the jury to ignore salient facts. This is obviously problematic for justice, and is also a major practical issue.

An analogy here can be drawn with the case law regarding diminished responsibility and alcoholism. *Wood,* for example, concerned a defendant who suffered from alcohol dependency syndrome.[41] He killed the victim after the victim had made unwanted sexual advances towards him. He pleaded manslaughter by virtue of diminished responsibility. The trial judge directed the jury that unless the jury was satisfied that every alcoholic drink the defendant consumed was involuntary, his alcoholism was to be disregarded when considering whether he suffered from an abnormality of the mind. This was held to be a misdirection, with the court stating that because alcoholism was now regarded as a disease which could fall within section 2 of the Homicide Act 1957, the trial judge had erred since in effect his direction implied that every drink was voluntary even when consumed by an

[40] *R v Vestuto* [2010] 2 Cr App R (S) 108 at [14].
[41] *R v Wood* [2008] 2 Cr App R 34.

alcoholic.[42] A similar decision occurred in *Stewart*, in which the court held that the trial judge had misdirected the jury by directing them to disregard the defendant's alcoholism for the purposes of the diminished responsibility defence.[43]

These cases demonstrate the potential for injustice which may occur if a specific domestic violence defence was introduced. It could lead the jury, and could give rise to similar misdirections. Consequently the best approach is to treat all cases equally. This enables the court to approach the question of the defendant's liability openly, and avoids leading the jury. Moreover, it is a fairer approach than singling out a particular group of defendants. Indeed, this was demonstrated above through comparing the two examples of different defendants. Although domestic violence is prevalent in this area of law, this in itself does not provide a reason for including a domestic violence defence. To include this defence would be discriminatory and unnecessary and so the best approach is to leave the law as it stands.

Another key reason for not introducing this type of defence is that inclusion may exonerate culpable defendants.

d. A domestic violence defence may exonerate culpable defendants

A domestic violence defence would be inherently broad, which increases the potential for exonerating culpable individuals. The defence would inevitably be broad as well as vague because there is little consensus in the law as to what constitutes domestic violence.[44] The concept is difficult, if not impossible, to define. This is exacerbated by the fact that it would be highly complicated to determine which relationships would qualify for the purposes of characterising the violence as 'domestic', adding to the vagueness and breadth of such a defence.[45]

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[42] See also the commentary on this decision by Ashworth, A., "Diminished Responsibility: Defendant Diagnosed as Suffering from Alcohol Dependency Syndrome but no Brain Damage as Result" [2008] *Criminal Law Review* 976.
[43] *R v Stewart* [2009] 2 Cr App 30.
[44] See, for example, Tadros, V., "The Distinctiveness of Domestic Abuse: A Freedom-Based Account" in Duff, R.A., & Green, S.P., (eds) *Defining Crimes – Essays on the Special Part of the Criminal Law* (Oxford: Oxford University Press; 2005) at pp. 119-142.
[45] *Ibid.*, at p. 123

Due to the breadth and vagueness of such a defence, it would have the potential to unjustifiably exculpate in the current context because it would unavoidably catch a large number of individuals within its ambit. This is because more individuals would be able to claim that they fall within the scope of the defence, thus increasing the potential for culpable individuals to also fall within the defence. This would obviously lead to injustice because culpable defendants may be acquitted. This can be explained by using *Lewis* as an example.[46]

Lewis allowed her son, Aaron, to die from injuries inflicted by her partner. Lewis admitted that she thought her partner may hurt Aaron, but stayed with him as she loved and trusted him.[47] She also stated that she put her own welfare above that of Aaron's.[48] However, she claimed that she thought about leaving her partner, but did not do so because she was afraid of what he may do as he had apparently threatened to kill her. Nonetheless, the court convicted her of familial homicide. This is undoubtedly the correct result as Lewis was culpable for homicide.[49] She was aware of the risk of harm to Aaron, yet failed to protect him because she was more concerned about her relationship with her partner.

However, if a domestic violence defence was introduced, Lewis could try and rely on it to exonerate herself. Due to the potential breadth of a domestic violence defence, her partner's alleged threatening statement could constitute domestic violence, meaning that she could rely on the defence to escape liability.

Undeserving defendants may try to exploit a domestic violence defence. However, a potential objection is that in some cases, for example *Lewis*, defendants may try to manufacture a defence based on domestic violence. Nonetheless, this can be rebutted. It is far easier to manufacture a domestic violence defence rather than one based on the reasonable steps test or on lack of *mens rea*. This is because a domestic violence defence would have a change in focus when compared to the reasonable

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[46] BBC News Online, "Mother Jailed after Baby's Death", 15th December 2006 <http://news.bbc.co.uk/1/hi/wales/south_west/6181051.stm> accessed 21st May 2012.
[47] BBC News Online, "Mother 'Let Partner Hurt Baby'", 26th October 2006 <http://news.bbc.co.uk/1/hi/wales/south_west/6088850.stm> accessed 21st May 2012.
[48] See the discussion in Drakeford, M., & Butler, I., "Familial Homicide and Social Work" (2010) 40 *British Journal of Social Work* 1419.
[49] See Chapter Four for further discussion of Lewis' culpability.

steps test, and this may mean that it is easier to establish, and thus manufacture, a defence based on it. The domestic violence test focuses on what the killer did to the victim, whereas the reasonable steps test focuses on the defendant and what she did. The former may therefore be easier to manufacture because domestic violence is more blatant. Thus, it will be easier for defendants to point to this obvious factor as a reason for why they should not be culpable for familial homicide.

A further problem is that adopting a domestic violence defence would introduce another route towards exculpation. This may make it more likely that undeserving defendants would be able to exonerate themselves. Indeed, this can be demonstrated by reference to Miccio, whose views were outlined above. She argued that the presence of domestic violence should allow exoneration as it transforms failure to act from unacceptable to acceptable behaviour.[50] So, if a domestic violence defence was introduced, it would make it more likely that undeserving defendants could exonerate themselves.

Due to the potential for exonerating culpable defendants such as Lewis, coupled with the fact that such a defence was shown above to be unnecessary, a domestic violence defence should not be introduced. This conclusion is furthered by the fact that an inherently broad defence would be problematic for reasons of legal certainty. Legal certainty requires legislation to be drafted as clearly as possible to ensure that individuals know what is expected of them by law. Due to the inevitable vagueness of a domestic violence defence, and the lack of consensus as to what domestic violence is, it is likely that the resulting legislation will not meet this standard.

Conclusion

Despite academic arguments to the contrary, the familial homicide offence does not need a specific domestic violence defence. This chapter has made a number of key conclusions, arguing that the current legislation does not actually need to be amended. The following table highlights the main academic objections against the

[50] Miccio, above at p. 95.

deliberate omission of a domestic violence defence, and the counterarguments advanced to the assertion in question as regards the familial homicide context:

Academic Objection	Response Based on Section 5's Terms
Section 5 fails to take into account the circumstances of individual defendants, such as domestic abuse she may have suffered.	The breach of duty test does actually permit this to be taken into account, as affirmed by *Khan*.
A reasonableness-based test is inappropriate for victims of domestic violence due to its inherent objectivity.	The test within section 5 is, when properly understood, not inherently objective.
The *mens rea* of the offence is inappropriate for application to victims of domestic violence because it is objective.	The *mens rea* test is not wholly objective and it actually takes the mental state of individual defendants into account rather than being a blanket term.
It is discriminatory not to include a specific defence for victims of domestic violence, particularly due to the frequency of domestic abuse within this area of law.	The opposite is actually true; to include a specific domestic violence defence would be discriminatory against, for example, those who cannot perceive risk due to schizophrenia.

For four overarching reasons, there is no need to include a specific domestic violence defence within the legislation. The current framework is the fairest and most appropriate way of determining the liability of defendants who have been victims of domestic violence. Consequently, the existing structure should remain the same.

Conclusion

This thesis has examined the existing familial homicide offence in detail and identified some important wider issues for the general part of the criminal law. It has concluded that although the introduction of the offence was significant and valuable, there are a number of alterations which need to be made in order to maximise the beneficial impact of the offence.

The following table summarises the amendments proposed by this thesis:

Amendment Number	Current Law	Proposals
1	'Child' constitutes a person aged under 16 (section 5(6))	'Child' constitutes a person aged under 18 (clause 2(a)(i))
2	'Household' (section 5(1)(a)(i))	'Personal association' (clause 1(a)(i); clause 2(c); clause 2(d))
3	Frequent contact' (section 5 (1)(a)(ii))	'Regular contact' (clause 1(a)(ii))
4	'Significant risk of serious physical harm' (section 5(1)(c)); section 5(6))	'Significant risk of serious harm' (clause 1(c); clause 2(e))
5	Causes or allows the death (section 5(1)(d))	Indirect cause of death, or role is evidentially uncertain (clause 1(h))
6	'D failed to take such steps as he could reasonably have been expected to take to protect V from the risk' (section 5(1)(d)(ii))	'D's failure to take steps to protect V from the risk of harm was unreasonable' (clause 1(f))
7	Maximum penalty of 14 years' imprisonment (section 5(7))	Maximum penalty of life imprisonment (clause 1(i) and clause 3(c))
8	Insertion of 'causing or allowing serious physical injury' by the Domestic Violence, Crime and Victims (Amendment) Act 2012	Significant contribution to serious harm of a child or vulnerable adult (clause 3)

As indicated in the Introduction, the scope of the current familial homicide offence is deficient in two respects. First, it is under-inclusive. It fails to catch all those

culpable for the offence within its ambit due to an inappropriately heavy emphasis on individual autonomy at the expense of other key principles such as welfare. Second, it is over-inclusive. Due to its unnecessarily broad wording, the offence encompasses defendants who should not fall within it. The proposals advanced within this thesis aim to address these issues. Various other amendments have also been proposed, whilst it has been argued that there are other positive aspects of the offence which should remain unchanged.

The proposals combat the statute's under-inclusivity in a number of ways. They increase the scope of omissions liability for the offence, as can be seen by amendments 1, 2, 3, 4, and 6 which relate to the new duty of personal association. Amendment 1 widens the applicability of the offence in relation to child victims. Amendments 2 and 3 broaden the scope of the duty, extending it from members of the victim's household who have frequent contact with the victim to those with a personal association, and regular contact, with the victim. Amendment 4 broadens the definition of harm which the victim must be at risk of before the defendant is obliged to act. Amendment 6 modifies the reasonable steps test to make it easier to establish whether the defendant's failure to act was sufficiently culpable for the purposes of the offence. Taken together, these proposals amount to a justifiable extension of the scope of omissions liability for familial homicide, encompassing a greater number of culpable individuals.

Another way in which the proposals address the current under-inclusivity of the familial homicide offence is by creating a new lesser offence as indicated by amendment 8. This ensures that those who make a significant contribution to the serious injury of a victim will be guilty of an appropriate criminal offence, as at present culpable defendants fall between the disparate offences of child cruelty (section 1 of the Children and Young Persons Act 1933) and familial homicide. It is limited to those who are indirect causes of the harm, and cases of evidential uncertainty as to the role of each party. Although the Domestic Violence, Crime and Victims (Amendment) Act 2012 widens the familial homicide offence by introducing a new category of causing or allowing serious physical injury, as detailed in Chapter One this is inappropriate for labelling reasons because it groups a

serious homicide offence with a non-fatal offence against the person. The distinct harm of homicide should be kept separate.

The proposals advanced in amendment 5 combat both the statute's under-inclusivity and over-inclusivity. This thesis has changed the traditional approach towards causation within the law, creating a category of indirect causation to sit alongside directly causal defendants and those who do not cause the result. This combats the statute's over-inclusivity because it excludes direct causes from the scope of familial homicide liability when at present they fall within the definition. In cases where the identity of the direct cause of death is known the appropriate charge is murder or manslaughter.

This proposal also combats the statute's under-inclusivity. It does this by arguing that omissions are causal, so should be treated as such. It also proposes a doctrine of intervening acts based on the operative cause approach rather than the voluntariness approach, which aims to address the statute's under-inclusivity by increasing the conviction rates of those who are culpable for the offence by ensuring that the voluntary intervening act of a third party is not a bar to liability.

In addition to combating both the under-inclusivity and over-inclusivity of the familial homicide offence, the proposals advanced within this thesis also make other changes to improve the law. For example, the statute currently relies on the artificial concept of a 'household' to determine the scope of omissions liability. This is changed by amendment 2, making the law simpler to understand and easier to apply. The law of causation is also modified, recognising the causal role of omissions, and moving away from a rigid binary approach to causation. Also, as can be seen in amendment 7, this thesis increases the maximum penalty to life imprisonment for both the familial homicide offence and the non-fatal offence. This change brings the maximum penalty in line with murder, manslaughter and GBH with intent (section 18 of the Offences Against the Person Act 1861), and ensures suitably severe punishments for those convicted of these offences.

This thesis also helps to quell the academic debate over the *mens rea* of the offence and whether a specific domestic violence defence is needed. First, this thesis argues

that the current *mens rea* requirements should remain unchanged because they catch the greatest number of culpable defendants whilst also rejecting broader formulations of the *mens rea* test on the grounds that they would be over-inclusive. This is because they would include individuals who would not have the necessary level of culpability within their ambit. Second, this thesis argues that a specific domestic violence defence is not needed because the tests for breach of duty and *mens rea* provide sufficient safeguards.

In addition to modifying the law of familial homicide, the proposals advanced within this thesis have a potential wider application. For example, the proposals for reforming the law of causation could apply within the context of drugs homicide. At present, the rules of causation cause problems in drugs homicide cases. Take the following example:

> D, a drug-dealer, sells heroin to V. V takes the drug back to V's house and self-injects. He suffers an overdose from which he dies.

D would not be guilty of unlawful act manslaughter because the chain of causation between the unlawful act of supplying the drug and V's death was broken by V's act of self-injection.[1] Nor would gross negligence manslaughter apply, notwithstanding the decision in *Evans.* Although a duty of care might arise in the above example on the basis of voluntary assumption of responsibility or on the grounds of creating a dangerous situation,[2] there is no act of breach. This is because the act of breach must be distinct from the act which creates the duty: the duty must pre-exist the breach. Moreover, even if it was held that there was an act of breach, V's act of self-injection would break the chain of causation between D's conduct and V's death. So, despite the outcome in *Evans*, there are still difficulties with imposing homicide liability on the supplier in such cases. Yet there are strong policy reasons for holding these individuals liable for a homicide offence: they knowingly committed a dangerous, unlawful act for personal gain; and their act was contributed to the victim's death.

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[1] *R v Kennedy (No. 2)* [2008] 1 AC 269.
[2] See Chapter Three for further detail on these traditional duties.

The approach towards causation advanced within this thesis could have application here. It would hold that D was not a direct cause of V's death by virtue of V's self-injection. However, the jury may find that D was nevertheless an indirect cause of death if they conclude that his act of supply made a significant contribution to V's death. As an indirect cause of death, he may be liable for unlawful act manslaughter. His act of supply was the unlawful act and this was a cause of death. The final question for determination would therefore be whether the unlawful act of supply was dangerous.[3]

The causation proposals advanced within this thesis thus not only provide a more principled way of approaching drugs homicide cases, but also ensure that culpable individuals are criminally liable for the harm they bring about.

Another context in which the causation proposals advanced within this thesis could have direct application relates to environmental protection. The well-known and heavily criticised decision in *Empress* is relevant here.[4] In *Empress*, the defendant company was held to have caused pollution to a river which occurred when a third party opened a tap on the defendant's site thereby releasing the oil. The House of Lords stated that vandalism was a fact of life and was therefore reasonably foreseeable. Accordingly, the court held the intervening act of the third party did not break the chain of causation. Academic commentators have opined that this decision was unprincipled and contrary to the traditional approach towards causation.[5] This criticism is valid, since the third party's act of opening the tank was a voluntary intervening act. The Court of Appeal in *Kennedy* subsequently held that *Empress* was confined to its facts, and had no application to areas outside of environmental protection.[6]

However, the approach advanced within this thesis provides a more principled way of understanding *Empress*. The distinction between direct and indirect causes helps to rationalise its outcome. The approach would hold that the vandal was the direct

[3] *R v Church* [1966] 1 QB 59.
[4] *Environmental Agency v Empress Car Company* [1998] 2 WLR 350.
[5] See, for example, Ormerod, D., & Forston, R., "Drug Suppliers as Manslaughterers (Again)" [2005] *Criminal Law Review* 819 and Ashworth, A., *Principles of Criminal Law* (Oxford: Oxford University Press; 5th edition; 2006) at pp. 107-8 for comment.
[6] *R v Kennedy (No. 2)* [2008] 1 AC 269 at p. 276 per Lord Bingham.

cause of the pollution. It would also hold that the company's failure to place a lock on the tap was an indirect cause of the result, provided that the jury found this made a significant contribution to the harm. The omission of the company was causative on this view.

Despite this rationalisation, some commentators may still question whether the company should be guilty of a pollution offence when it was a third party vandal who opened the tap. However, this merely means that the question now becomes whether an indirect cause of the pollution should be liable for the relevant offence or whether liability should be limited to those who directly cause it. There may be policy reasons for holding indirect causes liable in such cases by virtue of the fact that it is their equipment which pollutes the environment; the welfare principle dictates that companies in such a position act responsibly. The causation approach advanced within this thesis helps to focus discussion on these key questions, questions which are obscured by the House of Lords' reasoning in *Empress*.

The proposals advanced within this thesis ensure that no longer will deaths such as baby Sara in *Lane* will go unpunished.[7] The thesis draws on the strengths of the existing law whilst developing areas in which there are still weaknesses. This combination of old with new doctrine establishes a scheme to combat one of the most heinous crimes imaginable; infliction of injury or death on the most vulnerable members of society who cannot act to save themselves. Instead of relying on individual autonomy as the most important principle with which to underpin criminal offences, this thesis has instead taken a more principled and human approach towards the issue of criminal liability for homicide. This will catch more culpable defendants within its ambit whilst ensuring that liability is warranted. Until the necessary changes are made, this area of law will remain unsatisfactory and fail to secure justice to the extent that it should.

[7] *R v Lane & Lane* (1986) 82 Cr App R 5.

Appendix One

Domestic Violence, Crime and Victims Act 2004 c. 28

5. The offence

(1) A person ("D") is guilty of an offence if –

(a) a child or vulnerable adult ("V") dies as a result of the unlawful act of a person who –

(i) was a member of the same household as V, and

(ii) had frequent contact with him,

(b) D was such a person at the time of that act,

(c) at that time there was a significant risk of serious physical harm being caused to V by the unlawful act of such a person, and

(d) either D was the person whose act caused V's death or –

(i) D was, or ought to have been, aware of the risk mentioned in paragraph (c),

(ii) D failed to take such steps as he could reasonably have been expected to take to protect V from the risk, and

(iii) the act occurred in circumstances of the kind that D foresaw or ought to have foreseen.

(2) The prosecution does not have to prove whether it is the first alternative in subsection (1)(d) or the second (sub-paragraphs (i) to (iii)) that applies.

(3) If D was not the mother or father of V –

(a) D may not be charged with an offence under this section if he was under the age of 16 at the time of the act that caused V's death;

(b) for the purposes of subsection (1)(d)(ii) D could not have been expected to take any such step as is referred to there before attaining that age.

(4) For the purposes of this section –

(a) a person is to be regarded as a "member" of a particular household, even if he does not live in that household, if he visits it so often and for such periods of time that it is reasonable to regard him as a member of

it;

(b) where V lived in different households at different times, "the same household as V" refers to the household in which V was living at the time of the act that caused V's death.

(5) For the purposes of this section an "unlawful" act is one that –

(a) constitutes an offence, or

(b) would constitute an offence but for being the act of –

(i) a person under the age of ten, or

(ii) a person entitled to rely on a defence of insanity.

Paragraph (b) does not apply to an act of D.

(6) In this section –

"act" includes a course of conduct and also includes omission;

"child" means a person under the age of 16;

"serious" harm means harm that amounts to grievous bodily harm for the purposes of the Offences against the Person Act 1861;

"vulnerable adult" means a person aged 16 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise.

(7) A person guilty of an offence under this section is liable on conviction on indictment to imprisonment for a term not exceeding 14 years or to a fine, or to both.

Appendix Two

Domestic Violence, Crime and Victims (Amendment) Act 2012

Section 5 of the Domestic Violence, Crime and Victims Act 2004 (offence of causing or allowing the death of a child or vulnerable adult) is amended as follows:

(2)In subsection (1) —

(a) in paragraph (a), after "dies" insert "or suffers serious physical harm";

(b) in paragraph (d), for "V's death" substitute "the death or serious physical harm".

(3) In subsection (3)(a), for "V's death" substitute "the death or serious physical harm".

(4) In subsection (4)(b), for "V's death" substitute "the death or serious physical harm".

(5) In subsection (7), after "this section" insert "of causing or allowing a person's death".

(6) After that subsection insert —

"(8) A person guilty of an offence under this section of causing or allowing a person to suffer serious physical harm is liable on conviction on indictment to imprisonment for a term not exceeding 10 years or to a fine, or to both."

(7) The italic heading before section 5 becomes "*Causing or allowing a child or vulnerable adult to die or suffer serious physical harm*".

(8) The amendments made by this section do not apply in relation to any harm resulting from an act that occurs, or so much of an act as occurs, before the commencement of this section.

Appendix Three

Domestic Violence, Crime and Victims Act 2004 c. 28

6. Evidence and procedure: England and Wales

(1) Subsections (2) to (4) apply where a person ("the defendant") is charged in the same proceedings with an offence of murder or manslaughter and with an offence under section 5 in respect of the same death ("the section 5 offence").

(2) Where by virtue of section 35(3) of the Criminal Justice and Public Order Act 1994 (c. 33) a court or jury is permitted, in relation to the section 5 offence, to draw such inferences as appear proper from the defendant's failure to give evidence or refusal to answer a question, the court or jury may also draw such inferences in determining whether he is guilty –

(a) of murder or manslaughter, or

(b) of any other offence of which he could lawfully be convicted on the charge of murder or manslaughter,

even if there would otherwise be no case for him to answer in relation to that offence.

(3) The charge of murder or manslaughter is not to be dismissed under paragraph 2 of Schedule 3 to the Crime and Disorder Act 1998 (c. 37) (unless the section 5 offence is dismissed).

(4) At the defendant's trial the question whether there is a case for the defendant to answer on the charge of murder or manslaughter is not to be considered before the close of all the evidence (or, if at some earlier time he ceases to be charged with the section 5 offence, before that earlier time).

(5) An offence under section 5 is an offence of homicide for the purposes of the following enactments –

- sections 24 and 25 of the Magistrates' Courts Act 1980 (c. 43) (mode of trial of child or young person for indictable offence);
- section 51A of the Crime and Disorder Act 1998 (sending cases to the Crown Court: children and young persons);
- section 8 of the Powers of Criminal Courts (Sentencing) Act 2000 (c. 6) (power and duty to remit young offenders to youth courts for sentence).

Appendix Four

Children and Young Persons Act 1933 c. 12

1. Cruelty to persons under sixteen

(1) If any person who has attained the age of sixteen years and has responsibility for any child or young person under that age, wilfully assaults, ill-treated, neglects, abandons, or exposes him, or causes or procures him to be assaulted, ill-treated, neglected, abandoned, or exposed, in a manner likely to cause him unnecessary suffering or injury to health (including injury to or loss of sight, or hearing, or limb, or organ of the body, and any mental derangement), that person shall be guilty of a misdemeanor, and shall be liable —

(a) on conviction on indictment, to a fine or alternatively, or in addition thereto, to imprisonment for any term not exceeding ten years;

(b) on summary conviction, to a fine not exceeding £400, or alternatively, or in addition thereto, to imprisonment for any term not exceeding six months.

(2) For the purposes of this section —

(a) a parent or other person legally liable to maintain a child or young person, or the legal guardian of a child or young person, shall be deemed to have neglected him in a manner likely to cause injury to his health if he has failed to provide adequate food, clothing, medical aid or lodging for him, or if, having been unable otherwise to provide such food, clothing, medical aid or lodging, he has failed to take steps to procure it to be provided under the enactments applicable in that behalf;

(b) where it is proved that the death of an infant under three years of age was caused by suffocation (not being suffocation caused by disease or the presence of any foreign body in the throat or air passages of the infant) while the infant was in bed with some other person who has attained the age of sixteen years, that other person shall, if he was, when he went to bed, under the influence of drink, be

deemed to have neglected the infant in a manner likely to cause injury to its health.

(3) A person may be convicted of an offence under this section —

(a) notwithstanding that actual suffering or injury to health, or the likelihood of actual suffering or injury to health, was obviated by the action of another person;

(b) notwithstanding the death of the child or young person in question.

Appendix Five

Draft Bill

1. A defendant (D) is guilty of the offence if:
    a. A child or vulnerable adult (V) dies as a result of the unlawful act of K
    b. At the time of K's unlawful act D had:
        i. a personal association with V; and
        ii. regular contact with V
    c. D was, or ought to have been aware of, a significant risk of serious harm being caused to V by an unlawful act of K
    d. D's failure to take steps to protect V from the risk of harm in paragraph c was unreasonable
    e. the act occurred in circumstances of the kind that D foresaw or ought to have foreseen
    f. D is not guilty of this offence unless:
        i. he made a significant contribution to V's death; but
        ii. he did not contribute to V's death directly, or may not have done so
    g. A person guilty of an offence under this section is liable on conviction on indictment to a maximum of life imprisonment
2. For the purposes of this section
    a. V is a child or vulnerable adult
        i. 'Child' means a person under the age of 18
        ii. 'Vulnerable adult' means a person aged 18 or over whose ability to protect himself from violence, abuse or neglect is significantly impaired through physical or mental disability or illness, through old age or otherwise
    b. An 'unlawful act' is one which
        i. Constitutes an offence or
        ii. Would constitute an offence but for being the act of a person under the age of ten or a person entitled to rely on a mental condition defence or is unfit to plead
        iii. This definition covers both acts and omissions
    c. 'Personal' means that

i. D and V had a link or connection with each other including, but not limited to, an association for a common purpose

ii. A personal association includes familial, social, and employee relationships. It also includes persons who care for V in any capacity.

d. An 'association' means that

i. There must be a pre-existing relationship between D and V; and

ii. There is a level of familiarity between D and V

e. 'Harm' includes

i. Physical harm

ii. Mental harm

iii. Emotional harm

3. A defendant (D) is liable for an offence if:

a. instead of 'dies' in clause 1(a), V 'suffers serious harm as a result of the unlawful act of K'

b. instead of 'significant risk of serious harm' within clause 1(c), there was a 'significant risk of harm'.

c. A person guilty of an offence under this section is liable on conviction on indictment to a maximum of life imprisonment.

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