2

ACTUS REUS: THE CONDUCT ELEMENT

CENTRAL ISSUES

1. The traditional method of analysing the definition of an offence is to separate out the *actus reus* (which describes the acts of the defendant and their consequences) and the *mens rea* (which describes the required mental state of the defendant).
2. A defendant is only guilty if she or he has performed a voluntary act.
3. Normally people will not be guilty of a crime because they omitted to act. However, they can be guilty for an omission if they were under a duty to act.
4. Many crimes require proof that the defendant caused a particular result. A defendant will be held to have caused a result if but for his or her actions the result would not have occurred and there has been no intervening act of a third party.

PART I: THE LAW

1 DISTINGUISHING THE COMPONENT ELEMENTS OF A CRIME

DEFINITION

Actus reus: the conduct element of the offence. The *actus reus* describes what the defendant must be proved to have done (or sometimes failed to do), in what circumstances, and with what consequences in order to be guilty of a crime.

Mens rea: the mental element of the offence. This may be, for example, intention, recklessness, or negligence.

The traditional way of analysing criminal offences is to divide a crime up into the conduct of the accused (known as the *actus reus* or conduct element) and the state of mind of the accused (the *mens rea* or mental element).[1] For example, in a murder case the prosecution must show that the defendant caused the death of the victim and that he or she intended to kill or cause grievous bodily harm to the victim. The *actus reus* of murder is causing the death of the victim; the *mens rea* is an intention to kill or cause grievous bodily harm. Only if both the *actus reus* and *mens rea* are proved will the defendant be guilty.[2] In this chapter we will consider the *actus reus*, and in Chapter 3 the *mens rea* will be discussed. In Part II of this chapter we will examine the benefits and disadvantages of dividing crimes into the *mens rea* and *actus reus* elements. → 1 (p.104)

So what is the *actus reus* of a crime? One popular way of explaining it is to define its role, namely that it identifies the conduct which the criminal law considers harmful. The *actus reus* of an offence tells us what we can and cannot do: killing, damaging another's property, and injuring another person are examples of forbidden kinds of conduct. By contrast the *mens rea* and defences enable us to decide whether the defendant was to blame for his or her wrongful acts. Another popular way of defining an *actus reus* is by describing what it is not: the *actus reus* is that part of the crime which is not concerned with the accused's state of mind.

The exact nature of the *actus reus* depends on the particular crime: in murder it involves killing; in theft it involves taking another's property. The *actus reus* of a crime may involve three different aspects:

(1) proof that the defendant did a particular act,

(2) proof that the act caused a particular result, and

(3) proof that the act or result occurred in certain circumstances.

Not all *actus rei*[3] involve all three of these. For example, the offence of bigamy requires the act of marriage in certain circumstances (the defendant is already married), but there is no need to prove any result. It is useful to distinguish between conduct crimes and result crimes:

(1) Conduct crimes require proof only that the defendant did an act. There is no need to demonstrate that the act produced a particular result. Possession of prohibited drugs would be an example.

(2) Result crimes require proof not only that the defendant performed a particular act but that that act produced certain results. For example, murder requires proof that the defendant's act caused the death of the victim.

Are there any common threads that link the *actus reus* of every crime? There is much debate over this issue and this chapter will now consider three particular questions:

(1) Do all *actus rei* require an act?

(2) Do all *actus rei* require a *voluntary* act?

[1] In *Miller* [1983] 2 AC 161, 174 (HL) Lord Diplock suggested that it would be preferable not to use the Latin terminology and refer instead to 'the conduct of the accused and his state of mind'. Despite these objections the Latin terminology is still very widely used by the judiciary and commentators.

[2] The Latin maxim is *actus non facit reum nisi mens sit rea*—'an act is not criminal in the absence of a guilty mind'.

[3] *Actus rei* is the plural of *actus reus*.

(3) If the *actus reus* of a crime requires proof that the defendant caused a particular result, what does 'cause' mean?

2 THE VOLUNTARY ACT 'REQUIREMENT'

DEFINITION

The 'voluntary act requirement': many criminal offences require proof that the defendant performed a voluntary act. But not all do: sometimes offences can be committed by an omission, some only require proof of a state of affairs, and sometimes a defendant can be convicted in respect of the actions of another.

Usually you cannot commit a crime without doing an act. Sitting in a room thinking the most evil of thoughts and conjuring up the most heinous of plans is not an offence.[4] Indeed, if evil thoughts were to constitute criminal offences, the prisons would be very full indeed! Not only must there be an act; there must be a voluntary act. Lord Denning[5] explained: 'the requirement that it should be a voluntary act is essential . . . in every criminal case'.[6] Where the defendant is not acting voluntarily he or she is said to be acting as an automaton and will not be guilty of an offence because the *mens rea* and *actus reus* will not be proved. If Barbara was holding a valuable vase when Andre came up behind her and said 'boo' in a loud voice, causing Barbara to drop the vase, then this (the dropping of the vase) would not be seen as Barbara's act, and so she could not be convicted of unlawfully damaging the vase.[7] Another example of an involuntary act is where a defendant is rendered unconscious, falls over, and injures someone. The detail of the law on automatism, or involuntary acts, is discussed in Chapter 12. →2 (p.106)

The general principle that a crime must involve an act of the defendant is subject to two important caveats. First, it is far from clear what is meant by the word 'act' here. The question how to define an act will be considered in detail in Part II of this chapter. Second, there are a number of crimes which appear to be exceptions to the rule. In fact there are so many exceptions that some commentators argue that the rule does not really exist.[8] In brief, the exceptions include the following:

(1) Sometimes a failure to act, an omission, can give rise to criminal liability. In such cases the failure to act can constitute the *actus reus* of the crime.

(2) Sometimes the *actus reus* of an offence is defined as a state of affairs or set of circumstances, which may or may not involve an actual act. For example, possession of a firearm can, in some circumstances, amount to an offence.

(3) Under some circumstances a defendant can be responsible for the acts of another person.

It should be noted that whether these are or are not true exceptions in part depends on how one defines an act. Let us now consider these exceptions to the 'rule' that a criminal offence must require an act in more detail.

[4] Dan-Cohen (2002: ch. 6).
[5] *Bratty v A-G of Northern Ireland* [1963] AC 386 (HL).
[6] See also *Kay v Butterworth* (1945) 173 LT 191.
[7] Indeed it may be seen as Andre's act.
[8] G. Williams (1982: 31).

2.1 OMISSIONS

Generally, a person will not be liable for simply failing to act. Criminal lawyers often point out that if a person comes across a child drowning in a pond and simply walks by leaving the child to die, there is no criminal liability. Some countries have statutes that make it a criminal offence not to offer aid to those you come across who are in peril, when it is reasonably practical for you to do so.[9] But there is no such general duty in English and Welsh law. This is not to say that a defendant is never criminally liable for an omission: a defendant can be criminally liable for an omission where there is a duty to act in a particular way.

DEFINITION

A summary of the criminal law on omissions: a defendant is only guilty of a crime when failing to act, where he or she is under a duty to act.

The discussion of liability for omissions will be divided into four sections. First, we will note that there are some crimes which can never be committed by omission. Second, we will consider when a defendant will be under a duty to act. Third, we will ask what is required of a defendant who is under such a duty. Fourth, the difficult question of how acts and omissions can be distinguished will be tackled. →3 (p.110)

Crimes that cannot be committed by omission

There are certain crimes that cannot be committed by an omission. These are statutory crimes which in their definition require an act to be committed. For example in *Ahmad*[10] the defendant was charged with an offence under the Protection from Eviction Act 1977 which required proof of the defendant 'doing acts calculated to interfere with [the victim's] peace and comfort'. The defendant, a landlord, failed to carry out alterations on the victim's house and this left the premises uninhabitable, thereby interfering with the tenant's peace and comfort. The failure to carry out the alterations was not an 'act' and so the landlord was not guilty of the offence.

When the defendant is under a duty to act

The duty to act can arise in the following eight ways:

Statutory duty

There are a large number of statutory duties requiring people to act in a particular way. For example, under section 6 of the Road Traffic Act 1988 a driver who fails to provide a sample of breath when required to do so by a constable under certain circumstances commits a criminal offence. There are too many examples of statutory duties to act for them all to be listed here.[11]

[9] See e.g. Ashworth and Steiner (1990) which discusses the French law, and the discussion in Part II of this chapter.

[10] (1986) 52 P & CR 346 (CA).

[11] There are a few common law offences which can be said to involve liability for omission, e.g. cheating the Revenue and misconduct in a public office (*Mavji* [1987] 1 WLR 1388 (CA)).

Duties of law enforcement

Police officers are under a duty to assist members of the public in danger. So, a police officer who failed to protect a citizen who was being kicked to death was held to have committed an offence.[12] Further, if a police officer calls upon a citizen to assist him or her to restore the peace, the citizen is under a duty to offer the assistance.

Contractual duty

Where a person is under a contractual duty to help another he or she may be under a duty under criminal law to do so. For example, in *Pittwood*[13] the defendant was employed as a gatekeeper on a railway line. One day he failed to perform his duties and did not close the gate when required. This led to an accident in which a train hit a cart and a man was killed. It was held that he could be liable for manslaughter because he was required under his contract of employment to ensure that the gate was shut. His omission, in failing to shut the gate, was in breach of his contractual duty and so could constitute a criminal offence.[14]

Assumed duties

People who voluntarily assume responsibility for another's welfare will be under a duty to care for him or her. The assumption of responsibility may be expressed (e.g. where a person explicitly agrees to look after a vulnerable person) or implied (a person has regularly offered assistance to another and so a mutual understanding of responsibility can be assumed).[15]

Some duties arise automatically: a parent is automatically responsible for caring for a child. So, if a parent fails to feed a child and the child dies of starvation then the parent might be liable even though the failure to feed was an omission.[16] Similarly, a parent who stands by and lets another person harm his or her child might be guilty of an offence.[17] In *Sheppard*[18] it was held that there was no duty owed by a parent to an 18-year-old daughter. This suggests that once a child reaches majority the legal duty towards the child may come to an end.[19]

Whether a duty will be assumed in the context of other relationships is less clear. It is generally assumed that spouses (and presumably long-term partners)[20] owe a duty to assist each other if they are in peril.[21] It may be that older children owe duties towards their elderly parents, but the existence or extent of such a duty is yet to be tested in the courts.[22] It may be that outside the parent–child relationship the duty that will be imposed will depend on the nature

[12] *Dytham* (1979) 69 Cr App R 387 (CA). [13] (1902) 19 TLR 37.

[14] It should be noted that the contractual duty to shut the gate was owed not to the victim but to the employer.

[15] In *Charlotte Smith* (1865) 10 Cox CC 82 a master was found guilty of the homicide of his servant after he failed to give her sufficient food and general care.

[16] *Gibbons and Proctor* (1919) 13 Cr App R 134 (CA); *Lowe* [1973] 1 QB 702 (CA). The Domestic Violence, Crime and Victims Act 2004, s. 5 creates a specific offence of causing or allowing the death of a child.

[17] *Emery* (1993) 14 Cr App R (S) 394 (CA).

[18] (1862) Le & Ca 147. The age of majority was, at that time, 21.

[19] It should be noted that under the Children and Young Persons Act 1933, s. 1 there is a duty not to neglect the child which ends when the child reaches the age of 18. It is also an offence under the Mental Capacity Act 2005, s. 44 wilfully to neglect a person lacking mental capacity.

[20] Although in an American case, *People v Beardsley* 113 NW 1128 (1967), it was held that a man did not owe a duty to his lover who took morphine in his presence.

[21] *Hood* [2003] EWCA Crim 2772; *Bonnyman* (1942) 28 Cr App R 131 (CA). However, it has been held that a brother does not owe a duty to care for his sibling (*Smith* (1826) 172 ER 203).

[22] Simester and Sullivan (2007: 76) argue that children do not owe their parents a duty, but J.C. Smith (2002: 63) disagrees.

of the relationship between the two parties. In *Evans (Gemma)*[23] a mother who failed to summon help for her 16-year-old daughter who collapsed after taking heroin was convicted of manslaughter. Her older half-sister was held not to be under a duty of care simply by virtue of their blood relationship. However, the fact she had supplied the drugs could create the duty. The court will be reluctant to impose a duty between two spouses who have separated, but may be very willing to impose a duty if one person is disabled and depends on a friend for their well-being. In *Lewin v CPS*[24] a young man left his friend asleep and intoxicated in a car on a very hot day. The friend died, but no prosecution was brought. The decision not to prosecute was upheld in the High Court. This suggests friendship alone is insufficient.

Controversially, a duty of care was held to exist in the following case:[25]

R v Stone; R v Dobinson
[1977] QB 354 (CA)[26]

The appellants were John Edward Stone (a man aged 67, of below average intelligence, partially deaf, and almost blind) and Gwendoline Dobinson (aged 43 and described by the court as 'ineffectual and inadequate'). Stone's sister, Fanny, aged 50, came to live with them and their son Cyril. She suffered from anorexia nervosa and so often denied herself food and stayed in her room for days at a time. Once she was found by the police wandering the street and the appellants then tried to find her doctor but were unable to do so. Fanny grew weaker and became confined to bed. The appellants did nothing to get help for her, despite requests from neighbours. Subsequently she was found dead: naked, very dirty, and in appalling conditions. The appellants were convicted of manslaughter and appealed.

Lord Justice Geoffrey Lane

There is no dispute, broadly speaking, as to the matters on which the jury must be satisfied before they can convict of manslaughter in circumstances such as the present. They are: (1) that the defendant undertook the care of a person who by reason of age or infirmity was unable to care for himself; (2) that the defendant was grossly negligent in regard to his duty of care; (3) that by reason of such negligence the person died. It is submitted on behalf of the appellants that the judge's direction to the jury with regard to the first two items was incorrect.

At the close of the Crown's case submissions were made to the judge that there was no, or no sufficient, evidence that the appellants, or either of them, had chosen to undertake the care of Fanny.

. . .

This court rejects that proposition. Whether Fanny was a lodger or not she was a blood relation of the appellant Stone; she was occupying a room in his house; Mrs Dobinson had undertaken the duty of trying to wash her, of taking such food to her as she required. There was ample evidence that each appellant was aware of the poor condition she was in by mid-July. It was not disputed that no effort was made to summon an ambulance or the social services or the police despite the entreaties of Mrs Wilson and Mrs West. A social worker

23 [2009] EWCA Crim 650. 24 [2002] EWHC 1049 (Admin).
25 *Instan* [1893] 1 QB 450 (QBD) provides another example.
26 [1977] 2 All ER 341, [1977] 2 WLR 169, (1977) 64 Cr App R 186.

used to visit Cyril [Stone's disabled son]. No word was spoken to him. All these were matters which the jury were entitled to take into account when considering whether the necessary assumption of a duty to care for Fanny had been proved.

This was not a situation analogous to the drowning stranger. They did make efforts to care. They tried to get a doctor; they tried to discover the previous doctor. Mrs Dobinson helped with the washing and the provision of food. All these matters were put before the jury in terms which we find it impossible to fault. The jury were entitled to find that the duty had been assumed. They were entitled to conclude that once Fanny became helplessly infirm, as she had by 19th July, the appellants were, in the circumstances, obliged either to summon help or else to care for Fanny themselves.

Appeals against conviction dismissed. Appeal by the appellant Stone against sentence allowed; sentence varied (from three years to twelve months).

At the heart of this decision is the finding that Stone and Dobinson had voluntarily assumed responsibility to care for Fanny. The decision is highly controversial because of the low capabilities of the two accused. It appears they had enough difficulty looking after themselves effectively, let alone being expected to offer a reasonable level of care to Fanny. It is not clear from *Stone and Dobinson* what was crucial to the finding of a duty. Was it the biological relationship, the undertaking of especial responsibility for the victim's welfare, or a combination of these two factors? →4 (p.114)

Ownership or control of property

It may be that if someone owns a piece of property and another person in his or her presence commits a crime using that property the owner is under a duty to seek to prevent the crime in so far as is reasonable.[27] There certainly have been some cases where the courts have found an owner criminally liable under such circumstances, although this is normally based on liability for aiding and abetting the other person. For example, in *Tuck v Robson*[28] a publican failed to intervene to prevent customers on his premises drinking after hours. He was found to have aided and abetted their crime.[29] The precise scope of this duty is unclear until we have further guidance from the courts.[30]

Continuing act

The courts have held that some cases which appear to be cases involving omissions have, in fact, involved a 'continuing act'. This can be best explained by referring to an example. In *Fagan v Metropolitan Police Commissioner*[31] Fagan drove his car accidentally onto a policeman's foot. When the policeman asked him to remove it he refused to do so. Fagan was convicted but appealed on the basis that the only act he did was driving onto the foot and that was performed without *mens rea*. By the time he realized his car was on the foot (and he had *mens rea*) he was not doing an act. The Divisional Court, however, upheld Fagan's conviction on the basis that he was committing the *actus reus* of battery (exercising force on the policeman's foot) for the whole of the time he had his car on the constable's foot. Fagan

[27] Ashworth (1989: 446). [28] [1970] 1 WLR 741.

[29] Another example can be found in *DuCros v Lambourne* [1907] 1 KB 40.

[30] It may be argued that one neighbour owes a limited duty to another neighbour, e.g. to ensure that a fire does not spread from his or her house, relying on the tort case of *Smith v Littlewoods* [1987] 1 All ER 710 (HL).

[31] [1969] 1 QB 439.

was guilty once he was aware of the harm he was causing to the policeman because then he had both the *actus reus* and *mens rea* of the offence at the same time.[32]

Creation of the danger

Where someone has created a dangerous situation they may be under a duty to act to prevent harm resulting. The leading case on this is the following:

R v Miller
[1983] 2 AC 161 (HL)[33]

James Miller, who was drunk, fell asleep with a lighted cigarette in his hand in the house in which he was staying. He subsequently woke to discover that his cigarette had set his mattress on fire. He simply moved out of the room into a neighbouring room. He was convicted of arson. The Court of Appeal dismissed his appeal but gave leave to appeal to the House of Lords, certifying the following question of law: 'whether the *actus reus* of the offence of arson is present when a defendant accidentally starts a fire and thereafter, intending to destroy or damage property belonging to another or being reckless as to whether any such property would be destroyed or damaged, fails to take any steps to extinguish the fire or prevent damage to such property by that fire?'

Lord Diplock

. . .

The first question to be answered where a completed crime of arson is charged is: did a physical act of the accused start the fire which spread and damaged property belonging to another . . . ?

The first question is a pure question of causation. It is one of fact to be decided by the jury in a trial on indictment. It should be answered 'No' if, in relation to the fire during the period starting immediately before its ignition and ending with its extinction, the role of the accused was at no time more than that of a passive bystander. In such a case the subsequent questions to which I shall be turning would not arise. The 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.

If, on the other hand, the question, which I now confine to: 'Did a physical act of the accused start the fire which spread and damaged property belonging to another?', is answered 'Yes', as it was by the jury in the instant case, then for the purpose of the further questions the answers to which are determinative of his guilt of the offence of arson, the conduct of the accused, throughout the period from immediately before the moment of ignition to the completion of the damage to the property by the fire, is relevant so is his state of mind throughout that period.

Since arson is a result-crime the period may be considerable, and during it the conduct of the accused that is causative of the result may consist not only of his doing physical acts which cause the fire to start or spread but also of his failing to take measures that lie within his power to counteract the danger that he has himself created. And if his conduct, active or

[32] See p.167 for a discussion of the requirement that the *mens rea* and *actus reus* coincide in time.
[33] [1983] 1 All ER 978, [1983] 2 WLR 539, (1983) 77 Cr App R 17.

passive, varies in the course of the period, so may his state of mind at the time of each piece of conduct. If, at the time of any particular piece of conduct by the accused that is causative of the result, the state of mind that actuates his conduct falls within the description of one or other of the states of mind that are made a necessary ingredient of the offence of arson by s 1(1) of the Criminal Damage Act 1971 (i.e. intending to damage property belonging to another or being reckless whether such property would be damaged), I know of no principle of English criminal law that would prevent his being guilty of the offence created by that subsection. Likewise I see no rational ground for excluding from conduct capable of giving rise to criminal liability conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence. I venture to think that the habit of lawyers to talk of '*actus reus*', suggestive as it is of action rather than inaction, is responsible for any erroneous notion that failure to act cannot give rise to criminal liability in English law.

No one has been bold enough to suggest that if, in the instant case, the accused had been aware at the time that he dropped the cigarette that it would probably set fire to his mattress and yet had taken no steps to extinguish it he would not have been guilty of the offence of arson, since he would have damaged property of another being reckless whether any such property would be damaged.

I cannot see any good reason why, so far as liability under criminal law is concerned, it should matter at what point of time before the resultant damage is complete a person becomes aware that he has done a physical act which, whether or not he appreciated that it would at the time when he did it, does in fact create a risk that property of another will be damaged, provided that, at the moment of awareness, it lies within his power to take steps, either himself or by calling for the assistance of the fire brigade if this be necessary, to prevent or minimise the damage to the property at risk.

...

The recorder, in his lucid summing up to the jury (they took 22 minutes only to reach their verdict), told them that the accused, having by his own act started a fire in the mattress which, when he became aware of its existence, presented an obvious risk of damaging the house, became under a duty to take some action to put it out. The Court of Appeal upheld the conviction, but its ratio decidendi appears to be somewhat different from that of the recorder. As I understand the judgment, in effect it treats the whole course of conduct of the accused, from the moment at which he fell asleep and dropped the cigarette onto the mattress until the time the damage to the house by fire was complete, as a continuous act of the accused, and holds that it is sufficient to constitute the statutory offence of arson if at any stage in that course of conduct the state of mind of the accused, when he fails to try to prevent or minimise the damage which will result from his initial act, although it lies within his power to do so, is that of being reckless whether property belonging to another would be damaged.

My Lords, these alternative ways of analysing the legal theory that justifies a decision which has received nothing but commendation for its accord with common sense and justice have, since the publication of the judgment of the Court of Appeal in the instant case, provoked academic controversy. Each theory has distinguished support. Professor J C Smith espouses the 'duty theory' (see [1982] Crim LR 526 at 528). Professor Glanville Williams who, after the decision of the Divisional Court in *Fagan v Metropolitan Police Comr* [1968] 3 All ER 442, [1969] 1 QB 439 appears to have been attracted by the duty theory, now prefers that of the continuous act (see [1982] Crim LR 773). When applied to cases where a person has unknowingly done an act which sets in train events that, when he becomes aware of them, present an obvious risk that property belonging to another will be damaged, both

theories lead to an identical result and, since what your Lordships are concerned with is to give guidance to trial judges in their task of summing up to juries, I would for this purpose adopt the duty theory as being the easier to explain to a jury though I would commend the use of the word 'responsibility' rather than 'duty' which is more appropriate to civil than to criminal law since it suggests an obligation owed to another person, i.e. the person to whom the endangered property belongs, whereas a criminal statute defines combinations of conduct and state of mind which render a person liable to punishment by the state itself.

Appeal dismissed.

This case was a difficult one for the House of Lords. The problem was the requirement that the *actus reus* and *mens rea* of the offence must exist at the same moment in time (see p.xxx). At first sight in *Miller* the *actus reus* was the dropping of the cigarette, setting off the fire, but at that point there was no *mens rea*. However, at the time when the defendant had the *mens rea* (when he realized there was a fire) he was not doing anything. The House of Lords upheld the conviction by finding that Miller was under a duty to stop the fire because he had started it and that on leaving the room in breach of his duty to act he was therefore committing the *actus reus* of the offence.

The House of Lords' reasoning was applied in *Evans*[34] where the Court of Appeal held that a young woman who supplied her sister with drugs, owed her a duty of care. When the sister collapsed and the woman failed to seek help, she could be liable for manslaughter on the basis that she owed her sister a duty to summon help, and had breached that duty.

Novel situations

It seems that the list of exceptions is not necessarily a closed list. The courts may be willing to create new circumstances under which there is a duty to act.[35]

QUESTIONS

1. Lord Diplock in *Miller* acknowledged that there were two ways of explaining why Miller was liable: (a) the duty theory (Miller was under a duty to stop the fire because he had started it (albeit unintentionally)), (b) the continuing act theory (Miller's initial act was regarded as a continuing act until the result was produced). Which of the two theories do you think a jury would more readily understand?
2. In *Khan and Khan* [1998] Crim LR 830 (CA) the defendants supplied a 15-year-old girl with some heroin. It seems that she had not tried the drug before. She took twice the normal amount and collapsed in a coma. The defendants left without summoning medical help and she died. Do you think the defendants had a duty to summon help? (Without deciding the question the Court of Appeal suggested that it 'may be correct that such a duty does arise'.)

   For guidance on answering this question, please visit the Online Resource Centre that accompanies this book: www.oxfordtextbooks.co.uk/orc/herringcriminal5e/.

[34] [2009] EWCA Crim 650.

[35] Although it might be argued that to do so would constitute retrospective legislation and so be in breach of Art. 6 of the European Convention on Human Rights (ECHR). In *CR v UK* [1996] 1 FLR 434 the European Court of Human Rights held that case-by-case development of the common law by analogy with established cases would not necessarily constitute retrospective legislation.

What is required if there is a duty to act?

The simple answer to this question is that the defendant must do what is reasonable. What is reasonable will be decided by the jury. If a mother finds her child drowning in a shallow pond and she can easily save her child she should do so and if she does not she will have committed the offence of murder or manslaughter. If, however, the child is drowning in a tempestuous sea and she can attempt to rescue the child only by placing her own life in grave danger there is no legal obligation to do so. It may be that the reasonable thing to do is not to rescue the victim but to summon help. In *Singh (Gurphal)*[36] a landlord and his agent were responsible for failing to bring in experts when tenants complained that their gas fires were not working properly and subsequently a tenant died from escaping carbon monoxide.

One issue that is not yet resolved is whether the defendant is required to do what is reasonable *for him or her* or what would be reasonable for an ordinary person in his or her shoes. The Court of Appeal in *Stone and Dobinson*,[37] quoted above, did not directly address the issue, but seemed to ignore the defendant's disabilities and require the defendants to act as ordinary people.

In *R (Jenkins) v HM Coroner for Portsmouth and South East Hampshire and Cameron and Finn*[38] a man became seriously ill. His partner and friends advised him to see a doctor. However due to his beliefs he refused to see one. The court rejected an argument that his partner or friends breached their duty to him to summon help because it was his choice to refuse help.[39] It would have been different if he was a child or lacked mental capacity.

It must be shown that the omission caused the harm. In other words, had the defendant acted reasonably in accordance with his or her duty the harm would not have occurred. For example, in *Dalloway*[40] the defendant was driving a cart without keeping a proper grip on the reins. A young child ran out in front of the cart and was killed. It was held that if the defendant was to be convicted it had to be shown that had he been driving properly and holding onto the reins he would have been able to avoid injuring the child.[41] Similarly, if a father sees his child drowning in a pond and does nothing to help he is not criminally responsible for causing the child's death if it is shown that even if he had tried to save the child it would have been too late to do so.[42]

Distinguishing between omissions and acts

Although the law draws a sharp line between acts and omissions there can be great difficulties in distinguishing between the two.[43] This has led some commentators to question whether it is proper to place so much weight on the distinction. Andrew Ashworth argues: 'although there are some clear cases of omission and some cases of act, there are many ambiguous cases in which the act–omission distinction should not be used as a cloak for avoiding the moral issues.'[44] An example of the difficulty in drawing the distinction

[36] [1999] Crim LR 582 (CA). [37] [1977] QB 354 (CA). [38] [2009] EWHC 3229 (Admin).
[39] See Herring (2010b). [40] (1847) 2 Cox CC 273.
[41] There is some debate over whether it needs to be shown that if the defendant had acted as he ought the victim would not have suffered the harm, or whether it is enough that there is evidence that the victim might not have suffered the harm. In *Marby* (1882) 8 QBD 571 the defendant was convicted of manslaughter after failing to summon medical help which *might* have saved the life of the victim.
[42] He may, nevertheless, be guilty of the offence of child neglect (Children and Young Persons Act 1933, s. 1) for failing to ensure that the child did not get into a dangerous situation.
[43] See the discussion in Elliott and Ormerod (2008). [44] Ashworth (2009: 100).

between acts and omissions is *Speck*.[45] In that case a child innocently placed her hand on a man's genital area and he did nothing to move her hand. Was this an act or an omission by the man? It was held in effect to be an act by the man, although it might more naturally be regarded as an omission.

A leading case demonstrating the difficulty in drawing the distinction between acts and omissions is *Bland*. In order to understand the House of Lords' judgment it is necessary to appreciate two important points of medical law. The first is that a doctor must not force the treatment on a patient who is competent and refuses to consent, even if without the care the patient will die.[46] The second is that if a patient is unable to express a view a doctor must act in the best interests of the patient.[47] As the reasoning in *Bland* demonstrates, this does not mean that everything must be done to prolong the life of the patient. Sometimes it will be in the patient's interests not to receive treatment which could prolong a painful life, but this does not permit a doctor to do an act to end a patient's life.

Airedale NHS Trust v Bland
[1993] AC 789 (HL)[48]

Tony Bland, then aged 17, was horrifically injured at a disaster at the Hillsborough football ground. He was diagnosed as suffering from a condition known as persistent vegetative state. The medical opinion was that there was no hope of any improvement in his condition or recovery. The consultant in charge of his case, with the support of his parents, sought from the court a declaration permitting the discontinuation of all life-sustaining treatment.

Lord Keith of Kinkel

Where one individual has assumed responsibility for the care of another who cannot look after himself or herself, whether as a medical practitioner or otherwise, that responsibility cannot lawfully be shed unless arrangements are made for the responsibility to be taken over by someone else. Thus a person having charge of a baby who fails to feed it, so that it dies, will be guilty at least of manslaughter. The same is true of one having charge of an adult who is frail and cannot look after herself: *Reg. v. Stone* [1977] Q.B. 354. It was argued for the guardian ad litem, by analogy with that case, that here the doctors in charge of Anthony Bland had a continuing duty to feed him by means of the nasogastric tube and that if they failed to carry out that duty they were guilty of manslaughter, if not murder. This was coupled with the argument that feeding by means of the nasogastric tube was not medical treatment at all, but simply feeding indistinguishable from feeding by normal means. As regards this latter argument, I am of opinion that regard should be had to the whole regime, including the artificial feeding, which at present keeps Anthony Bland alive. That regime amounts to medical treatment and care, and it is incorrect to direct attention exclusively to the fact that nourishment is being provided. In any event, the administration of nourishment by the means adopted involves the application of a medical technique. But it is, of course, true that in general it would not be lawful for a medical practitioner who assumed responsibility for the care of an unconscious patient simply to give up treatment in circumstances where continuance of it would confer some benefit on the patient. On the other hand a medical practitioner is

45 [1977] 2 All ER 859 (CA).
46 *St George's v S* [1999] Fam 26 (CA).
47 *Re F (Mental Patient: Sterilisation)* [1990] 2 AC 1.
48 [1993] 1 All ER 821, [1993] 2 WLR 316, [1993] Crim LR 877.

under no duty to continue to treat such a patient where a large body of informed and responsible medical opinion is to the effect that no benefit at all would be conferred by continuance. Existence in a vegetative state with no prospect of recovery is by that opinion regarded as not being a benefit, and that, if not unarguably correct, at least forms a proper basis for the decision to discontinue treatment and care: *Bolam v. Friern Hospital Management Committee* [1957] 1 W.L.R. 582.

Given that existence in the persistent vegetative state is not a benefit to the patient, it remains to consider whether the principle of the sanctity of life, which it is the concern of the state, and the judiciary as one of the arms of the state, to maintain, requires this House to hold that the judgment of the Court of Appeal was incorrect. In my opinion it does not. The principle is not an absolute one. It does not compel a medical practitioner on pain of criminal sanctions to treat a patient, who will die if he does not, contrary to the express wishes of the patient. It does not authorise forcible feeding of prisoners on hunger strike. It does not compel the temporary keeping alive of patients who are terminally ill where to do so would merely prolong their suffering. On the other hand it forbids the taking of active measures to cut short the life of a terminally ill patient. In my judgment it does no violence to the principle to hold that it is lawful to cease to give medical treatment and care to a P.V.S. patient who has been in that state for over three years, considering that to do so involves invasive manipulation of the patient's body to which he has not consented and which confers no benefit upon him.

Lord Goff of Chieveley

. . . I start with the simple fact that, in law, Anthony is still alive. It is true that his condition is such that it can be described as a living death; but he is nevertheless still alive. This is because, as a result of developments in modern medical technology, doctors no longer associate death exclusively with breathing and heart beat, and it has come to be accepted that death occurs when the brain, and in particular the brain stem, has been destroyed: see Professor Ian Kennedy's paper entitled 'Switching off Life Support Machines: The Legal Implications', reprinted in *Treat Me Right, Essays in Medical Law and Ethics*, (1988), especially at pp. 351–352, and the material there cited. There has been no dispute on this point in the present case, and it is unnecessary for me to consider it further. The evidence is that Anthony's brain stem is still alive and functioning and it follows that, in the present state of medical science, he is still alive and should be so regarded as a matter of law.

It is on this basis that I turn to the applicable principles of law. Here, the fundamental principle is the principle of the sanctity of human life—a principle long recognised not only in our own society but also in most, if not all, civilised societies throughout the modern world, as is indeed evidenced by its recognition both in article 2 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd. 8969), and in article 6 of the International Covenant of Civil and Political Rights 1966.

But this principle, fundamental though it is, is not absolute. Indeed there are circumstances in which it is lawful to take another man's life, for example by a lawful act of self-defence, or (in the days when capital punishment was acceptable in our society) by lawful execution. We are not however concerned with cases such as these. We are concerned with circumstances in which it may be lawful to withhold from a patient medical treatment or care by means of which his life may be prolonged. But here too there is no absolute rule that the patient's life must be prolonged by such treatment or care, if available, regardless of the circumstances.

First, it is established that the principle of self-determination requires that respect must be given to the wishes of the patient, so that if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged,

the doctors responsible for his care must give effect to his wishes, even though they do not consider it to be in his best interests to do so: see *Schloendorff v Society of New York Hospital* (1914) 105 N.E. 92, 93, per Cardozo J.; *S. v. McC. (orse S.) and M. (D.S. Intervener); W. v. W.* [1972] A.C. 24, 43, per Lord Reid; and *Sidaway v. Board of Governors of the Bethlem Royal Hospital and the Maudsley Hospital* [1985] A.C. 871, 882, per Lord Scarman. To this extent, the principle of the sanctity of human life must yield to the principle of self-determination (see ante, pp. 826H–827A, per Hoffmann L.J.), and, for present purposes perhaps more important, the doctor's duty to act in the best interests of his patient must likewise be qualified. On this basis, it has been held that a patient of sound mind may, if properly informed, require that life support should be discontinued: see *Nancy B. v. Hotel-Dieu de Quebec* (1992) 86 D.L.R. (4th) 385. Moreover the same principle applies where the patient's refusal to give his consent has been expressed at an earlier date, before he became unconscious or otherwise incapable of communicating it; though in such circumstances especial care may be necessary to ensure that the prior refusal of consent is still properly to be regarded as applicable in the circumstances which have subsequently occurred: see, e.g. *In re T. (Adult: Refusal of Treatment)* [1993] Fam. 95. I wish to add that, in cases of this kind, there is no question of the patient having committed suicide, nor therefore of the doctor having aided or abetted him in doing so. It is simply that the patient has, as he is entitled to do, declined to consent to treatment which might or would have the effect of prolonging his life, and the doctor has, in accordance with his duty, complied with his patient's wishes.

But in many cases not only may the patient be in no condition to be able to say whether or not he consents to the relevant treatment or care, but also he may have given no prior indication of his wishes with regard to it. In the case of a child who is a ward of court, the court itself will decide whether medical treatment should be provided in the child's best interests, taking into account medical opinion. But the court cannot give its consent on behalf of an adult patient who is incapable of himself deciding whether or not to consent to treatment. I am of the opinion that there is nevertheless no absolute obligation upon the doctor who has the patient in his care to prolong his life, regardless of the circumstances. . . .

I must however stress, at this point, that the law draws a crucial distinction between cases in which a doctor decides not to provide, or to continue to provide, for his patient treatment or care which could or might prolong his life, and those in which he decides, for example by administering a lethal drug, actively to bring his patient's life to an end. As I have already indicated, the former may be lawful, either because the doctor is giving effect to his patient's wishes by withholding the treatment or care, or even in certain circumstances in which (on principles which I shall describe) the patient is incapacitated from stating whether or not he gives his consent. But it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering, however great that suffering may be: see *Reg. v. Cox* (unreported), 18 September 1992. So to act is to cross the Rubicon which runs between on the one hand the care of the living patient and on the other hand euthanasia—actively causing his death to avoid or to end his suffering. Euthanasia is not lawful at common law. It is of course well known that there are many responsible members of our society who believe that euthanasia should be made lawful; but that result could, I believe, only be achieved by legislation which expresses the democratic will that so fundamental a change should be made in our law, and can, if enacted, ensure that such legalised killing can only be carried out subject to appropriate supervision and control. It is true that the drawing of this distinction may lead to a charge of hypocrisy; because it can be asked why, if the doctor, by discontinuing treatment, is entitled in consequence to let his patient die, it should not be lawful to put him out of his misery straight away, in a more humane manner, by a lethal injection, rather than let him linger on in pain until he

dies. But the law does not feel able to authorise euthanasia, even in circumstances such as these; for once euthanasia is recognised as lawful in these circumstances, it is difficult to see any logical basis for excluding it in others.

At the heart of this distinction lies a theoretical question. Why is it that the doctor who gives his patient a lethal injection which kills him commits an unlawful act and indeed is guilty of murder, whereas a doctor who, by discontinuing life support, allows his patient to die, may not act unlawfully—and will not do so, if he commits no breach of duty to his patient? Professor Glanville Williams has suggested (see his *Textbook of Criminal Law*, 2nd ed. (1983), p. 282) that the reason is that what the doctor does when he switches off a life support machine 'is in substance not an act but an omission to struggle,' and that 'the omission is not a breach of duty by the doctor, because he is not obliged to continue in a hopeless case.'

I agree that the doctor's conduct in discontinuing life support can properly be categorised as an omission. It is true that it may be difficult to describe what the doctor actually does as an omission, for example where he takes some positive step to bring the life support to an end. But discontinuation of life support is, for present purposes, no different from not initiating life support in the first place. In each case, the doctor is simply allowing his patient to die in the sense that he is desisting from taking a step which might, in certain circumstances, prevent his patient from dying as a result of his pre-existing condition; and as a matter of general principle an omission such as this will not be unlawful unless it constitutes a breach of duty to the patient. I also agree that the doctor's conduct is to be differentiated from that of, for example, an interloper who maliciously switches off a life support machine because, although the interloper may perform exactly the same act as the doctor who discontinues life support, his doing so constitutes interference with the life-prolonging treatment then being administered by the doctor. Accordingly, whereas the doctor, in discontinuing life support, is simply allowing his patient to die of his pre-existing condition, the interloper is actively intervening to stop the doctor from prolonging the patient's life, and such conduct cannot possibly be categorised as an omission. The distinction appears, therefore, to be useful in the present context in that it can be invoked to explain how discontinuance of life support can be differentiated from ending a patient's life by a lethal injection. But in the end the reason for that difference is that, whereas the law considers that discontinuance of life support may be consistent with the doctor's duty to care for his patient, it does not, for reasons of policy, consider that it forms any part of his duty to give his patient a lethal injection to put him out of his agony.

Lord Mustill

After much expression of negative opinions I turn to an argument which in my judgment is logically defensible and consistent with the existing law. In essence it turns the previous argument on its head by directing the inquiry to the interests of the patient, not in the termination of life but in the continuation of his treatment. It runs as follows. (i) The cessation of nourishment and hydration is an omission not an act. (ii) Accordingly, the cessation will not be a criminal act unless the doctors are under a present duty to continue the regime. (iii) At the time when Anthony Bland came into the care of the doctors decisions had to be made about his care which he was unable to make for himself. In accordance with *In re F.* [1990] 2 A.C. 1 these decisions were to be made in his best interests. Since the possibility that he might recover still existed his best interests required that he should be supported in the hope that this would happen. These best interests justified the application of the necessary regime without his consent. (iv) All hope of recovery has now been abandoned. Thus, although the termination of his life is not in the best interests of Anthony Bland, his best interests in being

kept alive have also disappeared, taking with them the justification for the non-consensual regime and the co-relative duty to keep it in being. (v) Since there is no longer a duty to provide nourishment and hydration a failure to do so cannot be a criminal offence.

My Lords, I must recognise at once that this chain of reasoning makes an unpromising start by transferring the morally and intellectually dubious distinction between acts and omissions into a context where the ethical foundations of the law are already open to question. The opportunity for anomaly and excessively fine distinctions, often depending more on the way in which the problem happens to be stated than on any real distinguishing features, has been exposed by many commentators, including in England the authors abovementioned, together with *Smith & Hogan on Criminal Law*, 6th ed. (1988), p. 51, H. Beynon at [1982] Crim.L.R. 17 and M.J. Gunn and J.C. Smith at [1985] Crim.L.R. 705. All this being granted we are still forced to take the law as we find it and try to make it work. Moreover, although in cases near the borderline the categorisation of conduct will be exceedingly hard, I believe that nearer the periphery there will be many instances which fall quite clearly into one category rather than the other. In my opinion the present is such a case, and in company with Compton J. in *Barber v. Superior Court of State of California*, 195 Cal. Rptr. 484, 490 amongst others I consider that the proposed conduct will fall into the category of omissions.

I therefore consider the argument to be soundly-based. Now that the time has come when Anthony Bland has no further interest in being kept alive, the necessity to do so, created by his inability to make a choice, has gone; and the justification for the invasive care and treatment, together with the duty to provide it have also gone. Absent a duty, the omission to perform what had previously been a duty will no longer be a breach of the criminal law. . . .

[Speeches were also given by **Lord Lowry** and **Lord Browne-Wilkinson** agreeing that the appeal should be dismissed.]

Appeal dismissed.

QUESTIONS

1. Professor Smith asks: 'If a doctor is keeping a patient alive by cranking the handle of a machine and he stops, this looks like a clear case of omission. So too if the machine is electrically operated but switches it off every 24 hours and the doctor deliberately does not restart it. Switching off a functioning machine looks like an act; but is it any different in substance from the first two cases?' (J.C. Smith 2002: 64).
2. Lord Goff in *Bland* stated: 'I also agree that the doctor's conduct is to be differentiated from that of, for example, an interloper who maliciously switches off a life support machine because, although the interloper may perform exactly the same act as the doctor who discontinues life support, his doing so constitutes interference with the life-prolonging treatment then being administered by the doctor. Accordingly, whereas the doctor, in discontinuing life support, is simply allowing his patient to die of his pre-existing condition, the interloper is actively intervening to stop the doctor from prolonging the patient's life, and such conduct cannot possibly be categorized as an omission.' Does it make sense that a happening which is regarded as an action when done by one person (an interloper) is regarded as an omission when done by another (a doctor)?

For guidance on answering this question, please visit the Online Resource Centre that accompanies this book: www.oxfordtextbooks.co.uk/orc/herringcriminal5e/.

2.2 SITUATIONAL OFFENCES

Analogous to offences involving omissions are cases where the defendant is guilty for being in a particular situation or state of affairs.[49] Examples are being drunk while in charge of a vehicle,[50] or possessing a drug[51] or offensive weapon.[52] (Possession offences will be discussed further in Chapter 4.) Such offences can be seen as being compatible with the voluntary act requirement as they will at least involve an earlier act. Take being drunk in charge of a vehicle. It can be said that getting drunk and getting into a vehicle are acts.

A particularly controversial case concerning a situational offence was *Larsonneur*,[53] in which the defendant was convicted of the offence of being found in the United Kingdom while being 'an alien to whom leave to land in the United Kingdom had been refused', contrary to articles 1(3) and 18(1)(b) of the Aliens Order 1920, as amended. The case was controversial because the defendant was in the UK only because she had been forcibly returned to the UK by the Irish police.[54] Whether it was correct to punish her when she had performed no voluntary act to put herself in the criminal situation is hotly debated.[55]

2.3 LIABILITY FOR THE ACTS OF OTHER PEOPLE

There are certain circumstances under which a party is criminally responsible for the acts of a third party. In such a case a defendant is not punished for his or her own acts, but the acts of someone else. Two examples are particularly relevant: vicarious liability and the doctrine of innocent agency. Under vicarious liability an employer, under certain circumstances, may be criminally responsible for the acts of an employee. This is explored further in Chapter 4. Under the doctrine of innocent agency if A causes B (who is insane or a child) to cause harm to another then A can be made criminally responsible for the consequences of B's act. The doctrine of innocent agency is discussed in Chapter 15.

3 CAUSATION

We mentioned earlier that for some crimes it is necessary to show not only that the defendant performed an act, but that that act caused a particular consequence. For example, in murder it must be proved that the accused has caused the death of the victim. In many cases causation will be straightforward. If the defendant chops off the victim's head and the victim dies, it will be hard to deny that the defendant has caused the victim's death. It is only where there is a rather unusual set of facts that there is any dispute over the question. The most difficult cases are ones where it is not clear which of two people caused the result.

Imagine the following scenario: David, who was abused by his father as a child, has recently been made redundant by his employer and turned to drink. After a heavy drinking session Victor hurls a racial insult at him. David flies into a rage and stabs Victor. A passer-by phones for an ambulance, which takes a long time to arrive because of traffic jams and bad weather. When Victor arrives at the hospital there is a long delay before he is seen by a doctor because of the staff shortages in the NHS. By then Victor has died.

49 See generally Glazebrook (1978: 108). 50 Road Traffic Act 1988, s. 4(2).
51 Misuse of Drugs Act 1971. 52 Prevention of Crime Act 1953. 53 (1933) 149 LT 542.
54 The background to the case is explained in Lanham (1976).
55 See also *Winzar v Chief Constable of Kent* The Times, 28 March 1983.

Who or what caused Victor's death? It would be possible to blame David, David's father, David's employer, the brewery who produced the alcohol he drank or the pub which sold it to him, Victor for the racial insult, the government for failing to prevent traffic congestion or fund the NHS adequately, the NHS trust at the relevant hospital, or even God for the weather! Indeed it would not be surprising if a doctor, a sociologist, a lawyer, a politician, a theologian, or a member of the public all answered the question: 'Who caused Victor's death?' in different ways. The important point to make is that there is no magic formula to answer the question correctly; rather the law must decide which of the many possible approaches to take.

The courts have consistently stated that causation is simply a matter of common sense[56] and it is not a question of philosophical analysis. Stephen Shute has explained: 'the law tends to regard causation in terms of broad generalisations based on common sense principles, rather than attempting to mimic the more obscure approach to causation often taken by the philosopher or the scientist.'[57] Therefore the courts tend to see causation as a question of fact for the jury. However, it is not always that straightforward and the House of Lords has acknowledged that sometimes it is necessary for a judge to direct the jury to apply special legal rules and not just leave the causal question to the common sense of the jury.[58] Indeed if it is clear to the judge that in law the defendant could not be said to have caused the result, the judge should withdraw the case from the jury.[59]

At the heart of the law's understanding of causation is an assumption that each person is responsible for his or her actions. Arguments such as 'my background made me act this way' or 'society caused me to do this' carry no weight in the law's understanding of causation. The effect of this is that if there is an act of an individual immediately connected to the result the law's analysis stops. The individual caused the result and there is no need to ask if anything made him or her act in that way or enquire into the reasons for his or her action. →5 (p.129)

Although the issue of causation is a legal one the judiciary appears to apply the rules flexibly. Some commentators feel that in fact policy issues and moral judgments affect the law's attitude to causation. In other words the questions 'should the defendant be held responsible for this result?' and 'did the defendant legally cause the result?' merge together. We will consider this further in Part II of this chapter.

It is now necessary to look at the law's understanding of causation and start by considering factual or 'but for' causation.

3.1 FACTUAL OR 'BUT FOR' CAUSATION

DEFINITION

'But for' causation: the defendant's act is a but for cause of a result, if, but for the defendant's act, the result would not have occurred.

'But for' or factual causation is an important aspect of the criminal law on causation.[60] Something cannot be a legal cause unless it is a factual cause, but it does not follow that just

[56] See e.g. *Kennedy* [2007] UKHL 38, para. 15.
[57] Shute (1992: 584).
[58] *Empress Car Co (Abertillery) Ltd v National Rivers Authority* [1998] 1 All ER 481 (HL).
[59] *Malcherek* [1981] 2 All ER 422 (CA).
[60] This is sometimes known as *sine qua non* causation.

because an act is a factual cause that it is also a legal cause. The test for factual causation requires the jury to consider whether, but for the defendant's unlawful actions, the harm would have occurred at the same time and in the same way that it did. Contrast these two cases:

(1) In *Dyson*[61] the victim was dying from meningitis when Dyson injured him. The victim died as a result of the injuries. The evidence was that because of the injuries the victim died sooner than he would have done from the meningitis. Dyson could be held to have caused the victim's death. But for Dyson's actions the victim would not have died at the time and place that he did.[62]

(2) In *White*[63] the defendant put poison into the victim's drink. The victim suffered a heart attack, having taken a few sips. Medical evidence suggested that the poison was unrelated to the heart attack. The victim would have died in exactly the same way and at the same time had the defendant not put the poison in the drink, and therefore it could not be said that the poison was a factual cause of the death.

Factual causation cannot be used as the general rule for causation, however, because it is far too wide. For example, in a murder case a defendant's parents could be said to have caused a victim's death: but for the defendant's parents bringing him into the world, the victim would not have died. However, but for causation is useful in that it tells us who *cannot* be regarded as a cause of death. If the victim would have died in the same way and at the same time had the defendant not been there, then the defendant cannot be said to have caused the death in the eyes of the law.

3.2 THE KEY TEST FOR LEGAL CAUSATION

From the factual causes the law selects the one or ones which are the legal cause. A legal cause is 'an operating and substantial cause'. The Court of Appeal in *Mellor* stressed that there may be several operating and substantial causes of the result.[64] So, the mere fact that both the defendant and another person contributed to the harm does not mean that the defendant cannot be responsible. What do the two terms 'substantial' and 'operating' mean? →6 (p.123)

Substantial

The defendant's act must be a substantial cause of the result. It must contribute to the end result to a significant extent;[65] not be a 'slight or trifling link'.[66] It must make more than an 'insubstantial or insignificant contribution'.[67] Imagine Edwin stabbed Thelma in the leg and then Fred shot her and medical evidence established that she had died from the shot, but as she had been slightly weakened by the stabbing she died a second earlier than she would have done without the stab wound. In such a case, the stabbing would be regarded as

[61] [1908] 2 KB 454 (CA).

[62] There was, however, no conviction for manslaughter because the victim did not die within a year and a day of the defendant's actions. That year and a day rule is no longer part of the law (Law Reform (Year and a Day Rule) Act 1996).

[63] [1910] 2 KB 124 (CA).

[64] *Mellor* [1996] 2 Cr App R 245. See also *Benge* (1865) 4 F & F 504.

[65] *Cheshire* [1991] 3 All ER 670 (CA).

[66] *Kimsey* [1996] Crim LR 35 (CA).

[67] *Cato* [1976] 1 All ER 260 (CA).

a minimal contribution to the death and so not a cause. The courts have avoided speaking in mathematical terms. In *Hennigan*[68] a judge who directed the jury that a defendant was not guilty if he was less than one-fifth to blame was held to have given a misdirection. In *R v L*[69] it was suggested it was sufficient if the defendant's act had been a more than negligible contribution.

Operating

The defendant's act must be an operating cause of the result. The most common way for a defendant to deny that his or her act was an operating cause is to argue that there has been a 'break in the chain of causation' or a *novus actus interveniens*. This means that the act of someone else has taken over responsibility for the chain of events and the defendant is no longer responsible. For example, in *Rafferty*[70] the defendant and his friends, Taylor and Thomas, hit the victim. The defendant then ran away. Taylor and Thomas then drowned the victim in the sea. The actions of Taylor and Thomas were held to be a *novus actus interveniens* and Rafferty was not held to have caused the victim's death. He was, however, still guilty of the assault.

It is necessary to take a further look at the notion of a *novus actus interveniens*. It is useful to distinguish three different situations: where it is the acts of a third party which break the chain, where it is the victim's acts which are said to break the chain, and where it is a 'natural event' or 'act of God' which is said to break the chain.

3.3 ACTS OF THIRD PARTIES BREAKING THE CHAIN OF CAUSATION

EXAMINATION TIP

If you are dealing with a question in which A injured the victim and then B inflicted a further injury on the victim after which the victim died, the following would be four possible results a court could reach:

(1) If the evidence was that the victim died as a combination of both injuries it could be found that both A and B caused the death.

(2) It could be found that B's act was a *novus actus interveniens* so A no longer could be said to have caused the death, but B could.

(3) It could be that B's act was of negligible effect (e.g. if B had only scratched the victim), then it may be found that A caused the death, but B did not.

(4) It could be found that neither of the acts caused the death, for example if the victim died from a heart attack unconnected with either injury.

You should consider which of these possibilities covers the set of facts with which you are dealing.

As the above indicates, if two people both harm the victim there are a number of different legal interpretations of what has happened. Here we will concentrate on where one person's act is a *novus actus interveniens* and breaks the chain of causation.

[68] [1971] 3 All ER 133. [69] [2010] EWCA Crim 1249. [70] [2007] EWCA Crim 1846.

DEFINITION

A *novus actus interveniens*: a free voluntary act of a third party which renders the original act no longer a substantial and operating cause of the result.

The importance of the doctrine of *novus actus interveniens* has been affirmed by the House of Lords in the following decision:[71]

R v Kennedy
[2007] UKHL 38

Simon Kennedy had prepared a syringe of heroin for Marco Bosque. Bosque injected himself and died shortly after. Kennedy was charged with supplying a class A drug and manslaughter, and convicted on both charges. On appeal the Court of Appeal held that the crucial question was whether the appellant could be held to be jointly responsible for carrying out the injection. This issue, it was felt, was adequately covered by the trial judge's direction and therefore the appeal was dismissed. Subsequently the Criminal Cases Review Commission referred the case back to the Court of Appeal on the basis that later cases had cast doubt on the reasoning of the original Court of Appeal case and that the judge had failed adequately to explain to the jury that the free, voluntary, and informed act of the victim in injecting himself with heroin would break the chain of causation between the appellant's act of supplying the drugs and the victim's death.

[The report was delivered on behalf of all their Lordships:]

14. The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also of deception and mistake. But, generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act, and none of the exceptions is relied on as possibly applicable in this case. Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another. There are many classic statements to this effect. In his article "*Finis for Novus Actus?*" (1989) 48(3) CLJ 391, 392, Professor Glanville Williams wrote:

"I may suggest reasons to you for doing something; I may urge you to do it, tell you it will pay you to do it, tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new 'chain of causation' going, irrespective of what has happened before."

In chapter XII of *Causation in the Law,* 2nd ed (1985), p 326, Hart and Honoré wrote:

"The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility."

This statement was cited by the House with approval in *R v Latif* [1996] 1 WLR 104. The principle is fundamental and not controversial.

15. Questions of causation frequently arise in many areas of the law, but causation is not a single, unvarying concept to be mechanically applied without regard to the context in which

[71] See W. Wilson (2008b) for an excellent discussion of the issues raised.

the question arises. That was the point which Lord Hoffmann, with the express concurrence of three other members of the House, was at pains to make in *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22. The House was not in that decision purporting to lay down general rules governing causation in criminal law. It was construing, with reference to the facts of the case before it, a statutory provision imposing strict criminal liability on those who cause pollution of controlled waters. Lord Hoffmann made clear that (p 29E–F) common sense answers to questions of causation will differ according to the purpose for which the question is asked; that (p 31E) one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule; that (p 32B) strict liability was imposed in the interests of protecting controlled waters; and that (p 36A) in the situation under consideration the act of the defendant could properly be held to have caused the pollution even though an ordinary act of a third party was the immediate cause of the diesel oil flowing into the river. It is worth underlining that the relevant question was the cause of the pollution, not the cause of the third party's act.

16. The committee would not wish to throw any doubt on the correctness of *Empress Car*. But the reasoning in that case cannot be applied to the wholly different context of causing a noxious thing to be administered to or taken by another person contrary to section 23 of the 1861 Act. In *R v Finlay* [2003] EWCA Crim 3868 (8 December 2003) V was injected with heroin and died. D was tried on two counts of manslaughter, one on the basis that he had himself injected V, the second on the basis that he had prepared a syringe and handed it to V who had injected herself. The jury could not agree on the first count but convicted on the second. When rejecting an application to remove the second count from the indictment, the trial judge ruled, relying on *Empress Car*, that D had produced a situation in which V could inject herself, in which her self-injection was entirely foreseeable and in which self-injection could not be regarded as something extraordinary. He directed the jury along those lines. The Court of Appeal upheld the judge's analysis and dismissed the appeal. It was wrong to do so. Its decision conflicted with the rules on personal autonomy and informed voluntary choice to which reference has been made above. In the decision under appeal the Court of Appeal did not follow *R v Finlay* in seeking to apply *Empress Car,* and it was right not to do so.

17. In his article already cited Professor Glanville Williams pointed out (at p 398) that the doctrine of secondary liability was developed precisely because an informed voluntary choice was ordinarily regarded as a *novus actus interveniens* breaking the chain of causation:

> "Principals cause, accomplices encourage (or otherwise influence) or help. If the instigator were regarded as causing the result he would be a principal, and the conceptual division between principals (or, as I prefer to call them, perpetrators) and accessories would vanish. Indeed, it was because the instigator was not regarded as causing the crime that the notion of accessories had to be developed. This is the irrefragable argument for recognising the *novus actus* principle as one of the bases of our criminal law. The 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."

18. This is a matter of some significance since, contrary to the view of the Court of Appeal when dismissing the appellant's first appeal, the deceased committed no offence when injecting himself with the fatal dose of heroin. It was so held by the Court of Appeal in *R v Dias* [2002] 2 Cr App R 96, paras 21–24, and in *R v Rogers* [2003] EWCA Crim 945, [2003] 1 WLR 1374 and is now accepted. If the conduct of the deceased was not criminal he was not a principal offender, and it of course follows that the appellant cannot be liable as a secondary party. It also follows that there is no meaningful legal sense in which the

appellant can be said to have been a principal jointly with the deceased, or to have been acting in concert. The finding that the deceased freely and voluntarily administered the injection to himself, knowing what it was, is fatal to any contention that the appellant caused the heroin to be administered to the deceased or taken by him.

24. It is possible to imagine factual scenarios in which two people could properly be regarded as acting together to administer an injection. But nothing of the kind was the case here. As in *R v Dalby* and *R v Dias* the appellant supplied the drug to the deceased, who then had a choice, knowing the facts, whether to inject himself or not. The heroin was, as the certified question correctly recognises, self-administered, not jointly administered. The appellant did not administer the drug. Nor, for reasons already given, did the appellant cause the drug to be administered to or taken by the deceased.

25. The answer to the certified question is: "In the case of a fully-informed and responsible adult, never". The appeal must be allowed and the appellant's conviction for manslaughter quashed.

The principle confirmed by their Lordships from these cases appear straightforward.[72] If A does an act after which B does an act, then if B's act is:

(1) a free, voluntary, and informed act; and

(2) it renders A's act no longer a substantial and operating cause,

A will not have caused the result. B's act will be a *novus actus interveniens*.[73] More needs to be said about these requirements.

A free, voluntary, and informed act

Only the free, voluntary, and informed acts of a third party will break the chain of causation. What then will constitute a free, voluntary, and informed act? The following points will be of some assistance:

(1) Where a person, D, is not acting voluntarily his or her 'action' will not be a *novus actus interveniens*. So if Guy pushes Mary into Ivy who suffers injuries then Guy is said to have caused the injuries, as Mary was not acting in a voluntary way and so her 'act' could not be regarded as a *novus actus interveniens*. It is not quite clear how far this may be taken. In *Wise v Dunning*[74] a religious preacher gave an anti-Catholic speech. He realized that there were Catholics in the audience and that they would react violently to his speech, which they did. The court was willing to accept that the preacher caused the spontaneous violence. It seems the court took the view that the violence was an instinctive reaction of the listeners, and so was not truly voluntary. Some commentators regard this case as stretching the meaning of 'voluntary' too far.

[72] While the decision has been widely welcomed, Cherkassky (2008) argues that it fails to follow the earlier line of cases which established that only unforeseeable 'free, voluntary and informed acts' break the chain of causation.

[73] Interestingly, the Scottish courts have declined to follow the *Kennedy* approach (*Kane v HM Advocate* [2009] HCJAC 8, with Lord Hamilton explaining that the Scottish courts would follow the practical experience of the reasonable man rather than by the theoretical speculations of the philosopher).

[74] [1902] 1 KB 167.

(2) Where a person is acting in a way which is justified his or her action is not free, voluntary, or informed.[75] To give three examples:

(a) If someone is acting in order to preserve his or her own life or limb the act will not be free, voluntary, or informed. So if Tim throws an object at Penelope who, in order to protect herself, deflects the object but it then hits Fred, Tim will be said to have caused Fred's injuries. Penelope's act will not break the chain of causation because she was justified in acting as she did.[76]

(b) If someone is acting in order to assist law enforcement this will not be a break in the chain of causation. So in *Pagett*[77] a defendant was said to have caused his girlfriend's death after he kidnapped her and she was killed by police marksmen trying to secure her release. It was found that he had caused the police to act in this way and the police were acting lawfully and therefore their actions did not break the chain of causation.

(c) It may be that acts in accordance with a moral obligation will not break the chain of causation. For example, if a passer-by came across an injured person and tried to administer first aid, but did so in such a way that in fact the victim died, the passer-by's act may not break the chain of causation.[78] Certainly sound medical practice will not break the chain of causation. In *Malcherek and Steel*[79] a doctor who switched off a life support machine in accordance with approved medical procedures was held not to have caused the patient's death.

(3) If a person does not know the circumstances of his action it may not break the chain of causation. If Charles posts a parcel bomb which is delivered by Tina (a postal worker) and injures someone, Charles will be said to have caused the injury. Although the delivery of the bomb by Tina was free and voluntary it was not 'informed'.[80]

Rendering the defendant's action no longer an operating and substantial cause

To amount to a *novus actus interveniens* the act of the third party must have rendered the defendant's original act no longer an operating and substantial cause. Many of the cases have involved a defendant who has injured a victim; the victim has then received bad medical treatment and died. The defendant then claims that the bad medical treatment the victim subsequently received broke the chain of causation. The courts have been very reluctant to accept such arguments. They have clearly been persuaded by the response that the victim would not have required medical treatment had the defendant not injured him or her. It therefore hardly lies in the mouth of the defendant to complain about the standard of the medical treatment he or she necessitated. Indeed it has been suggested that bad medical treatment cannot be regarded as 'abnormal'. Inevitably in busy hospitals treatment of emergencies cannot always be of the highest possible standard.[81]

[75] *Latif* [1996] 1 All ER 353 (HL). [76] *Scott v Shepherd* (1773) 96 ER 525.
[77] *Pagett* (1983) 76 Cr App R 279 (CA). Contrast *Latif* [1996] 1 All ER 353 (HL).
[78] Hart and Honoré (1985: 335). [79] [1981] 1 WLR 690 (CA).
[80] Similarly if D is a child or suffers from a mental illness his actions will not be free, voluntary, and informed.
[81] Stannard (1992: 582).

One of the very few cases where medical treatment did break the chain of causation was *R v Jordan*.[82] Here the defendant stabbed the victim. The victim was taken to hospital, where the wound had almost healed when a doctor administered a drug to which the victim was allergic. The drug killed the victim. The court heard evidence that the doctor should have known that the victim was intolerant to the drug. The Court of Appeal held that the medical treatment and not the defendant caused the death of the victim. There were two crucial facts in the case which led to this conclusion:

(1) The original wound had virtually healed at the time of death. In medical terms the wound inflicted by the defendant had not contributed to the death of the deceased.

(2) The treatment provided by the hospital was 'abnormal', 'palpably wrong', or 'grossly negligent'. It should have been known by the doctor that the victim was intolerant to the antibiotic.

Of course, although Jordan was held not to be responsible for the death he was still responsible for the original assault.

Jordan has been regarded as exceptional: only in the most unusual of circumstances will medical treatment, however negligent, break the chain of causation. A more representative example of the case law is *Cheshire*,[83] excerpted above, where, even though the treatment was not as it should have been, it did not break the chain of causation. In *Malcherek*[84] D inflicted wounds upon P, who had to be put on a life support machine. Several days later the machine was switched off by doctors. The Court of Appeal accepted that there was no doubt that the injury was an operating and substantial cause of the death. After all, what did the victim die from when the machine was switched off, if not the injuries inflicted by the defendant?

William Wilson[85] has suggested that in a case where a victim suffers death in hospital it is necessary to distinguish two kinds of cases:

(1) The death of the victim was a result of bad medical treatment which was attempting to treat the victim's injuries. In such a case the treatment must be palpably wrong if it is to break the chain of causation.

(2) The death of the victim was caused by things done in a hospital not connected to treatment of the injuries inflicted by the defendant (e.g. food poisoning from the hospital food, catching a disease from a fellow patient, a doctor deliberately harming a victim out of maliciousness), which do not have to be palpably wrong to break the chain of causation.

The argument behind this distinction is that although the defendant can reasonably be said to have necessitated the provision of medical treatment there is a looser connection between the defendant and other things that may happen to the victim in hospital. Although the courts have not been explicit in drawing such a distinction, they may well be attracted to such an approach in an appropriate case.

The following case[86] is a good example of how the courts treat cases where it is alleged that medical treatment has broken the chain of causation.

[82] (1956) 40 Cr App R 152 (CA).
[83] *Cheshire* [1991] 3 All ER 670 (CA).
[84] [1981] 2 All ER 422 (CA).
[85] W. Wilson (2003: 112–13).
[86] For a discussion see Stannard (1992).

R v Cheshire
[1991] 3 All ER 670 (CA)[87]

David Cheshire (the appellant) shot the victim (Trevor Jeffrey) in the leg and stomach during an argument in the Ozone fish and chip shop. The victim was taken to hospital and placed in intensive care. A tracheotomy tube was inserted in his windpipe because he was having breathing difficulties. Two months after the shooting the victim died because the windpipe had narrowed where the tracheotomy had been performed. This was a rare but not unknown complication of such a procedure. The defendant was convicted of murder. He appealed on the basis that the trial judge had wrongly directed the jury that only if the medical treatment could be described as reckless could the appellant be said not to have caused the victim's death.

Lord Justice Beldam

In the criminal law, and in particular in the law of homicide, whether the death of a deceased was the result of the accused's criminal act is a question of fact for the jury, but it is a question of fact to be decided in accordance with legal principles explained to the jury by the judge.

[Having quoted from Hart and Honoré's *Causation in the Law,* **Beldam LJ** continued:]

As Professors Hart and Honoré comment, treatment which falls short of the standard expected of the competent medical practitioner is unfortunately only too frequent in human experience for it to be considered abnormal in the sense of extraordinary. Acts or omissions of a doctor treating the victim for injuries he has received at the hands of an accused may conceivably be so extraordinary as to be capable of being regarded as acts independent of the conduct of the accused but it is most unlikely that they will be.

We have not been referred to any English authority in which the terms of the direction which should be given to a jury in such a case have been considered. We were referred to *R v Jordan* (1956) 40 Cr App R 152, in which the appellant, who had been convicted of murder, sought leave to call further evidence about the cause of the victim's death. The application was granted and evidence was received by the court that the stab wound from which the victim died eight days later was not the cause of the victim's death. The deceased had died from the effects of sensitivity to Terramycin which had been given to him after his intolerance to it was established and in abnormal quantity. The court considered that the introduction into the system of the victim of a substance shown to be poisonous to him and in quantities which were so great as to result in pulmonary oedema leading to pneumonia were factors which ought to have been before the jury and which in all probability would have affected their decision.

R v Jordan was described in the later case of *R v Smith* [1959] 2 QB 35 as a very particular case dependent upon its exact facts. The appellant in *R v Smith* had been convicted at court-martial of the murder of another soldier by stabbing him. The victim had been dropped twice while being taken to the medical reception station and was subsequently given treatment which was said to be incorrect and harmful. Lord Parker CJ, giving the judgment of the Court Martial Appeal Court, rejected a contention that his death did not result from the stab wound. He said ([1959] 2 QB 35 at 42–43):

'It seems to the court that, if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that

[87] [1991] 1 WLR 844, (1991) 93 Cr App R 251.

some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it in another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.'

Both these cases were considered by this court in *R v Malcherek, R v Steel* [1981] 2 All ER 422, in which it had been argued that the act of a doctor in disconnecting a life support machine had intervened to cause the death of the victim to the exclusion of injuries inflicted by the appellants. In rejecting this submission Lord Lane CJ, after considering *R v Jordan* and *R v Smith*, said ([1981] 2 All ER 422 at 428):

'In the view of this court, if a choice has to be made between the decision in *R v Jordan* and that in *R v Smith*, which we do not believe it does (*R v Jordan* being a very exceptional case), then the decision in *R v Smith* is to be preferred.'

Later in the same judgment Lord Lane CJ said ([1981] 2 All ER 422 at 428–429):

'There may be occasions, although they will be rare, when the original injury has ceased to operate as a cause at all, but in the ordinary case if the treatment is given bona fide by competent and careful medical practitioners, then evidence will not be admissible to show that the treatment would not have been administered in the same way by other medical practitioners. In other words, the fact that the victim has died, despite or because of medical treatment for the initial injury given by careful and skilled medical practitioners, will not exonerate the original assailant from responsibility for the death.'

In those two cases it was not suggested that the actions of the doctors in disconnecting the life support machines were other than competent and careful. The court did not have to consider the effect of medical treatment which fell short of the standard of care to be expected of competent medical practitioners.

[Having considered passages from the judgments in the Supreme Court of Victoria in *R v Evans and Gardiner (No 2)* [1976] VR 523, **Beldam LJ** continued:]

It seems to us that these two passages demonstrate the difficulties in formulating and explaining a general concept of causation but what we think does emerge from this and the other cases is that when the victim of a criminal attack is treated for wounds or injuries by doctors or other medical staff attempting to repair the harm done, it will only be in the most extraordinary and unusual case that such treatment can be said to be so independent of the acts of the accused that it could be regarded in law as the cause of the victim's death to the exclusion of the accused's acts.

Where the law requires proof of the relationship between an act and its consequences as an element of responsibility, a simple and sufficient explanation of the basis of such relationship has proved notoriously elusive.

In a case in which the jury have to consider whether negligence in the treatment of injuries inflicted by the accused was the cause of death we think it is sufficient for the judge to tell the jury that they must be satisfied that the Crown have proved that the acts of the accused caused the death of the deceased, adding that the accused's acts need not be the sole cause or even the main cause of death, it being sufficient that his acts contributed significantly to that result. Even though negligence in the treatment of the victim was the immediate cause of his death, the jury should not regard it as excluding the responsibility of the accused unless the negligent treatment was so independent of his acts, and in itself so potent in causing death, that they regard the contribution made by his acts as insignificant.

It is not the function of the jury to evaluate competing causes or to choose which is dominant provided they are satisfied that the accused's acts can fairly be said to have made a significant contribution to the victim's death. We think the word 'significant' conveys the necessary substance of a contribution made to the death which is more than negligible.

...Although for reasons we have stated we think that the judge erred when he invited the jury to consider the degree of fault in the medical treatment rather than its consequences, we consider that no miscarriage of justice has actually occurred. Even if more experienced doctors than those who attended the deceased would have recognised the rare complication in time to have prevented the deceased's death, that complication was a direct consequence of the appellant's acts, which remained a significant cause of his death. We cannot conceive that, on the evidence given, any jury would have found otherwise.

Accordingly, we dismiss the appeal.

Appeal dismissed.

QUESTIONS

1. In *Bush v Commonwealth* 78 Ky 268 (1880) (Kentucky Court of Appeals) the defendant injured the victim. A medical officer then attended the victim and inadvertently infected him with scarlet fever and he died of that. Did the defendant cause the victim's death?
2. In *Martin* (1827) 172 ER 390 a father offered his son a sip from his alcoholic drink, but the child took the whole drink and died. This was held not to be foreseeable (perhaps surprisingly!) and so the father had not caused the death. Do you think the same result would be reached today?

3.4 OMISSIONS OF THIRD PARTIES BREAKING THE CHAIN OF CAUSATION

Although the courts have not said so explicitly, it is submitted that omissions of a third party cannot break the chain of causation. This is because an omission cannot render the defendant's act no longer an operating and substantial cause. If the defendant stabbed the victim, who was taken to hospital but died because no medical treatment was offered, then the defendant would be said to have caused the death.[88]

3.5 ACTS OF THE VICTIM BREAKING THE CHAIN

What about cases where the defendant alleges that the acts of the victim have broken the chain of causation? There are two leading cases on this which need to be contrasted, *Roberts* and *Blaue*:

[88] In such a case it is arguable that the hospital trust also caused the death.

R v Roberts
(1971) 56 Cr App R 95 (CA)

Kenneth Roberts was giving the victim a lift in his car after a party when he made indecent suggestions to her. He threatened her and started to touch her coat. She jumped out of the car injuring herself. Roberts was convicted of causing her actual bodily harm, contrary to section 47 of the Offences Against the Person Act 1861. The judge directed the jury that if they felt sure that the victim was induced to jump out of the car they should convict the defendant. Roberts appealed on the basis that the judge had misdirected the jury.

Lord Justice Stephenson

We have been helpfully referred to a number of reported cases, some well over a century old, of women jumping out of windows, or jumping or throwing themselves into a river, as a consequence of threats of violence or actual violence. The most recent case is the case of *Lewis* [1970] Crim. L. R. 647. An earlier case is that of *Beech* (1912) 7 Cr. App. R. 197, which was a case of a woman jumping out of a window and injuring herself, and of a man who had friendly relations with her, whom she knew and might have had reason to be afraid of, being prosecuted for inflicting grievous bodily harm upon her, contrary to section 20 of the Offences against the Person Act. In that case the Court of Criminal Appeal (at p. 200) approved the direction given by the trial judge in these terms:

> Will you say whether the conduct of the prisoner amounted to a threat of causing injury to this young woman, was the act of jumping the natural consequence of the conduct of the prisoner, and was the grievous bodily harm the result of the conduct of the prisoner?' That, said the Court, was a proper direction as far as the law went, and they were satisfied that there was evidence before the jury of the prisoner causing actual bodily harm to the woman. 'No-one could say', said Darling J. when giving the judgment of the Court, 'that if she jumped from the window it was not a natural consequence of the prisoner's conduct. It was a very likely thing for a woman to do as the result of the threats of a man who was conducting himself as this man indisputably was.'

This Court thinks that that correctly states the law, and that Mr. Carus was wrong in submitting to this Court that the jury must be sure that a defendant, who is charged either with inflicting grievous bodily harm or assault occasioning actual bodily harm, must foresee the actions of the victim which result in the grievous bodily harm, or the actual bodily harm. That, in the view of this Court, is not the test. The test is: Was it the natural result of what the alleged assailant said and did, in the sense that it was something that could reasonably have been foreseen as the consequence of what he was saying or doing? As it was put in one of the old cases, it had got to be shown to be his act, and if of course the victim does something so 'daft,' in the words of the appellant in this case, or so unexpected, not that this particular assailant did not actually foresee it but that no reasonable man could be expected to foresee it, then it is only in a very remote and unreal sense a consequence of his assault, it is really occasioned by a voluntary act on the part of the victim which could not reasonably be foreseen and which breaks the chain of causation between the assault and the harm or injury.

Appeal dismissed.

It should be noted that the test in *Roberts* is not whether the victim acted reasonably, but whether the reaction was reasonably foreseeable. The significance of this distinction is that it is foreseeable that, put into an emergency situation, a victim may react irrationally.

Roberts was approved by the Court of Appeal in *Williams and Davis*,[89] but with a slight modification of the test. It suggested the question for the jury in these kinds of cases was

> whether the deceased's reaction in jumping from the moving car was within the range of responses which might be expected from a victim placed in the situation in which he was. The jury should bear in mind any particular characteristic of the victim and the fact that in the agony of the moment he may act without thought and deliberation.

In *Lewis*[90] the Court of Appeal suggested the jury could consider whether the victim's response 'might have been expected' as a result of the defendant's acts and if it was then it was caused by the defendant. *Roberts* was also followed in the Court of Appeal's decision in *Marjoram*[91] which emphasized that when deciding whether the victim's reaction was reasonably foreseeable the question was whether the reaction was foreseeable to an ordinary person and not whether it was reasonably foreseeable to a person of the defendant's age and characteristics. →7 (p.125)

R v Blaue
[1975] 3 All ER 446 (CA)[92]

Robert Blaue stabbed Jacolyn Woodhead, piercing her lung. She was taken to hospital and was told that a blood transfusion was necessary. She refused to consent to the operation which was contrary to her beliefs as a Jehovah's Witness. She was told that without the transfusion she would die, but she stuck by her refusal and died the next day. The appellant was subsequently convicted of manslaughter, but appealed, arguing that the victim's refusal to have a blood transfusion broke the chain of causation between the stabbing and death.

Lord Justice Lawton

The physical cause of death in this case was the bleeding into the pleural cavity arising from the penetration of the lung. This had not been brought about by any decision made by the deceased girl but by the stab wound.

Counsel for the appellant tried to overcome this line of reasoning by submitting that the jury should have been directed that if they thought the girl's decision not to have a blood transfusion was an unreasonable one, then the chain of causation would have been broken. At once the question arises—reasonable by whose standards? Those of Jehovah's Witnesses? Humanists? Roman Catholics? Protestants of Anglo-Saxon descent? The man on the Clapham omnibus? But he might well be an admirer of Eleazar who suffered death rather than eat the flesh of swine (See 2 Maccabees, ch 6, vv 18–31) or of Sir Thomas Moore who, unlike nearly all his contemporaries, was unwilling to accept Henry VIII as Head of the Church in England. Those brought up in the Hebraic and Christian traditions would probably be reluctant to accept that these martyrs caused their own deaths.

As was pointed out to counsel for the appellant in the course of argument, two cases, each raising the same issue of reasonableness because of religious beliefs, could produce different verdicts depending on where the cases were tried. A jury drawn from Preston,

[89] [1992] 2 All ER 183 (CA). [90] Lewis [2010] EWCA Crim 151.
[91] *Marjoram* [2000] Crim LR 372 (CA). [92] [1975] 1 WLR 1411, (1975) 61 Cr App R 271.

sometimes said to be the most Catholic town in England, might have different views about martyrdom to [*sic*] one drawn from the inner suburbs of London. Counsel for the appellant accepted that this might be so; it was, he said, inherent in trial by jury. It is not inherent in the common law as expounded by Sir Matthew Hale and Maule J. It has long been the policy of the law that those who use violence on other people must take their victims as they find them. This in our judgment means the whole man, not just the physical man. It does not lie in the mouth of the assailant to say that his victim's religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable. The question for decision is what caused her death. The answer is the stab wound. The fact that the victim refused to stop this end coming about did not break the causal connection between the act and death.

Appeal dismissed.

At first sight these two cases seem to be offering different tests. The *Blaue* decision focuses on the rule that defendants must take their victims as they find them, whatever their peculiarities. This is an application of the 'thin skull' rule, which will be discussed below.[93] The *Roberts* decision focuses on whether the victim's response was reasonably foreseeable. The two tests are quite different. Had the *Roberts* test been applied in the *Blaue* decision it might have been decided that it was not reasonably foreseeable that the victim would be a Jehovah's Witness and refuse a blood transfusion. Although the cases appear to conflict, commentators have suggested a number of ways to reconcile them:

(1) The crucial fact in the *Blaue* decision was that the victim's act was in effect an omission. She failed to consent to the blood transfusion. By contrast, in *Roberts* the victim acted by jumping out of the car. This interpretation suggests that the *Blaue* rule is that an omission of the victim will not break the chain of causation, whereas the *Roberts* rule explains that the act of a victim might, if the act was unforeseeable or 'daft'. Such a position could be readily justified because it would fit in well with the criminal law's general approach of not attaching causal significance to omissions. Indeed the courts have consistently held that a victim who is injured by a defendant, but decides not to seek medical treatment and dies, will be found to have been killed by the defendant.[94] After all, if the victim neglects the injury and dies, what else does the victim die from, but the injury inflicted by the defendant? Although there is much to be said in favour of this argument, based on whether the victim performs an act or an omission, it must be admitted that it is not one that is made explicit by the courts themselves.

(2) It might be argued that there is no conflict between the two approaches given the modification of the *Roberts* test in *Williams and Davis* which required the jury to consider whether the response was reasonably foreseeable, *given the victim's characteristics*. In *Blaue* it was reasonably foreseeable that a victim with the characteristic of being a Jehovah's Witness would refuse a blood transfusion. The difficulty with such a test is that it could be argued that it will always be satisfied. In *Corbett*[95] it was held that the victim's conduct in running away and falling in front of a car was foreseeable, given that the victim was 'immensely drunk'. Further, if that was the correct interpretation then the Court of Appeal in *Blaue*

93 *Martin* (1832) 5 C & P 128. For a case where the victim actually had a thin skull, see *Simpson* [2002] EWCA Crim 25.

94 *Holland* (1841) 2 Mood & R 351.

95 [1996] Crim LR 594 (CA).

should have considered whether the victim acted as a reasonable Jehovah's Witness. But, they never asked that question.

(3) It may be argued *Blaue* was a special case which was in fact about freedom of religion. The argument could be that normally the jury should consider whether the victim's response was reasonably foreseeable, but that the court was unwilling to ask that question in *Blaue* because that might require the jury to consider whether the exercise of a religious belief was unreasonable.

A recent rather problematic decision which is not readily reconcilable with either *Roberts* or *Blaue* is *Dear*,[96] where the victim was stabbed by the defendant. The victim died from the wounds, although it was unclear whether the victim had reopened the wounds himself. With a minimum of discussion of the legal issues, the Court of Appeal held that the jury was entitled to find that, even if the victim had deliberately reopened the wounds, the defendant's actions could be found to have been an operating and substantial cause of the victim's death. The point is that the victim had died from the blood seeping from the very wounds inflicted by the defendant.

In *Dhaliwal*[97] the Court of Appeal appeared willing to accept that a husband who had been continually abusive to his wife had caused her to commit suicide. The outcome of the case turned on other issues (see Chapter 5), and there was little discussion of the causation issue. It might be argued that subjecting someone to a lengthy campaign of abuse in an intimate relationship could foreseeably cause the victim to commit suicide. Another argument is that 'the destructive effect domestic abuse has on the victim's autonomy can be regarded as rendering the defendant criminally responsible for the victim's suicide'.[98] In other words, the defendant, through the abuse, has made suicide something the victim was not truly free to avoid.

QUESTIONS

1. Marion slashes Steve's face with a knife. Steve is a vain model and is so distressed with the resulting scar that he commits suicide. Has Marion caused Steve's death? Consider how the cases of *Roberts*, *Blaue*, and *Dear* could be relevant to this case.

For guidance on answering this question, please visit the Online Resource Centre that accompanies this book: www.oxfordtextbooks.co.uk/orc/herringcriminal5e/.

2. Timothy stabs Yvonne. When Yvonne gets to hospital she is converted to the faith of the Jehovah's Witnesses by a nurse and therefore refuses to consent to a blood transfusion which is needed to save her life. Yvonne dies. Has Timothy caused Yvonne's death?

3.6 THE 'THIN SKULL' RULE

The 'thin skull' rule states that defendants must take their victims as they find them.[99] In other words, it is no defence for a defendant to say that the injuries or death were caused by

[96] [1996] Crim LR 595 (CA).
[97] [2006] EWCA Crim 1139. See further the excellent discussion in Horder and McGowan (2006).
[98] Horder and McGowan (2006: 1042).
[99] Colvin (1991: 84) argues that there is no need for a 'special' rule because in all cases where the thin skull rule is used, applying the 'operating and substantial cause' test would produce the same result.

the physical condition of the victim.[100] In *Hayward*[101] there was a violent argument between the defendant and his wife. Hayward chased his wife out of the house and she collapsed and died. The medical evidence suggested that the wife had an abnormal medical condition which meant that if she suffered fright or physical exertion she might die. Ridley J confirmed that the husband could be said to have caused the wife's death. The fact that the wife's death had resulted in part from her medical condition was irrelevant: the husband's act had caused her death. A less obvious application of the rule was *McKechnie*,[102] where, owing to the injuries inflicted by the defendant, the victim was not able to receive the medical treatment that he needed for an ulcer (which had nothing to do with the injuries caused by the defendant) and died as a result. It was held that the defendant had caused the victim's death. As we have seen in *Blaue*[103] the Court of Appeal said that under the thin skull rule the defendant must take the victim as the 'whole person'. This includes not only their physical characteristics, but also, in that case, their religious beliefs. The defendant will also have to take the victim with her own emotional and psychological condition. What is not clear is whether the thin skull rule can be extended to apply to cases where as a result of the injury inflicted by the defendant the victim acts in a way which causes a further harm. It is submitted that such an extension would be taking the thin skull rule too far and it is better to restrict it to cases where the victim does not do anything to make their condition worse.[104]

3.7 A NATURAL EVENT ('ACTS OF GOD')

A natural event will not normally break the chain of causation. If the defendant injures the victim and leaves his or her body on the sea shore and the sea comes in and drowns the victim then the sea coming in does not break the chain of causation.[105] However, where there is a freak of nature this may break the chain of causation. Imagine that the defendant had injured the victim and left his body in a field, and a bolt of lightning struck and killed the victim. In such a case the bolt of lightning could constitute a break in the chain of causation because it would be an 'extraordinary' event. In *Gowans*[106] the defendant attacked the victim, putting him in a coma. The victim then caught a serious infection and died. As being in a coma had put the victim in an especially vulnerable state to any infections, it was held the defendant's act was an operating and substantial cause of the death.

3.8 INTENDED RESULTS

Some commentators have suggested that if a defendant acts intending to produce a particular result and that result occurs then the defendant will automatically be found to have caused that result.[107] It should be stressed that this would be true only if the 'but for test' was satisfied. Mary could not be convicted of John's murder if he died shortly after she had stuck pins into a voodoo doll of him, intending that this should lead to his death (assuming it cannot be proved that the voodoo caused the death!).

[100] *Watson* [1989] 2 All ER 865 (CA). [101] (1908) 21 Cox CC 692.
[102] (1992) 94 Cr App R 51 (CA). [103] [1975] 3 All ER 446 (CA).
[104] See the discussion above at p.100.
[105] In *Hart* [1986] 2 NZLR 408 (NZCA) the New Zealand Court of Appeal found the defendant guilty on similar facts.
[106] [2003] EWCA Crim 3935. [107] See the discussion in J.C. Smith (2002: 55).

Despite some academic support for the proposition there is little case law on the point. In *Michael*[108] the defendant wished her baby dead and so gave a bottle of poison to a nurse, saying that it was medicine for the baby. The nurse placed the medicine on the mantelpiece, unaware that it was poison. A five-year-old child removed the poison and gave it to the baby. Even though the turn of events was unexpected, the end result was what the defendant wanted, and so she could be said to have caused it. However, the case can also be explained on the basis that the actions of the nurse and child were not free, voluntary, and informed actions and so could not be *novus actus interveniens*.

FURTHER READING

Cherkassky, L. (2008) '*Kennedy* and Unlawful Act Manslaughter: An Unorthodox Application of the Doctrine of Causation' *Journal of Criminal Law* 387.

Elliot, C. and De Than, C. (2006) 'Prosecuting the Drug Dealer When a Drug User Dies: *R v Kennedy (No 2)*' *Modern Law Review* 69: 986.

Hart, H. and Honoré, A. (1985) *Causation in the Law* (2nd edn, Oxford: OUP).

Padfield, N. (1995) 'Clean Water and Muddy Causation' *Criminal Law Review* 683.

Shute, S. (1992) 'Causation: Foreseeability v Natural Consequences' *Modern Law Review* 55: 584.

Williams, G. (1957) 'Causation in Homicide' *Criminal Law Review* 429.

Williams, R. (2005a) 'Policy and Principle in Drugs Manslaughter Cases' *Cambridge Law Journal* 64: 66.

—— (2005b) 'Drugs Manslaughter and Unorthodox Doctrine on Causation' *Cambridge Law Journal* 64: 537.

PART II: *ACTUS REUS*: THEORY

4 CLASSIFICATION OF OFFENCES

As suggested at the start of this chapter, the most common way of analysing a criminal offence is to divide it into three elements:[109]

(1) the *actus reus*,

(2) the *mens rea*,

(3) defences which the defendant may rely on.

However, this is by no means the only way of separating out the elements of the offence. Andrew Ashworth, for example, uses four requirements:

(1) act and causation requirements,

(2) absence of justification,

[108] (1840) 9 C & P 356.

[109] e.g. Lanham (1976).

(3) capacity and fault requirements, and

(4) excusatory defences.[110]

By contrast Glanville Williams argues that there are only two elements of an offence, the *actus reus* and *mens rea*.[111]

You may well be wondering whether it really matters very much how we divide up the elements of an offence and how we decide into which category a particular requirement falls.[112] Is this not just academics desperately trying to create a tidy picture of the criminal law? Well, there are both practical and theoretical benefits which some claim for such analysis. Here are some: ←1 (p.71)

(1) **Evidential rules.** Such divisions may assist when considering burdens of proof. As a very basic rule the prosecution must prove beyond reasonable doubt the *actus reus* and *mens rea*. However, the defendant has an evidential burden in relation to a defence.[113] Unfortunately there are exceptions to this. For example, a justification (e.g. self-defence) has been regarded by the courts as an element of the *actus reus*,[114] but the defendant carries the evidential burden in relation to the justification.

(2) **Substantive law.** There are some occasions on which the substantive law requires attention to whether or not the *actus reus* of the crime has occurred. For example, strict liability offences require proof of the *actus reus*, but not the *mens rea*.

(3) It can be claimed that the distinction between *actus reus* and *mens rea* assists in theoretical analysis of offences in that it separates the issues: what is the wrong with which this offence is concerned (the *actus reus* question) and when will the defendant be held sufficiently blameworthy for the offence (the *mens rea* question). Several commentators have objected to this kind of reasoning and claimed that the wrong done to the victim sometimes depends on the state of mind with which an act is done. Antony Duff[115] gives an example: 'Robbery is not just a physical attack or threat, *plus* theft: the character of the attack or the threat as a particular kind of wrong is determined in crucial part by the fact that it is made in order to steal.' In his view, then, the definition of the wrong done to the victim can include elements of both the *actus reus* and *mens rea*.

FURTHER READING

Robinson, P. (1993) 'Should the Criminal Law Abandon the *Actus Reus/Mens Rea* Distinction?' in S. Shute, J. Gardner, and J. Horder (eds) *Action and Value in Criminal Law* (Oxford: OUP).

—— (1997) *Structure and Function in Criminal Law* (Oxford: OUP).

Smith, A. (1978) 'On *Actus Reus* and *Mens Rea*' in P. Glazebrook (ed.) *Reshaping the Criminal Law* (London: Sweet & Maxwell).

110 Ashworth (2009: 85).

111 G. Williams (1961: 20) argues that defences are included in the meaning of the *actus reus*. Others claim that the *mens rea* involves blameworthiness and therefore includes both the required mental element and the absence of a defence (see e.g. Kadish (1968)).

112 See the discussion in P. Robinson (1993).

113 i.e. the defendant must introduce some evidence in support of the defence. If he or she does so then the prosecution must prove beyond reasonable doubt that the defendant does not have the defence. See further p.xxx for a more detailed explanation of the different kinds of burdens of proof.

114 *Williams (Gladstone)* [1987] 3 All ER 411 (CA).

115 Duff (2002: 59).

5 THE NEED FOR A VOLUNTARY ACT

Contrast these two examples:

(1) Alfred was a mathematician and was so taken up with considering a novel algebraic problem that he did not look where he was going when he bumped into Beth, who then fell over.

(2) Chau was walking along when he was pushed from behind by Danielle, causing him to bump into Edith, who also fell over.

In both cases Alfred and Chau did not intend to bump into anyone. But there is an important difference between the cases. Although we can say that Alfred's acts caused Beth to fall over in case 1, it is not clear that Chau acted at all. Indeed Danielle was the one who acted and Chau was more like an object than a person.[116] Something was done *to him*, rather than something being done *by him*.[117] This distinction is reflected in legal terms by the fact that Alfred would be found not guilty because he lacked *mens rea*, while Chau would be found not guilty on the basis that he did not commit the *actus reus*.

As mentioned in Part I, it is often stated that a defendant can be convicted of a crime only if he or she has performed a voluntary act. But why might the law have such a requirement?

5.1 WHY MIGHT THE LAW HAVE A VOLUNTARY ACT REQUIREMENT?

One reason the law may require an act is the argument that the criminal law should not punish evil thoughts alone. But why not? Several reasons could be advanced for this:[118]

(1) Those who fantasize about crime have not done anything which is sufficiently harmful to society to justify criminalization. We do not punish people for being bad, but for doing bad things.[119]

(2) There would be enormous difficulties of proof if an offence were directed towards the thoughts of the defendant alone. Requiring an act lessens the chance of a wrongful conviction by demanding some outward manifestation of the wrongful thoughts.

(3) The requirement limits government power. Punishing people for their thoughts is normally associated with the most authoritarian of governments and is too open to manipulation by corrupt governments or officials who wish to punish those they perceive to be a threat to their power.[120]

Why must the act be voluntary? As indicated in our consideration of Alfred and Chau, an involuntary action is one for which not only is the defendant not responsible, it is not even properly described as *his* act. It would clearly be unjust to punish a defendant for something he could not have avoided 'doing', even if he had tried his best.

[116] Hart (1968: 91–2).

[117] See Finkelstein (2002) for a discussion of defendants who voluntarily put themselves in a position where they act involuntarily.

[118] P. Robinson (1993) usefully summarizes the debate.

[119] M. Moore (1993: 51).

[120] In *Robinson v California* 370 US 660 (1962) the US Supreme Court held that a criminal offence of being addicted to drugs infringed the American constitution.

5.2 WHAT IS THE 'VOLUNTARY ACT REQUIREMENT'?

The obvious meaning of the requirement is that any offence must involve proof that the defendant did something. But Donald Husak has argued that the requirement must mean more than that. His point is that an offence of 'thinking evil thoughts while knitting' is objectionable even though it involves proof of an act (namely knitting). The offence is still objectionable because it is the evil thoughts and not the act of knitting which the offence is actually seeking to prevent. Hence Husak argues that criminal liability must be imposed '*for* an act'.[121] ←2 (p.72)

To understand the requirement further we need to consider what we mean by a 'voluntary act'.

The traditional view: acts as 'willed voluntary movements'

The traditional view is that actions are 'willed bodily movements'.[122] Although the traditional view has in recent years rather fallen into disrespect,[123] interest in it has been revitalized by an impressive and complex book in support, namely *Act and Crime* by Michael Moore.[124] In this passage, he summarizes the traditional view:

M. Moore, *Act and Crime* (Oxford: OUP, 1993), 44–6

1. Preliminary Overview of the Act Requirement

As I would unpack it, there are four theses to this theory, as it was propounded by Bentham, (John) Austin, Holmes, and Walter Cook, and carried on into our own time by the American Law Institute's Model Penal Code. The four theses are as follows. First, what I shall call the identity thesis holds that the acts required for criminal liability are partially identical to events of a certain kind, namely, bodily movements like moving one's finger or tongue. Such bodily movements on which the act requirement focuses are the simplest things one knows how to do as a means to achieving some end. Raising one's arm, for example, is usually such a simple act because one doesn't do (or know how to do) some even more simple act in order to do it. If, however, one raises one's arm by moving one's foot on a pulley arrangement attached to the arm, then raising the arm on that occasion is not the act focused on by the act requirement of criminal law. *A fortiori*, if one's raising one's arm on some occasion is to signal the start of a race, so that in moving one's arm one was starting a race, the latter act is also not the act focused on by the criminal law's act requirement; for starting a race is far removed from the simplest act one knows how to do.

Secondly, the only acts that exist are the simple acts on which the act requirement focuses. Although there are complex acts of killing, hitting, scaring, telephoning, and the like, and although criminal codes invariably use these complex action descriptions in their substantive prohibitions, these acts in reality are never anything but some acts of bodily movement. I shall call this the exclusivity thesis.

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121 Husak (1995a).

122 M. Moore (1993: 28). The theory goes back to Austin and Holmes, but requires a controversial separation to be drawn between the working of the mind and the body (see Ryle (1949)).

123 M. Moore (1994) responds to his many critics.

124 See also M. Moore (1997) who places his theories of acts in a wider context.

Thirdly, not just any bodily movements (that are the simplest things one knows how to do) are acts satisfying the act requirement. A reflex movement of the leg, for example, is not an act no matter how identical it is behaviourally to simple leg movements that are acts. Thus, the third thesis—what I shall call the mental cause thesis—requires that such bodily movements must be caused by a certain mental event or state. Such event or state is variously styled as an act of willing, a volition, a desire, a simple intention, or a choice. Because all of these ordinary expressions have connotations inappropriate to this third thesis when it is most favourably construed, I shall use the least ordinary of the terms, 'volition'.

The three theses thus far, taken together, assert that the criminal law's act requirement requires that there be a simple bodily movement that is caused by a volition before criminal liability attaches, and that such a movement is all the action a person ever performs. This is the positive core of the orthodox view of the criminal law's act requirement. The fourth thesis seeks to accommodate this univocal act requirement of the general part of the criminal law to the multiple, complex action descriptions used in the various prohibitions of the special part. Statutes almost never use simple action descriptions like 'moving one's finger'; they prohibit actions described as 'starting a race without a permit', 'killing', 'disfiguring', 'removing another's property', etc. For the act requirement just described to fit the criminal law as we know it, something must be said about how such diverse, complex action prohibitions are related to the univocal, simple act requirement. This is the burden of the fourth thesis.

This thesis asserts that any complex action description used in the special part of the criminal law is equivalent to (and thus can be replaced by) a description of some simple act (as defined above) of the accused causing a prohibited state of affairs. Murder statutes prohibit the complex action of killing another, for example. The fourth thesis—what I shall call the equivalence thesis—asserts that such a prohibition is equivalent to a prohibition that forbids 'any simple act that causes the death of another'.

Three objections to the traditional view will now be summarized:

(1) Defining an act as a willed voluntary movement can produce an artificial view of the world.[125] It would describe as 'moving a hand to the right' both a person doing an aerobic exercise and a person punching another. In other words by describing an action simply in terms of what movement was done without considering the context or consequences of that movement gives a misleading (or at least not very useful) description of what was done.[126] Indeed in our day-to-day lives we understand ourselves to be doing certain activities: for example, eating, walking, or talking; and not doing the separate bodily movements that make up those activities.[127]

In reply to such arguments, Moore[128] has suggested that his definition of an act describes what it is in our power to do. I can intend to move my arm to the left; whether it hits the person next to me is not something over which I have direct control. Therefore, we should not, he insists, include consequences in the definition of an action.

(2) A second objection is that the traditional view would not answer the point that people sometimes act on 'automatic pilot' when engaging in some routine act (e.g. shaving or eating) where it would be artificial to talk about such acts being willed. But it might be said that

[125] Husak (1995a) suggests that although the traditional view may have some merit for the purpose of philosophical discussion, it is not a useful one for criminal lawyers.

[126] Shapira (1998). Norrie (2000: ch. 9) argues that responsibility needs to be 'relationised' to give voice to the true context of the wrong.

[127] Hart (1968). [128] M. Moore (1994).

in such cases there is an 'unconscious will'[129] which is operating or that such actions *could have been* guided by decisions of the actor if he or she had wished, even if in fact they were not.[130]

(3) It can be argued that the traditional definition of an act may be too narrow, in that it excludes some omissions which would be quite properly described as 'acts'.[131] Consider a meeting at which it was said that if anyone objected to a proposal they should raise their hand and everyone remained still. It would then be generally accepted that by not raising their hands those attending were supporting the motion, even if they had not moved: their non-movement would be regarded as an act of support for the motion.[132] Yet Moore, in requiring a movement, would say that they had not acted.

Alternatives to the traditional view

If we decide that the traditional view of the voluntary act requirement is not accepted, what alternatives are there? The most popular has become known as 'the control principle': namely that it would be unjust to impose criminal liability for a state of affairs over which the defendant had no control.[133] In the following passage, Andrew Simester summarizes the 'control principle' and then considers some of its practical implications. Notice that the 'control principle' makes it far easier to punish omissions than the 'voluntary act requirement' does:[134]

A.P. Simester, 'On the So-called Requirement for Voluntary Action' (1998) 1 *Buffalo Criminal Law Review* 403 at 414–18

The indispensable minimum, then, is to establish that D is responsible for the explicit or implicit behavior element of the actus reus, regardless of whether the behavior is named as an act or omission, and of whether D was an agent in respect of that behavior. This requirement is met when D's behavior is voluntary. Recall our opening case scenario. [One fine September morning, Jim is discovered dead in his home. His skull has been crushed by a blow inflicted with a heavy object. The police are called. Upon further investigation, they establish that he was murdered by his daughter, Alice, who killed him in order to receive her inheritance under his will.] Suppose that Alice did in fact cause Jim's death, but that she did so while suffering an epileptic seizure, during which her movements caused a heavy object to fall and crush Jim. Alice's behavior, which causes Jim's death, is not voluntary. She is not morally responsible for his death, and cannot be convicted of murder.

Very often, acquittal in these circumstances need not be based upon involuntariness. Crimes such as murder require proof of some form of mens rea on the part of the defendant.

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[129] Fletcher (1978: 434–9) is willing to include within the definition of a voluntary act defendants who have a conscious or subconscious reason for acting as they did.

[130] Duff and von Hirsch (1997).

[131] If a scientist can show that thoughts involve movement in the brain then the definition may be too wide.

[132] Some supporters of the traditional view argue that flexing muscles to stay still (e.g. a gymnast holding a position) can be regarded as movements.

[133] Husak (1999b); Simester (1998).

[134] Note, however, the argument in J. Gardner (1994b: 499) that the voluntary act requirement and the issue of whether liability should attach to omissions should be seen as quite distinct.

In most jurisdictions, murder itself cannot be committed unless D intends or is reckless about the victim's death. Thus, even though Alice's behavior may have caused death, she lacks the mental element required to be guilty of murder.

But involuntariness is not merely a denial of intention, or of other forms of mens rea, or even a denial of fault in general. Alice does not claim that she killed Jim by accident. Her denial is much more profound. It is a claim that the movements of her body which caused Jim's death do not belong to Alice as a reasoning person.

As part of our conception of what it is to be a human being, we draw a distinction between a deliberative or reasoning person and her body. Not all movements of one's body can be identified with the person whose body it is that moves. When the doctor tests Simon's reflexes by tapping him on the knee, the swinging of his leg cannot be attributed to Simon. It is merely an event in the history of his body, rather like the lurching of passengers standing in a crowded bus. These are not actions that a person is answerable for doing; they are things that happen to him, over which he has no control, and for which he is not responsible. So it is with Alice. Her behavior is part of her body's history, but is not traceable to her as a reasoning person. It is not produced by any exercise of the capacities which mark Alice out as a moral agent. In the words of H.L.A. Hart:

'What is missing in these cases appears to most people as a vital link between mind and body; and both the ordinary man and the lawyer might well insist on this by saying that in these cases there is not "really" a human action at all and certainly nothing for which anyone should be made criminally responsible however "strict" legal responsibility may be.'

QUESTIONS

1. Is it wrong to assume that an act is either voluntary or involuntary? Would it be better to accept that there is a scale of voluntariness? Would doing so render the law too uncertain? (See Denno (2002).)
2. Is it possible to distinguish 'moral voluntariness' (where a defendant is under intense moral pressure, e.g. duress) and 'physical voluntariness' (where a defendant is physically unable to act otherwise than he did)? (See Norrie (2002: ch. 6).)

FURTHER READING

Hart, H. (1968) 'Acts of Will and Responsibility' in H. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford: OUP).

Husak, D. (1999b) 'Does Criminal Liability Require an Act?' in A. Duff (ed.) *Philosophy and the Criminal Law* (Cambridge: Cambridge University Press).

Moore, M. (1993) *Act and Crime* (Oxford: OUP).

Moore, M. (2009) Causation and Responsibility: An Essay in Law, Morals and Metaphysics (Oxford: OUP).

Simester, A. (1998) 'On the So-called Requirement for Voluntary Action' *Buffalo Criminal Law Review* 1: 403.

Wilson, W. (2002) *Central Issues in Criminal Theory* (Oxford: Hart).

6 OMISSIONS

As we saw in Part I of this chapter, the criminal law is generally reluctant to impose criminal liability on a defendant who failed to act. It will do so only if there is a legal duty on the defendant to act.

6.1 SHOULD THE CRIMINAL LAW PUNISH OMISSIONS?

Despite the bitter arguments over the punishment of omissions, in fact there is less disagreement than appears at first sight. Few people suggest that we should be guilty in relation to every omission, nor do many suggest that omissions should never be punished.[135] The debate is really over which omissions should be punished. ←3 (p.73)

Arguments against criminalizing omissions

It is argued by some that it cannot be said that an omission causes a result.[136] If a person walks past a drowning child in a pond can it be said that that person caused the child's death? Using but for causation it can be argued that had the defendant not been there the child would still have died at the same time and in the same place. The omission failed to alter the status quo.[137] Further it could be argued that the person's failure to save the child was as significant as anyone else's failure to rescue. Another point is that it is often difficult to know for sure what would have happened if the defendant had acted. Even if he had tried to save the drowning child he may not have been able to.[138]

Those who support liability for omission have struggled to overcome this argument. Hart and Honoré[139] explain that omissions liability can be supported by their distinction between normal and abnormal events (discussed further below). They suggest that if someone is under a duty to act and fails to do so this will be regarded as 'abnormal' and hence a cause of the result. For example, if several people walk past a child drowning in the pond, including the child's father, the fact that the father is under a duty to save the child in English law means that it is abnormal for him to walk past, while it would be 'normal' for others to walk past. This explanation is, however, problematic. It concerns an ambiguity over the meaning of 'normal'. If 'normal' means that an action is statistically likely, it is far from clear that statistically it is abnormal for people to help children in peril.[140] If normal means what 'ought' to occur then the argument simply becomes that people are punished for omissions because they ought to be.[141]

It is crucial to realize that this causation argument is not a 'knockout argument' for those who do not wish to punish omissions. The argument is simply stating that one cannot sensibly argue that an omission causes a result. That does not mean that the law cannot seek to punish omissions. The causation argument could not be used against a statute which stated that it was a criminal offence not to offer aid to someone you could reasonably be expected to help. Such a statute does not claim that the omission has caused anything—it

[135] e.g. even Michael Moore (1993: 32), who is generally reluctant to punish omissions, accepts that a parent who fails to feed his or her child deserves to be convicted.
[136] M. Moore (1993: 267). [137] Mack (1980). [138] W. Wilson (2010).
[139] Hart and Honoré (1995: 31–2). [140] Benyon (1987).
[141] See M. Smith (2001) for further argument.

punishes for the failure to act itself. In the following extract, Joshua Dressler considers such laws which are often known as 'Bad Samaritan laws'.[142] You should note that in this passage 'BS laws' is Dressler's (rather unfortunate!) abbreviation for Bad Samaritan laws:[143]

J. Dressler, 'Some Brief Thoughts (Mostly Negative) About "Bad Samaritan" Laws' [2000] *Santa Clara Law Review* 971 at 981–9

2. Refuting the Justifications for Bad Samaritan Laws

. . .

Criticisms of BS laws begin with legalist concerns with retributive overtones. First, why is the offense called a 'Bad Samaritan' law? The name suggests, I think, that we punish the bystander for being a bad person, i.e., for his 'selfishness, callousness, or whatever it was' that caused him not to come to the aid of a person in need. However, the criminal law should not be (and, ordinarily, is not) used that way: criminal law punishes individuals for their culpable acts (or, perhaps here, culpable non-acts), but not generally for bad character. As mortals, we lack the capacity to evaluate another's soul. It is wrongful conduct, and not an individual's status as a bad person or even an individual's bad thoughts, that justify criminal intervention. BS laws may violate this principle. At a minimum, there is a serious risk that juries will inadvertently punish people for being (or seeming to be) evil or 'soulless,' rather than for what occurred on a specific occasion. One need only consider David Cash and the public's intense feelings of disgust and anger toward him to appreciate why jurors might convict Bad Samaritans less on the basis of the 'technicalities' of a statute, and more on the basis of character evaluation.

Second, for retributivists, punishment of an innocent person is always morally wrong, and the risk of false positives—punishing an innocent person—is especially high with BS laws. Consider, for example, the Vermont BS law. To be guilty of this crime the bystander must 'know' that another is at risk of 'grave physical harm,' and must give 'reasonable assistance' if he can do so 'without danger or peril to himself.' If any one of these elements is lacking, the bystander is innocent and, therefore, in a society committed to the principle of legality, does not deserve punishment.

Notice the inherent problem of punishing people for not-doings rather than wrongdoings. When a person points a loaded gun at another and intentionally pulls the trigger, it is reasonable to infer that the actor intended to cause harm. His *mens rea* is obvious. It is far harder to determine why a person does not act. Return to the Bystander and Blind Person example. The facts stated that Bystander knew what was going on and wanted harm to occur. In the real world, however, it would be exceedingly difficult to reliably determine Bystander's potential guilt. How do we know Bystander realized what was about to happen? Did he see BP? Did he realize BP was about to walk into the street? Did Bystander see the truck? Did he realize the truck driver was not paying attention? Beyond that, why did Bystander not act? Maybe he froze up, maybe he didn't think fast enough, or maybe (reasonably or unreasonably) he believed that helping BP would jeopardize his own safety.

[142] The reference is to the parable of the Good Samaritan found in the *Bible* (Luke 10:30–7) in which two people walked past a man who had been mugged and left for dead, but the Good Samaritan stopped to help him.

[143] Dingwall and Gillespie (2008). For a more sceptical attitude to the duty to rescue, see Menlowe (1993) and Dressler (2000).

For that matter, why did the Genovese bystanders[144] hear the woman scream but fail to act, if in fact that was the case? Is it at least possible that some of the bystanders did not know she was in dire jeopardy? A person who wakes up from a sleep often fails to appreciate her surroundings. Also, perhaps some of them—even all of them—believed that someone else had already called the police. It may be that, despite the condemnation directed at the Genovese bystanders, few, if any, of them were guilty of Bad Samaritanism. In view of the inherent ambiguities in such circumstances, if juries take their duties seriously—including the presumption of innocence—few, if any, BS convictions will result. If emotions and bad character attributions rule the day, however, innocent persons will be improperly convicted.

Third, the threat of convicting innocent persons points to a related danger. BS statutes are so rubbery in their drafting that they grant police and prosecutors too much discretion to determine whether and whom to prosecute. The due process clause prohibits the enforcement of penal laws that 'fail to establish guidelines to prevent "arbitrary and discriminatory enforcement" of the law.' However, even if the issue is seen as a non-constitutional matter, it is difficult to see how a prosecutor can fairly determine when charges are proper.

Again, the distinction between actions and non-actions demonstrates the vagueness problem. BS laws compel people to make the world (or, at least, a small part of it) better, rather than punish actors for actively making it worse. In the latter case, the identifiable conduct of the accused, and the demonstrable harm caused by those actions, serve to single out the actor as a plausible candidate for prosecution. With laws that punish for nothing, rather than something, there is a need for alternative objective criteria. At least with commission-by-omission liability, there are identifiable criteria, such as the status relationship of the parties, contractual understandings, or the suspect's personal connection to the emergency by having created the initial risk. In contrast, with BS laws, which impose a duty to aid strangers (potentially, anyone), criminal responsibility is based on imprecise factors (e.g. the duty to provide 'reasonable assistance') and nearly unknowable circumstances (e.g. that the stranger is exposed to 'grave' physical harm, and that assistance can be rendered without any 'danger or peril' to the actor or others).

As the Genovese case demonstrates, these omission criteria are far less helpful in determining whether and against whom a prosecution should be initiated than are identifiable acts of commission. There is a significant risk with BS laws that 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 (which, in turn, may be founded on inappropriate factors, such as race, background, or even the physical attractiveness of the victim and/or the supposed poor character of the bystander). Not only may persons guilty of Bad Samaritanism avoid conviction because of selective enforcement, but the process may result in prosecution of persons who, upon cooler reflection, we might realize are innocent of wrongful not-doing.

There are also utilitarian reasons to question the wisdom of BS legislation. First, if such laws are taken seriously, the costs of investigating and potentially prosecuting bystanders might be prohibitive. Imagine the investigation necessary to decide whether to prosecute any of the Genovese bystanders and, if the decision were to proceed, to determine which of them to prosecute. Second, to the extent that BS statutes are narrowly drafted to reduce the risk of unfairness, prosecutions are likely to be rare (and convictions even rarer). Therefore, it

[144] The reference is to the following incident referred to earlier in the article: 'Kitty Genovese—a young Queens, New York woman—cried for help for more than half an hour outside an apartment building as her assailant attacked her, fled, and then returned to kill her. According to reports at the time, as many as thirty-eight persons heard her pleas from the safety of their residences, but did nothing to help her.'

is unlikely that the threat of punishment will have the desired effect of inducing bystanders to help persons in peril. The muted threat of a misdemeanor conviction is less likely to promote good behavior than the threat of public scorn that follows the publicity of such cases, or a Samaritan's own conscience.

Third, to the extent that such laws do, in fact, compel 'Good Samaritanism,' there is a risk that the Samaritan will hurt the person she is trying to assist, hurt others in the process, or unforeseeably harm herself. Fourth, since BS statutes are not linked to any prevention-of-harm causal requirement (i.e., it is not necessary to successfully prevent the threatened harm from occurring; it is enough to give it 'the old college try'), the costs of such laws may easily outweigh their limited practical benefits. Even supporters of BS legislation concede that the law only helps at the boundaries.

There is one final reason to question the wisdom of BS statutes. Not only are positive duties morally less powerful than negative ones, but they also restrict human liberty to a greater degree. A penal law that prohibits a person from doing X (e.g. unjustifiably killing another person) permits that individual to do anything other than X (assuming no other negative duty). In contrast, a law that requires a person to do Y (e.g. help a bystander) bars that person from doing anything other than Y. The edict that 'no student may laugh aloud at a fellow student's silly answers to a professor's questions' only marginally restricts a student's autonomy—she can silently laugh at her colleague, sleep through the answer, or walk out of the room to protest the student's stupidity, just to name a few examples. However, a rule requiring a student to 'provide reasonable assistance to a fellow student in jeopardy of offering a silly answer to a professor's question,' not only is less precise, but also prevents students from doing anything other than help.

Arguments in favour of punishing omissions

There are two main arguments in favour of punishing omissions. The first is that the line between an act and an omission is too fine a line on which to place any great weight. Consider a person who drops a vase: is this an act ('dropping the vase') or an omission ('not holding on to it')? We saw in Part I of this chapter that this argument has received some judicial support.[145] In reply those who support the distinction accept that cases on the borderline are complex, but that is often true when one seeks to draw a distinction between two concepts. They argue that the distinction is a basic one in morality: taking food away from a starving person is not the same as failing to provide food to such a person. To these kinds of arguments William Wilson has replied: 'What is morally worse/causally more significant: shooting a child to prevent the agony of her burning to death in a flaming inferno one is powerless to prevent, or failing to save a similar child from a similar fate by the simple mechanism of unlocking the door behind which she is trapped?'[146]

The second argument in favour of punishing omissions is based on the concept of social responsibility. In an important article on this topic, Ashworth contrasts two basic approaches to omissions: the conventional view and the 'social responsibility view'. The conventional view suggests that criminal law should not impose omissions except in clear and serious cases. The social responsibility view[147] would draw attention to the need for cooperation in

[145] e.g. Lord Mustill in *Bland* [1993] AC 789.
[146] W. Wilson (2003: 81).
[147] He relies on Raz (1985).

social life.[148] Ashworth supports the social responsibility view and explains his reasoning in the following passage:[149]

A. Ashworth, 'The Scope of Criminal Liability for Omissions' (1989) 105 *Law Quarterly Review* 431

The social responsibility view of omissions liability grows out of a communitarian social philosophy which stresses the necessary interrelationship between individual behaviour and collective goods. Individuals need others, or the actions of others, for a wide variety of tasks, which assist each one of us to maximise the pursuit of our personal goals. A community or society may be regarded as a network of relationships which support one another by direct and indirect means. But the community also consists of individuals, each having certain basic rights (such as the right to life). It is therefore strongly arguable that each individual life should be valued both intrinsically and for its contribution (or potential contribution) to the community. It follows that there is a good case for encouraging co-operating at the minimal level of the duty to assist persons in peril, so long as the assistance does not endanger the person rendering it, and a case may be made for reinforcing this duty by the criminal sanction. (There are arguments for other duties too.) The argument does not rest on a simple utilitarian calculation of benefits, ensuring a net saving of lives with comparatively little inconvenience of other members of society. Nor does it rest on the prediction that both respect for the law and the level of social co-operation will be improved if the law encourages morally desirable conduct, although those would be beneficial consequences. The foundation of the argument is that a level of social co-operation and social responsibility is both good and necessary for the realisation of individual autonomy. What this requires is a general moral and legal recognition of people's vital interests. 'Physical integrity . . . is necessary for the accomplishment of any human aim, and so is an appropriate subject for a system of mutually restraining duties.' Each member of society is valued intrinsically, and the value of one citizen's life is generally greater than the value of another citizen's temporary freedom. Thus it is the element of emergency which heightens the social responsibility in 'rescue' cases, and which focuses other people's vital interests into a 'deliberative priority', and it is immediacy to *me* that generates *my* obligation. The concepts of immediacy and the opportunity of help (usually because of physical nearness) can thus be used to generate, and to limit the scope of, the duty of assistance to those in peril. The duty might well be subject to other limitations too. It should only arise in 'easy rescue' cases, where the assistance is unlikely to endanger the safety of the person present. And the duty to render assistance must give way to the individual's right to self-determination: if a person wishes to be left to die, respect for that person's autonomy should prevent any duty of assistance from arising.

In the following passage Neil Cobb warns of the assumptions that can underpin the current law on liability for omission. He critically examines the decision of *Stone and Dobinson*.[150] ←4 (p.76)

[148] See Feinberg (1988: 126–85) for further discussion of arguments in favour of imposing liability for omissions.

[149] For the arguments against Ashworth's views, see G. Williams (1991a).

[150] [1977] QB 354 (CA).

N. Cobb, 'Compulsory Care-giving: Some Thoughts on Relational Feminism, the Ethics of Care and Omissions Liability' (2008) 39 *Cambrian Law Review* 11 at 21–4

(a) "Special" relationships of care: judging motherhood

Perhaps the most well-established omission duties derive from the special set of obligations imposed by the criminal law upon particular human relationships. These status relationships are clearly signifiers of law's own hierarchy of the responsibilities human beings owe to one another. Intrinsic relationships of care-giving are those founded upon conjugality between spouses, the dependency of a child upon his or her parent and other proximate blood relationships. To a certain extent, this approach to compulsory care-giving must pose difficulties for some feminists. Considered against the backdrop of the refusal to impose duties towards strangers, these rules reinforce a traditional normative model of kinship and interdependency organised around conjugality and blood ties. In turn, they provide another reminder of the historic heteronormative preoccupations of the common law.

On the other hand, one might expect relational feminists to support the significance given here to the care of children. Recognition of the value of the nurturing of the young, and the depth of the interrelationship between mother and child, is central to relational theories. As noted earlier, many such scholars derived their ethical framework from the practical reality of women's care-giving arising from their role as mothers. For instance, Martha Fineman proposes a normative hierarchy of care-giving that places the mother-child dyad at the heart of care. One might conclude, then, that at the very least the criminal law's claim about the intrinsic responsibilities of care-giving incumbent on a parent is indisputable from a feminist relational perspective. Yet what must still remain troubling for feminists in this context is the role of judgement intrinsic to a disciplinary, and materially punitive, system like the criminal law, and how invariably this judgement has gendered implications.

Moral judgment by the legal system upon child-rearing is likely to affect women disproportionately because they remain predominantly responsible for the care of young people. One of the classic liberal arguments against omissions duties is that, unlike offences of action defined clearly in terms of the prohibited behaviour, the criminal law provides no guide to the steps required to satisfy their duties of care-giving. Yet there is unlikely to exist the same jurisprudential concern about lack of clarity in the context of parenting, as caring duties of parenthood tend to be presented as self-evident. More particularly, contemporary discourses tend to glorify motherhood. Society continues to shore up powerful standards upon women and this gives rise to the general concern that an ethics of care, when associated with women specifically, has dangerous implications. Indeed, this fear seems to be borne out by the recent spate of 'failure to protect' statutes. The reality of many women's lived experiences, in which harm to children in contexts of domestic violence by violent male partners, seems to carry little weight in the face of an apparent expectation that mothers can and should do everything in their power to protect their children from harm. Moreover, the process of punishment of mothers in contexts of domestic violence also ensures discursive constructions that position mother and child in opposition to one another. In such circumstances, law fails to adequately recognise the extent to which punishment of the mother ultimately harms the child and that they are both the victims of the violence meted out most often by a man.

In light of these observations, the decision in *Stone and Dobinson* is perhaps revealing when considered again from a relational feminist perspective (as long as one remains aware of the provisos raised earlier about the contribution a single case can make to our conclusions

about the care-giving experiences of women). Generally (and most obviously) what the decision seems to reinforce is the broader claim that women more often than not find themselves primary care-givers in domestic relationships. Though the victim was Stone's blood relative it was Dobinson who took on all care-giving responsibilities. There is the suggestion of even greater illustrative potential, however, when one considers the short paragraph, entirely ignored by the Court of Appeal itself in reaching its judgment on the case, in which the leading judge describing in passing Dobinson's interrogation by the police:

> When asked, "You are a woman and you go into the bedroom. Your own common sense would tell you that she needed attention?" She is said to have replied "She never complained so I didn't bother."

The specific, explicit reference to Dobinson's sex, and the particular common sense of caring apparently available to her as a woman, provides a fleeting glimpse, perhaps, of deeper gendered conclusions about her conduct. In the context of care-giving there is seemingly nothing more damning than a woman's inability (or refusal) to satisfy the social expectations of her gender.

(b) Voluntary undertaking of responsibility: of choice and coercion

One might well conclude that the rule that an omissions duty will arise if a defendant has voluntarily undertaken responsibility for another provides a more attractive model for compulsory care-giving than the imposed status offences. There are two components to the justification for criminal liability in this context. First, in undertaking responsibility for another you are identified as primary carer and, accordingly, others that might seek to take on caring responsibilities would be deterred from interfering in the welfare of the dependent individual. Second, the requirement of voluntariness appears to reflect again the prioritisation placed by the criminal law upon individual autonomy. Beyond the expectation of the law that you care for those within the (constructed) family unit, care is entirely in your gift, to be entered into in a quasi-contractual fashion. Drawing once more from my previous argument, while responsibilities to others are subject, then, to the prior value of the individual, this could in fact be viewed as necessary, in certain circumstances, to enable the realisation of prior care-giving responsibilities. Rather than treating such an approach as an indication of a selfish legal order it might be seen instead to provide individuals with a space within which they can ensure that they satisfy their responsibilities to those dependent upon them. If one wishes to care for another then one should be able to take on that responsibility voluntarily, bringing oneself within the ambit of the criminal law.

Yet I am also concerned by the broader implications of the notion of a voluntary undertaking of responsibility. Underpinning the interpretation of the duty as I have presented it here is a construction of care-giving that appears once again to be based upon a masculine model of care. Voluntary undertaking of responsibility for others as an ethical basis for criminal liability, because one has actively claimed a duty for another's care, assumes that individuals are empowered to negotiate these responsibilities freely. However, as noted above, the experience of womanhood promulgated by relational feminists asserts that connection is too often the result of economic, social or psychological coercion. Put another way, the notion of voluntary undertaking of responsibility fails to consider the possibility that care-giving might not always be freely negotiated (with all the implications carefully evaluated) from a position of separation and therefore power, but may be imposed when contexts and circumstances position individuals within relationships of care-giving and dependency. One particular problem with such coercion is that individuals often find themselves subject to care-giving responsibilities that they are unable to effectively satisfy. More importantly,

however, it is men who are usually most free to negotiate in and out of these relationships of care.

My concern extends beyond the parenting role to all relationships in which one finds systemic coercion over the care-giving roles of individuals. For instance, a well-established basis for omissions liability, deriving from the broader liability arising from voluntary undertaking of responsibility, is the contract. Alan Norrie has suggested that the development of this contractual model reflected the need to find a basis for the increasing interconnectedness of capitalism in late nineteenth century England. But with capitalism comes also the role economic power plays in shaping the process of undertaking, again challenging the model of free negotiation of care-giving responsibilities (available to the white, middle class male) that the criminal law presumes.

I want to return, finally, to the case of *Stone* and a further excerpt from the overlooked police interview with Mrs Dobinson. Once again, I am wary of drawing specific conclusions about the nature of law from this case. It involves one story, one particular era, and one particular woman. Yet what seems [so] peculiar to me is the absence of any consideration of the explicitly gendered implications of the context in which Dobinson's care-giving seems to have taken place. As the Court of Appeal noted:

> The appellant [Dobinson] said she kept telling Ted (the other appellant), but that he would not do anything. He just told her, "Leave it while tomorrow." She was asked why she did not get help and she replied, "I asked him to get a doctor. He said he had tried to, but because the deceased was not on his panel the doctor wouldn't come." When asked why she did not speak to the lady next door or to Mrs. Wilson's daughter, who was a nurse, she is said to have replied, "I daren't. He is boss down there. I daren't do anything unless he tells me. She is not my sister, so I left it to him."

This excerpt serves as an illustration of the reality that care-giving by women often takes place in the absence of the kind of empowerment predominantly experienced by men, and assumed by the notion of voluntary undertaking.

Finally, the decision in *Stone and Dobinson* is useful for relational feminists beyond the insight it provides into women's experience of compulsory care-giving because it suggests the rule on voluntary undertaking of responsibility potentially remains structurally gendered. As Alan Norrie has previously noted, closer consideration of the case suggests some problematic reasoning:

> The argument rests on a play on the concept of an undertaking. Dobinson had, as a matter of fact, 'undertaken' certain actions on the deceased's behalf, but there was no evidence that she had made an undertaking to perform such tasks as she performed. There is a slide in the judgment between 'undertaking' in a practical and in a 'contractual' sense.[151]

Norrie argues that the concept of undertaking was deliberately "manipulated into action" in this way by the judges of the Court, who appreciated "they had no real basis in law for establishing a duty to act in the case of [the] defendant", in order to ensure a conviction in the face of the harrowing death of the victim. However, from a relational feminist perspective I want to pose a further alternative interpretation of this apparent slippage in meaning. Could it be said instead that the judges of the Court, acculturated themselves according to a masculine vision of empowered negotiation of care-giving responsibilities, actually believed that evidence of Dobinson's practical care-giving presupposed that her responsibility was voluntarily undertaken? If so, it is perhaps time the reality of coercive care-giving (not just among women) was confronted explicitly within the rules on criminal liability for omissions.

[151] Norrie (2001: 127).

QUESTIONS

1. In *Brock and Wyner* [2001] 2 Cr App R 31 (discussed in Padfield (2000) and Glazebrook (2001)) two project workers at a hostel for homeless people were convicted under section 8 of the Misuse of Drugs Act 1971 for not preventing drug selling in the hostel. Is such a conviction appropriate?
2. Is it a greater infringement of your liberty to be required to act in a particular way or to be forbidden to act in a particular way?
3. If a celebrity were seriously injured in a car crash and a photographer took photographs, rather than summoning help, should the photographer be guilty of an offence?

FURTHER READING

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Williams, G. (1991a) 'Criminal Omissions—The Conventional View' *Law Quarterly Review* 107: 86.

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7 CAUSATION: SHOULD CONSEQUENCES MATTER?

There has been much academic debate over whether the law should hold people criminally responsible for their actions. This is a debate to which we will return several times in this book, but we will outline the arguments now.

7.1 ARGUMENTS AGAINST HOLDING PEOPLE RESPONSIBLE FOR THE CONSEQUENCES OF THEIR ACTIONS

Although students often assume that criminal law must concern itself with causation, it would be possible to construct a system of criminal law where issues of causation were irrelevant. Supporters of such a system argue that the consequences of our acts are beyond our control and a matter of luck. One way of putting the argument is this: Alf, Bertha, and Charles all throw a punch at someone, intending to give her a black eye. Alf's victim jumps out of the way at the last moment and escapes unhurt. Bertha's punch lands on target and gives the victim the hoped-for black eye. Charles's victim tries to jump out of the way of the punch, but falls over, bangs her head, and dies. Did not Alf, Bertha, and Charles all do the same thing? The different consequences were out of their control. Charles was 'unlucky' that his victim died; it was just luck that Alf's escaped. It is therefore only fair, the argument goes, to punish people for what is within their control, that is, what they do, and to ignore the things which are outside their control, such as what happens as a result of their actions. The criminal law should therefore only penalize acts and ignore the consequences of those acts. In practical terms the law would punish acts which endangered others; whether any harm actually resulted being a matter of chance.[152] Many leading figures in the academic world are sympathetic to the force of this argument: Joel Feinberg,[153] Andrew Ashworth,[154] and Sanford Kadish,[155] to name but a few.[156] A recent powerful example of this argument can be found in Larry Alexander and Kimberly Kessler Ferzan's book, *Crime and Culpability*:

L. Alexander and K. Kessler Ferzan, *Crime and Culpability* (Cambridge: Cambridge University Press, 2009), 172–3

Consider the following thought experiment. Assume that you are watching a DVD in which an actor decides that he wishes to kill his victim. He buys the gun. He lies in wait until she arrives home. He fires the gun. *Now, press stop on the remote control.* At this point, the actor has revealed his willingness to harm the victim. He has shown that he does not respect her life. He has acted with the purpose of killing her. *Now, hit play.* The bullet hits the victim, and the victim dies.

What have these later frames told you about what the actor deserves? We submit that they tell you nothing. These later frames speak neither to the influence that the law and morality can have over the actor nor to the influence that the actor can have over the harm that occurs. Choice is a desert basis. Causation is not . . . .

Consider the following claim by Michael Moore (2010) " 'Causation matters' seems a pretty good candidate for a first principle of morality". Really? It seems to us that "you break it, you buy it" is not a first principle of the criminal law. Rather, the first principle is "treat others with sufficient concern". Now, whatever the actor is going to *do*, the criminal law can influence the actor only by guiding the choice he makes. It is at this point that law and morality guide action, and it through his choice that the agent controls his action and the results of his action.

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[152] Ashworth (1987b). Although whether the harm did or did not result would be useful evidentially in indicating whether the conduct was dangerous. See also J. Lewis (1989) for a discussion of the impact of such thinking on sentencing.

[153] Feinberg (1970 and 1995). [154] Ashworth (1988). [155] Kadish (1994).

[156] Parker (1984). Many supporters draw on the writing of Kant (see the discussions in A. Moore (1990) and Nagel (1979)). For a rejection see Johnson (2010) and Wallen (2010).

If the agent does not foresee harm, he is not held responsible for harm just because he caused it. In other words, causation without choice does not matter. So, if the criminal law's power and the agent's power over results occur at the point in time that the actor chooses to act, from where does the result itself derive additional moral power?

At first this sounds a thoroughly convincing argument, but, as Paul Robinson has pointed out, those who argue that consequence should not matter are 'a breed that exists (and will probably always exists) only in academia. I know of no jurisdiction that actually takes such a view'.[157]

7.2 ARGUMENTS THAT CONSEQUENCES DO MATTER

The reactions of the actor and bystanders

The consequences of a person's actions affect the reaction of the actor and passers-by. If A is driving dangerously and kills a child, quite different emotions will be felt by all involved than if A just misses a child.[158] A will feel very guilty about the death of the child, but may soon forget the near miss. The fact that such reactions are near universal indicates that they reflect a moral truth that consequences do matter and people feel responsible for the consequences of what they do.[159] Even if there is not a 'logical'[160] argument that can explain why we should be responsible for the consequences of our actions, it is clearly fundamental to our common experience and the way our society works. Kimberly Kessler[161] suggests, however, that such reactions reflect the distress at the harm suffered (or not suffered) by the victim, rather than judgments about the actor's responsibility.

Action reasons and outcome reasons

John Gardner[162] argues that there is an important difference between what he calls 'action reasons' and the 'outcome reasons' against doing something. An action reason is an argument for not performing a certain kind of action, whatever the consequences. An outcome reason sees the reason for not performing the action as the bad consequences that flow from that action. An example will clarify. A person tells a lie to a friend. Telling a lie could be described as wrong simply because lying is wrong (an action reason) but also because lying has bad consequences (it breaks down the trust in the friendship). The consequences of an action therefore do matter in that they provide another (outcome) reason for (or against) acting in a particular way.

The importance of consequences to our humanity

In the following passage, Tony Honoré argues that it is part of treating people as human that both the good and bad consequence of their actions are taken into account:

[157] Robinson (1997: 109). [158] B. Williams (1981).

[159] Jareborg (1993) argues that deciding the appropriate public response to wrongdoing involves considerations that are not relevant in making a moral judgment about the behaviour.

[160] M. Moore (1997: 232) argues that the fact that a defendant is responsible for the consequences of his or her action is self-evident as a 'foundationalist principle'.

[161] Kessler (1994). [162] Gardner (1998).

A. Honoré, 'Responsibility and Luck' (1988) 104 *Law Quarterly Review* 530 at 543–5

[O]utcome-allocation is crucial to our identity as persons; and, unless we were persons who possessed an identity, the question of whether it was fair to subject us to responsibility could not arise. If actions and outcomes were not ascribed to us on the basis of our bodily movements and their mental accompaniments, we could have no continuing history or character. There would indeed be bodies and, associated with them, minds. Each would possess a certain continuity. They could be labelled A, B, C. But having decided nothing and done nothing these entities would hardly be people.

In the real world, fortunately, human bodily movements and their mental accompaniments are with some exceptions interpreted as actions and decisions. They are ascribed to authors, who accordingly count as persons; and it is by virtue of these ascriptions that each of us has a history, an identity and a character. But there is a price to be paid for being a person. As the counterpart of this status we are responsible for our actions and their consequences, and sometimes this responsibility exposes us to legal sanctions. To ascribe personhood and responsibility to people in this way is to apply normative principles. It is not merely that others attribute to us an identity and a character, but that we are entitled to claim them for ourselves and to ascribe them to others. Others in turn not only hold us responsible for our actions and their outcomes, but are entitled to do so. Of course the balance between personhood and responsibility cannot, any more than the system of outcome-allocation, be said to rest on a social contract. We have never decided to assume responsibility in exchange for the gift of personal identity. Both are natural in the sense that we can neither choose them nor give them up. Considered as a bargain, the exchange would not even, properly speaking, be in our interest; for to be responsible is part of what it means to be a person and hence to have interests. But the normative principles involved may be regarded in a pre-moral sense as well-founded, since they embody a balance between identity and responsibility.

Such are the normative arguments for allocation according to outcomes and, as a corollary, for strict legal liability for the harmful upshot of risky conduct. In practice most ordinary people endorse the former and most lawyers the latter, though either might be hard put to say why. Virtually no one inside or outside the law believes that fault and desert are the sole basis of responsibility. In their off-duty moments even those philosophers and theologians who in theory cleave to fault alone assign credit and discredit for actions and their outcomes in cases where blame and praise are not in point. Take a non-moral example: the contrasting fortunes of X and Y, two footballers playing in a needle match. X miskicks but a gust of wind carries the ball into the opposing goal. He is credited with a goal, but not praised for scoring it. It would be better, of course, had he been skilful as well as lucky, for he would then both be credited with the goal and praised for scoring it. Y aims a skilful shot at goal, but this time a gust of wind diverts it. He is praised for his good shot but not credited with a goal. It would be still worse for him had his shot been a bad one. X is lucky, Y unlucky; but it is the outcome of their actions, not what they deserve, that primarily determines credit or its absence. Desert merely increases or diminishes credit or discredit. Take a legal example. I fire at my rival intending to kill him. It would be murder if I succeeded, but I miss. I am guilty only of an attempt. If fault is to be judged by disposition, my fault is as great as if I had hit him, but my responsibility is less. Now for an extra-legal example. If purely by your fault in darting out into the road I run you over, I must stop, send for the ambulance and give you what help I can in the meantime. My responsibility is not as great as if I had been at fault. It may not be legal: that depends on the applicable system of law. It may not be moral in the sense that I am

morally responsible for the accident itself. But, just because I have hurt you, I am responsible, and by virtue of that responsibility bound to take certain steps. Indeed, unless I am wholly insensitive, I shall feel and express regret for the harm I have done. For it is a myth that fault and desert are essential to responsibility. They serve rather to increase the credit or discredit for the outcome of our behaviour that we incur in any event.

It is only this primary outcome-responsibility that can explain why we (rightly) judge murder more severely than attempted murder and causing death by dangerous driving more severely than dangerous driving. It is said that morally the harmful outcome makes no difference; and indeed the difference between causing death by dangerous driving and mere dangerous driving, like the difference between aiming a good shot at goal and scoring a goal, is causal, a matter of outcomes. On a narrow view of morality the cases are not morally distinguishable. For allocation according to outcomes is not allocation according to effort, talent or disposition. A good outcome can sometimes be achieved with less effort than a bad outcome, and by a person with less talent and a worse character. Outcome-allocation is allocation according to results, whether they constitute achievements or botches. But it does not follow that the system of allocation according to result, in contrast with its application to individual instances, lacks a moral or pre-moral basis. The person concerned, though he cannot be sure what the outcome of his action will be, has chosen to act in the knowledge that he will be credited or debited with whatever it turns out to be. Moreover we cannot opt out of the system by which we obtain credit for favourable outcomes; and so we cannot slough off the burden of discredit either. Finally, it is outcomes that in the long run make us what we are.

Part of our response to when people are in fact injured by the defendant's action is an acknowledgement that the victim has been harmed. A major complaint about the Alexander/Kessler Ferzan view is that it fails to adequately acknowledge the harm done to the victim by the defendant. A defendant who kills a victim has not just done 'an act which is likely to endanger life', he or she has actually killed someone. Although their theory is very persuasive if criminal law were just about assessing a defendant's blameworthiness, the criminal law also has an important role in recognizing the wrong done to victims. That the Alexander/Kessler Ferzan view fails to do.

Of course, the choice is not just between saying you are not responsible for any of the consequences of your actions and saying you are responsible for all of the consequences. Most commentators take the view that you are responsible for some but not all of them. It is the rules of causation in the criminal law that seek to take this middle path and define for which of the consequences of an accused's actions you are responsible.[163]

FURTHER READING

Alexander, L. and Kessler Ferzan, K. (2009) *Crime and Culpability* (Cambridge: Cambridge University Press).

Ashworth, A. (1988) 'Criminal Attempts and the Role of Resulting Harm under the Code, and in the Common Law' *Rutgers Law Journal* 19: 725.

Gobert, J. (1993) 'The Fortuity of Consequences' *Criminal Law Forum* 4: 1.

Honoré, A. (1988) 'Responsibility and Luck' *Law Quarterly Review* 104: 530.

[163] For a wider discussion, see Cane (2003: ch. 4) and Morse (2000).

Morse, S. (2004) 'Reason, Results and Criminal Responsibility' *University of Illinois Law Review* 363.

Westen, P. (2010) 'Resulting Harms and Objective Risks as Constraints on Punishment' *Law and Philosophy* 401.

8 SEEKING A COHERENT APPROACH TO CAUSATION

One key question about causation in the law is: 'To what extent is causation a question or fact and to what extent is it a question of judgment?' In other words, in causation cases are we asking 'Did the defendant cause this result?' or 'Should the defendant be held responsible for this consequence?'[164] To some, causation should not be regarded as a quasi-scientific question but rather a question about whether it is fair to impute this consequence to the defendant.[165] To others the questions of culpability and causation should be kept quite distinct.[166]

It has become common for those examining the case law on causation to conclude that, rather than applying any general principles, the judge simply considers what he or she considers to be the common sense answer on causation and declares that to be the legal position.[167] In other words it is not possible to set out any guiding rules of causation. This section will consider attempts by those who reject such an argument and seek to develop some general principles governing the law on causation. ←6 (p.88)

8.1 'CAUSAL MINIMALISM'

This view is that factual causation (but for) causation (as explained above at p.xxx) should be the guiding rule for the criminal law. Opponents point out that it could throw the net of potential liability very widely: the stabber's grandmother could be said to be a but for cause of the stabbing. Supporters reply that such concerns are easily dealt with by the law on *mens rea*, which would acquit the grandmother because she clearly lacked it. However, this reply is not available in relation to crimes of strict liability which do not require proof of *mens rea*.[168]

8.2 HART AND HONORÉ

In their important work, *Causation in the Law*,[169] Hart and Honoré suggest an alternative approach. They place much weight on giving causation its ordinary meaning. They focus on the difference between normal and abnormal effects. Only abnormal conditions can be causes; normal conditions cannot. Normal conditions 'are those conditions which are present as part of the usual state or mode of operation of the things under inquiry'.[170] They give an example of a person who lights a match by a haystack, setting it ablaze. The fact that

[164] Fumerton and Kress (2001). [165] Brudner (1998). [166] e.g. M. Moore (1999).

[167] As seen in Part I of this chapter, the legal principles relied upon by the courts, such as the operating and substantial cause test, are so vague that they leave the judiciary open to such charges.

[168] For criticism of causal minimalism, see R. Wright (1985 and 1988).

[169] Hart and Honoré (1985). [170] Hart and Honoré (1985: 35).

there is oxygen in the air will be a normal condition and so not a cause. The lighting of the match will be abnormal and so can be regarded as a cause. In the following passage, they explain that the free, voluntary, and informed act of a human being will be regarded as an abnormal act that 'breaks the chain of causation' and takes over responsibility for resulting harms, rendering earlier actions no longer causes:

H.L.A. Hart and A. Honoré, *Causation in the Law* (2nd edn, Oxford: OUP, 1985), 42–4

If unusual quantities of arsenic are found in a dead man's body, this is up to a point an explanation of his death and so the cause of it: but we usually press for a further and more satisfying explanation and may find that someone deliberately put arsenic in the victim's food. This is a fuller explanation in terms of human agency; and of course we speak of the poisoner's action as the cause of the death; though we do not withdraw the title of cause from the presence of arsenic in the body—this is now thought of as an ancillary, the 'mere way' in which the poisoner produced the effect. Once we have reached this point, however, we have something which has a special *finality* at the level of common sense: for though we may look for and find an explanation of why the poisoner did what he did in terms of motives like greed or revenge, we do not regard his motive or speak of it as the cause of the *death* into which we are inquiring, even if we do (as is perhaps rare) call the poisoner's motive the 'cause' of his action. The causal explanation of the particular occurrence is brought to a stop when the death has been explained by the deliberate act, in the sense that none of the antecedents of that deliberate act will count as the cause of death. This is not to say that causal inquiries may not be pursued further. We may, for example, discover that someone provided a reason or opportunity for the poisoner to do the deed, e.g. by persuading him not to hesitate or by supplying an appropriate dose of poison. In that case a causal relationship *of some sort* may indeed be established between the conduct of the person who supplies the advice or means and the death of the victim. The latter can properly be described as a consequence of the persuasion or the provision of poison. But the fact that what is here unearthed is not the central type of causal relationship but something more tenuous is marked by the fact that we would not happily say that the accomplice had either 'caused' the death or 'caused' the poisoner to kill. We do not therefore trace the *central type* of causal inquiry *through* a deliberate act.

Although Hart and Honoré's approach has received much judicial and academic support it has its critics. Michael Moore, for example, is concerned about their premise that causation should take its meaning from the normal usage of the word.[171] He is not convinced that there is a 'normal usage', at least in difficult cases of causation. Other concerns surround their emphasis on the distinction between 'normal' and 'abnormal' events or conditions.[172] It can be argued that these terms are vague and too easily permit a judge to smuggle in value judgments when considering whether a cause is abnormal or not.[173] In the extract from Alan Norrie's book at the end of this chapter, further objections are made to Hart and Honoré's analysis.

[171] See also Cane (2002: 118). [172] Christlieb (1993).

[173] An interesting example is Chamallas and Kerber (1990) who (writing from a feminist perspective) criticize the courts' approach to women who die in attempts to escape from threatening circumstances.

8.3 REASONABLE FORESEEABILITY

Some commentators and courts have sought to argue that defendants cause the reasonably foreseeable consequences of their actions.[174] Such a test has a refreshing simplicity. In the following passage, Dennis Klimchuk sets out its moral justification: ←7 (p.99)

D. Klimchuk, 'Causation, Thin Skulls and Equality' (1998) 11 *Canadian Journal of Law and Jurisprudence* 115 at 129–35

The standard of reasonable foreseeability gives expression to a powerful moral intuition, namely, that it is unfair to ask others to answer for those consequences of their actions which we could not reasonably have expected them to consider in deciding what actions to perform or to refrain from performing. This suggests that the fact that extraordinary operations of nature would break the causal chain between the actions of a wrongdoer and the victim's eventual injury follows from the fact that to extend my actions through the intervention of such extraordinary operations would in some sense be unfair. The reasonable foreseeability test makes explicit the reliance of the doctrine of causation on a sense of fairness only implicit in the substantial or operating cause test.

On what does this sense of fairness rely? The key to the answer I defend lies in giving attention to the work done by the concept of reasonableness in the standard of reasonable foreseeability. I want to borrow an idea that John Rawls develops in *Political Liberalism*, namely that reasonableness and equality are correlative: to act rationally is to act so as to further one's own ends; to act reasonably is to interact with others on terms of equality. Thus, the intuition of fairness to which I appealed above relies on the idea that the reasonable foreseeability standard gives expression to what I called the principle of equality, namely the principle that the law should treat persons as equals.

We have to give some content to the principle of equality. What equality requires in a given legal context will be in part a function of the sorts of interests the law protects in that context. As a part of public law, the primary relationship in terms of which criminal law is typically conceptualized is that between the state and citizen. Indeed, this suggests a common means by which the contrast between public and private law is drawn: tort law, for example, may be understood as having as its domain those aspects of wrongful conduct in which the state has no direct interest, but the pursuit of whose remedy is rather left to the private parties involved.

However, along with the relationship between the citizen and the state—most clearly at issue when the question is whether some *type* of action ought to attract the state's interest—criminal law has as its object, no less than tort law, the relationship citizens have as among themselves—most clearly at issue when the question is whether some *particular* action constitutes a violation of the sort of rights the criminal law protects. Thus to ask, for example, whether self-defence should be recognized as a defence at all is to ask whether the state should ever permit persons the right to self-help when the state's agents are not there to protect them, and this is a question of the relationship between the state's interests and the interests of the individual. To ask whether this particular assault was an act of self-defence is to inquire into the structure of the interaction between two individuals at the time of their violent confrontation. At stake here are not the interests of the state versus those of the individual but rather the protection of an individual's interests as against their interference by another. Following Arthur Ripstein, I would suggest that the relevant interests here are

[174] See e.g. Yeo (2000).

liberty and security. The link to equality is provided by an idea—Kantian in spirit—on which I will here rely: to treat persons as equals is to permit them as much exercise of their liberty and security interests as is compatible with everyone else doing the same.

My suggestion, then, is that the reasonable foreseeability test alone among the options I have considered succeeds in doing so. It will be easiest to see this if we begin by seeing how the other options fail to. Along with the substantial or operating cause test, I considered earlier two criteria by which we might answer the question of which of his consequences a wrongdoer must answer for, namely (1) the wrongdoer must answer for all of those consequences which would not have occurred but for his actions, and (2) the wrongdoer must answer for only those consequences which he acted so as to bring about. I suggested above that both of these can be dismissed on grounds of unfairness; now I want to give some content to the intuition to which I there appealed. Then I will return to the substantial or operating cause and reasonable foreseeability tests.

Let's call the view that the wrongdoer must answer for all of those consequences which would not have occurred but for his actions the *objective view* and the view that the wrongdoer must answer for only those consequences which he acted so as to bring about the *subjective view.* As I suggested above, the contrast between these two views can be captured in terms of the degree to which an agent has authority over the question of which consequences of his actions will count as his doings. On the objective view, the agent has no such authority; on the subjective view, he has the final say. This contrast can also be captured in terms of who must bear the costs of the agent's intervention into the causal chains in which he acts and is acted upon. On the objective view, the agent, we might say, acts at his own peril; on the subjective view he acts at the peril of others.

The second way of making the contrast most clearly illustrates the extent to which the principle of equality, interpreted in the terms I introduced above, is at issue here. To say that on the objective view, *A* acts at his own peril, is to say that (supposing *A* wishes not to do wrong) *A* cannot act even when the foreseeable consequences of his action do not include harm to others, because if harm were to occur, *A* would have to answer for it anyway. That is to say, the security of those who might be harmed if *A* acted is purchased at the cost of his liberty. To say that, on the subjective view, *A* acts at the peril of others is to say that *A* will not have to consider as reasons against acting a broad range of the consequences of his actions—all those other than those he acted so as to bring about, including consequences which will consist in harms to others. That is to say, our security is purchased at the cost of *A*'s liberty.

Above I suggested that we think of the substantial or operating cause test and the reasonable foreseeability test as attempts to chart a middle ground between the extremes represented by what I am here calling the objective and subjective views. But note that the substantial or operating cause test shares the shortcomings of the objective view on the terms of analysis just introduced. This follows from the fact that the difference between causes *sine qua non* and substantial or operating causes is one of degree. No less than on the objective view, on the substantial or operating cause test the agent is deprived of any say over which of the consequences of his actions will count as his doings. No less than on the objective view, on the substantial or operating cause test the agent acts at his own peril. Thus on the substantial or operating cause test, our security is purchased at the expense of the agent's liberty, and so the substantial or operating cause test violates the principle of equality.

The reasonable foreseeability test splits the difference, as it were, between the objective view and the substantial or operating cause test on the one hand, and the subjective view on the other. On the one hand, by tying the test concerning which consequences a wrongdoer must answer for to foresight, the reasonable foreseeability standard does not deprive the

agent of all say whatsoever over which of the consequences of his actions will count as his doings. On the other hand, by tying the answer to what the agent could have *reasonably* foreseen, the reasonable foreseeability standard prevents the agent from having final authority over which of the consequences of his actions will count as his doings. In this sense, the standard of reasonable foreseeability is both public and objective. It is public to the extent that it can operate as a rule which guides conduct (unlike the objective view and the substantial or operating cause test, which both leave the question of which consequences count as my doings to fortune). It is objective to the extent that it prevents the wrongdoer from measuring the rights of others in terms of his judgment (unlike the subjective view, which leaves the question of which of my consequences count as my doings to my say): and the law treats us as equals, in part, precisely by denying us the privilege of so doing.

Critics of reasonable foreseeability claim that it does not operate fairly in thin skull rule cases, and notably Klimchuck goes on in his article to support the existence of the thin skull test in certain cases as an exception to the reasonable foreseeability test.[175] Klimchuk justifies the thin skull rule because it prevents the defendant claiming that the victim must take legal responsibility for her physical weakness or 'protected beliefs'.[176]

8.4 NATURAL CONSEQUENCES

The 'natural consequence' approach claims that the defendant is responsible for the natural consequences of his actions. It may be thought that there is little difference between the reasonable foreseeability test and the natural consequence test. The key difference seems to be this:[177] the reasonable foreseeability test looks at the issue from the defendant's point of view at the time when he or she acted (could he or she have foreseen the result?), while the natural consequence test looks back from the injury inflicted on the victim and attempts to find out which cause or causes were the most legally significant.[178] Michael Moore supports a version of this theory, arguing that a defendant should be responsible for proximate cause (those things caused in the normal routine) but not for 'freakish' results. Critics might reply that the terms 'natural' or 'proximate' are too vague to be useful.

In the following passage, Victor Tadros makes a different objection and that is that when making causation assessment the courts do (and should) take into account normative issues (i.e. questions of how people should have behaved). He makes the point here using the example of third party interventions:

V. Tadros, *Criminal Responsibility* (Oxford: OUP, 2005), 173–5

It is commonly argued that the actions of third parties at least sometimes break the chain of causation even where those actions would not have happened but for the action of the defendant. If D acts which then gives rise to an action by D2, it is at least sometimes the case that D is not legally responsible for consequences of the action by D2. That normative

[175] Of course, other supporters of the reasonable foreseeability test would not permit such an exception.

[176] Klimchuck (1998) argues that in *Blaue* the right to hold religious views (except in so far as they might harm others) means that the victim had the right to exercise her religious beliefs in refusing the blood transfusion and so it should not be said that her decision broke the chain of causation.

[177] Shute (1992). [178] Colvin (1991: 84).

considerations are significant in assessing whether the activities of third parties break the chain of causation should be relatively familiar to legal scholars. However, the issue is a complex one and it seems implausible that a general test can be developed to determine when actions of third parties break the chain of causation.

The basic issue can be illuminated by a consideration of the facts of *R v Williams and Davis*. In that case the two defendants gave a lift to a hitch-hiker who they allegedly attempted to rob. The hitch-hiker jumped out of the car and died from head injuries sustained by falling into the road. Two considerations might be thought important in assessing whether the defendants caused the death of the hitch-hiker. The first is the factual question of whether the actions of the hitch-hiker were foreseeable. The second is an assessment of the reasonableness (or rightness, or some other normative assessment) of the acts of the hitch-hiker.

Foreseeability is often thought to be an important element of the law of causation. If a consequence is not foreseeable, it is said, it is not caused. There is a general problem with this idea. Due to lack of knowledge, it may not have been foreseeable in 1900 that cancer would result from smoking, but that does not entail that in 1900 smoking was not a cause of cancer. Whether or not D caused E, then, is not sensitive to the knowledge that we have, or could be expected to have, about E. It is quite possible that we do everything that could be done to establish whether D caused E and still be wrong about the answer because there is something about the world that we do not, and even could not, know. This is a sense in which questions of causation are questions of fact.

Whether the actions of the hitch-hiker were reasonable, on the other hand, might well properly be a determining factor in assessing whether the chain of causation was broken by his jumping from the car. Suppose that the actions of the hitch-hiker were spectacularly unreasonable. Suppose that the threat was very trivial, say because the force threatened was only a slap. In that case surely it would be wrong to say that the death was caused by the actions of the defendants. On the other hand, suppose that the hitch-hiker reasonably thought that he would be killed whether or not he gave over his money, perhaps because the defendants were known to the hitch-hiker to be convicted serial killers on the run. Then it seems quite right to say that the death of the hitch-hiker was caused by the actions of the defendants. Normative considerations, then, clearly play a role in the assessment of whether intervening acts of third parties break the chain of causation.

Wilson [(2002: 181)] is critical of basing accounts of causation on the idea of reasonableness later in the chapter on causation. He suggests that the difficulty here is that even unreasonable intervening acts of third parties may not break the chain of causation. He considers the case of *R v Cheshire*, in which D shot the victim in the leg and abdomen which induced respiratory problems. In attempting to alleviate this, the doctors performed a tracheotomy. It was negligently performed and the victim died. The chain of causation was held not to have been broken. Wilson approves and thinks that this shows that it is strictly not the 'reasonableness' of the response of the third party that is relevant, but rather the 'reactive nature' of the third party's action. The third party, in such cases, the argument goes, is reacting to a state of affairs created by the defendant. Reactive acts do not, it is claimed, break the chain of causation.

Relevant to deciding the case, Wilson rightly argues, is the fact that doctors 'who have emergency surgery thrust upon them cannot be expected to get it right all the time'. There is a difference between what is right and what is reasonable, of course, but that cannot decide the case. Not only can we not expect doctors to get it right all the time, we cannot always expect them to behave reasonably, or at least even if we do expect them to behave reasonably, unreasonable actions of doctors ought not always to break the chain of causation.

Holding the defendant criminally responsible for the death in *R v Cheshire* ought not to preclude at least civil liability for the doctor. And for this reason we should not think that the 'reasonableness' test is very strict. But that is not to say that reasonableness is not the right concept to apply here. It is just that the intervening action must have fallen very far below the level of reasonableness to break the chain of causation in these cases. For, if the action of the doctors is bad enough, the chain of causation will be broken, despite the fact that they are reacting to circumstances created by the defendant.

This explains the decision not to attribute liability in another case that Wilson considers: that of *State v Preslar*. In that case, a husband forced his wife out of their home by his violent acts. She died due to the cold close to her father's house, the explanation being that she didn't want to disturb her father to let her in. Presumably it is because her reason for staying outside was so weak that the defendant could not be held criminally liable. Had there been some, albeit insufficient, good reason for her not to disturb her father (perhaps he had a heart condition, or would likely have attempted to shoot the defendant) then, presumably, the chain of causation would not have been broken. In such cases, much depends upon the reasonableness of the action of the third party, albeit that it is only very unreasonable acts that break the chain of causation.

It is hard to see anything but a specifically legal explanation of this idea. Surely the reason why only very unreasonable acts break the chain of causation is that the scope of legal liability ought not to be restricted by unrealistic expectations of medical professionals and others to behave rightly. In the natural world, on the other hand, we may be inclined to suggest that the chain of causation is broken more easily. For example, suppose that there is a medical condition which always requires an operation. Some operations of this kind will cause scarring and others will not. In establishing whether the disease was the cause of the scarring in a particular case, it may well be appropriate to suggest that the chain of causation was broken if the doctors conducted the operation negligently.

There are good reasons for the law to be more restrictive about how unreasonable the conduct must be for the chain of causation to be broken. The general requirement that reasonableness is the appropriate concept to determine whether the chain of causation is broken applies in legal and in scientific investigations. But it is plausible that the concept applies differently depending on the purpose of the enquiry.

8.5 NARROWNESS OF CAUSATION APPROACH

Critical scholars have argued that the criminal law with its assumption that individuals are responsible for their actions is placing undue focus on one individual and is ignoring the wider exercise of powers within society. Power structures within society, political assumptions, economic inequality, and cultural and social factors all play a role in influencing people to commit crime. The law's approach enables the problem of crime to be seen as the results of the actions of a few evil people, rather than recognizing it as a product of an unequal and excluding society.[179] In the following extract, Alan Norrie develops several of these points in criticizing the approach to causation developed by Hart and Honoré (which was summarized above): ←5 (p.87)

[179] See the interesting discussion of metaphysics and causation in Morse (2000).

A. Norrie, *Crime, Reason and History* (Cambridge: Cambridge University Press, 2001), 137–40

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. . .

Hart and Honoré's position is most plausible where they draw their examples from situations in which an individual, isolated and alone, acts to bring about some effect in nature, for example, the lighting of a spark which sets a forest on fire. But even here, the picture that is presented is one-sided, for we are told nothing about the conditions in which the act occurs, or how it is perceived.

This becomes clear in the crucial distinction they draw between abnormal and normal conditions. An individual is only 'the moral/legal cause of those events in the world that are accompanied by the normal range of attendant conditions. Where an abnormal condition ensues, it becomes the cause in place of the human intervention, which in turn becomes an antecedent condition to the abnormal element.' The problem is that what is normal and what is abnormal, what is cause and what is condition, is a matter of judgment and perspective. To use one of the authors' own (slightly modified) examples (1985, 35), the effect of a famine in a third world country might appear to a peasant as the consequence of drought, and to a relief agency as the result of the inefficiency and corruption of government. To a charity activist, it would be seen as the product of the meanness of the industrialised countries, and to a radical as the effect of economic underdevelopment resulting from neo-liberal economics. All these different factors could be singled out as the cause, with the others regarded as the background conditions; each could be presented as the factor which 'makes the difference'. Hart and Honoré acknowledge that 'the distinction between cause and condition may be drawn in different ways in one and the same case according to the context' (1985, 37). But if the 'normal' is contingent and subject to development and change according to context, it is a weak, potentially unstable, foundation for legal and moral judgments. Individual responsibility ultimately relies upon a variable evaluation of what is 'normal' in social life.

A good illustration is provided by Lord Scarman (1981) in his report into English inner city riots in the early 1980s. Speaking of the events leading to a particular riot, he stated that—

> 'Deeper causes undoubtedly existed, and must be probed: but the immediate cause of Saturday's events was a spontaneous combustion set off by the spark of one particular incident.' (1981, 37)

Which factor 'makes the difference', the 'deeper causes' or the 'immediate cause'? If those 'deeper causes' (relating to poor social environment, racial discrimination, police harassment) are part of the 'normal' conditions of life in late twentieth-century England, are they *for that reason* excluded from our account of what caused the riot? It would perhaps be convenient for the law, with its emphasis on the individual, if they were. Elsewhere in his report, Lord Scarman did draw a distinction between the 'causes' and the 'conditions' of the riots (1981, 16). This was shortly before he argued that the *conditions* of young black people cannot exclude their guilt for grave criminal offences which, as causal agents, they have committed (1981, 14). If Hart and Honoré are correct to say it is all a matter of perspective, the example of the Scarman Report reveals that there are competing political views to that of the law.

Second, there is the question of the law's use of the concept of voluntariness. On the face of it, the idea of a new intervening voluntary act by a third party possesses a measure of solidity that the distinction between the normal and the abnormal does not. However, this is illusory since it all depends on how one defines 'voluntary'. Only a voluntary act will break the causal chain, so the act of a third party may not break the chain if it is adjudged 'involuntary'. Hart and Honoré concede that there are narrower and broader uses of the terminology (1985, 138), and much hinges upon their notion of what constitutes a 'fair choice'. This, they say, 'depends in part on what conduct is regarded from a moral or legal point of view as reasonable in the circumstances', an issue that 'raises questions of legal policy' (1985, 42; cf Stapleton, 1988, 124).

This becomes apparent in their discussion of situations which are not regarded as voluntary by the law. These include, in addition to the more obvious situations of unconsciousness and physical duress, the policy-influenced situations of preservation of property, safeguarding of rights and interests, including economic interests, and the carrying out of legal and even moral obligations (1985, 142–62). All may be regarded as situations 'in which an individual did not act voluntarily'. Just how broad the concept of the involuntary may go becomes apparent when the authors are discussing legal obligation:

> 'In ordinary speech we recognise that even a social obligation restricts our freedom, so that if I have accepted an invitation to dine with you I am "not free" to dine with anyone else. So too in the law.' (1985, 138)

With such wide notions of what might constitute involuntariness, the hope that the voluntary intervention of a third party might draw a line across a causal chain in a principled manner is impossible. The definition is too flexible, too open to broad and narrow interpretations of what the term means.

What is voluntary may be subject to a more or less individualistic interpretation. If it is a matter of looking at whether an individual was conscious when he acted, this is a narrow focus on the individual and his mental state. If, on the other hand, it is a question of examining social or legal obligations, this locates the individual in a network of social relations and understandings, and presents a broad view of the voluntary/involuntary line. From this latter, more social view, rooting the individual in a context of interpersonal relations, it is questionable just what significance the voluntariness of human agency should have (see further Norrie, 2000, chs 1, 9).

Hart and Honoré's argument is that voluntary human agency has a special finality about it. While we may look for reasons why a poisoner did what he did in terms of motives like greed or revenge, we do not regard his motive as the cause of death, although we may consider it the cause of his action. The example is perhaps tendentious, but the main point is that it draws upon the illustration of an isolated, asocial individual, alone with his private emotions, and does not locate individual agency in its broader context. A good counter-example is provided by J B Priestley's play, *An Inspector Calls*. The author persuades us to look behind the 'voluntary' act of the young woman's suicide to the conduct of the various members of the well-to-do family, who each in their own way have contributed to the girl's decision to take her life. Priestley forces the family to see that each of its members has in his or her own way caused the girl's death. They cannot conceal behind the girl's 'voluntary' act their own causal roles stemming from the interconnectedness of relations between rich and poor. It is this which ensures that any focus on individual agency can only be falsely narrow. The girl's suicide is 'voluntary', but it is still caused by the acts of the family, so that no special finality is given to her actions. 'Voluntariness' loses its special character when a broader view of events and actions is taken.

QUESTIONS

1. Which of these approaches would (a) make most sense to a jury and (b) be most desirable in theory?
2. Do you think there is a difference in thin skull cases where because of the physical infirmity the victim suffers a worse injury than would otherwise occur, and cases where an action which otherwise would be harmless causes a serious injury? (This question is discussed in Gobert (1993).)
3. If Norrie's argument were accepted, would it be possible to have any kind of criminal law that took appropriate account of the political and social forces that influence the commission of crime?

FURTHER READING

Brudner, A. (1998) 'Owning Outcomes: On Intervening Causes, Thin Skulls and Fault-undifferentiated Crimes' *Canadian Journal of Law and Jurisprudence* 11: 90.

Hart, H. and Honoré, A. (1985) *Causation in the Law* (2nd edn, Oxford: OUP).

Hassett, P. (1987) 'Absolutism in Causation' *Syracuse Law Review* 38: 683.

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Mead, G. (1991) 'Contracting into Crime' *Oxford Journal of Legal Studies* 11: 147.

Norrie, A. (1991) 'A Critique of Criminal Causation' *Modern Law Review* 54: 685.

Tadros, V. (2005) *Criminal Responsibility* (Oxford: OUP), ch. 6.

Wilson, W. (2008b) 'Dealing with Drug-induced Homicide' in C. Clarkson and S. Cunningham (eds) *Criminal Liability for Non-Aggressive Death* (Aldershot: Ashgate).

9 CONCLUDING THOUGHTS

The *actus reus* is a central aspect of criminal law. It defines the harm done to the victim and the wrong performed by the defendant. In many cases this involves proof that the defendant caused a particular result. That is often an easy question, but not always. The courts have struggled to produce a set of principles for causation that are consistently applied. This, in part, reflects the wide range of complex moral, political, and theoretical issues that questions of causation throw up. It is notable that the courts have been reluctant to open up a can of worms and consider the extent to which any of us are responsible for our actions. The criminal law proceeds on the great fiction that we are all fully responsible for our actions, in the absence of one of the recognized defences. While it is difficult to imagine how the criminal law could do otherwise, the fact that much of criminal law is based on a possibly unfounded assumption cannot be comfortable for criminal lawyers.