IN THE COURT OF APPEAL (CRIMINAL DIVISION)

REGINA

Appellant

-and-

ALEXANDER TROUT

Respondent

RESPONDENT'S BUNDLE

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

REGINA

Appellant

-and-

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1. The Respondent, Alexander Trout, is charged on an indictment containing two counts:
   (i) Murder of Bertie Greaves on 3 June 2019 (**Count 1**)
   (ii) Unlawfully wounding Bertie Greaves on 1 July 2017, with intent to do him grievous bodily harm, contrary to section 18 of the Offences Against the Person Act 1861 (**Count 2**)

   At the conclusion of the Crown's case the trial judge ruled that there was no case to answer in respect of either count.

2. The Appellant Crown has served notice of appeal under section 58 of the Criminal Justice Act 2003 against the terminating ruling of the trial judge. The grounds of appeal are as follows:

Ground 1 (Count 1)

The Learned Judge erred in principle in his approach to the law of causation; the count of murder (Count 1) should have been left to the jury for their determination at the conclusion of the evidence. The judge was not entitled to substitute his own view of the evidence on the issue of causation for that of the jury. There was sufficient evidence for the case on Count 1 to proceed beyond the conclusion of the prosecution case.

Ground 2 (Count 2)

The Learned Judge erred in his approach to the principles of law which govern intention, consent and the wounds which are inflicted on their customers by licensed tattoo artists. There was sufficient evidence which would have entitled

a jury to conclude that the defendant in wounding the deceased had acted both unlawfully and with intent to cause grievous bodily harm. There was sufficient evidence for the case on Count 2 to proceed beyond the conclusion of the prosecution case.

Factual background

3. The Prosecution case at trial was that in the summer of 2017, Bertie Greaves, a fanatical Tottenham Hotspur supporter (date of birth 1 August 1999) had visited Alexander Trout at Trout's licensed tattoo parlour in Archway, London, N19. He told Trout that he had just turned 19 and that in order properly to cheer himself up and to celebrate his birthday he would like an image of Harry Kane's face tattooed on the back of his right shoulder blade. Mr Kane had just finished the Premier League season as its top scorer for the second year running. Mr Greaves provided Mr Trout with a photograph of Mr Kane. Trout indicated that it would cost £750, the full price being payable in advance. Greaves signed a 'consent and disclaimer' document in advance of the work in which he accepted that he understood that the quality of the workmanship could not be guaranteed and that he consented to the process nonetheless.

4. The Prosecution alleged that during the course of completing the work during the following day, 1 July 2017, it appeared that Trout (a season ticket holder at Arsenal) had developed an increasingly intense dislike of Greaves - largely as a result of the fact that the young man talked incessantly about his favourite team, Spurs. Meanwhile, Trout produced a tattoo which depicted a high quality image of Mr Kane.

5. However, when Bertie Greaves got home and was able to inspect his back in the bathroom mirror, he discovered that an equally high-quality image of the face of the then Arsenal manager, Arsene Wenger had also been depicted in an additional tattoo located just alongside the tattoo of Mr Kane.

6. Bertie Greaves reported the matter to the police in the summer of 2017 – the investigating officer, at that time, had indicated that he intended to take no further action since Greaves had signed a non-specific disclaimer as to the quality of the tattooing image before the process had started and had consented to the process.

7. Over the following two years Greaves became increasingly unwell. In January 2018 Greaves was diagnosed as suffering with both severe depression and Post Traumatic Stress Disorder by a Dr Smith, a psychiatrist (registered under section 12 of the Mental Health Act 1983) to whom Greaves had been referred by his general practitioner and who first saw Greaves in September 2017. Thereafter, until his death, Greaves was under the care of Dr Smith.

8. On 15 May 2019 Greaves received an e-mail from his general practitioner in London informing him that had been diagnosed with terminal liver cancer, that available treatments had about a 50% success rate and that a consultant oncologist estimated that, if left untreated, his life expectancy was in the region of 2-3 years.

9. On 1 June 2019 Tottenham Hotspur were defeated 2-0 by Liverpool in the final of the Champions League.

10. On 3 June 2019 Bertie Greaves took an overdose of paracetamol tablets. He died at the Whittington Hospital on the following day. A letter was found by his bedside in his flat in which he had written to his family, *"Life has finally become unbearable for me – what with the cancer and everything. I just can't face the radiology given the way I feel. Ever since that tattoo was placed on my shoulder in Archway, I have struggled to see the point of life. But that bastard Trout knew what he was doing at the time – I know it in my guts."*

11. In July 2020 Trout was arrested. When he was informed of the reason for his arrest, he made an unsolicited comment which was recorded by the arresting officer PC Dud as follows: *"What? Oh yes. I remember that kid – the one I tattooed Wenger's face on. What a daft idiot he was, going on and on – talking drivel about Spurs ….he annoyed me so much I just decided I wanted to kind of really annoy and bloody upset him for a while - you know, give him something to remember me by always that kinda hurt him and made him cry, maybe even cause him some ongoing heartache – but I meant no real proper physical harm. Why's the bloody fool gone and killed himself?"*

12. In interview, Trout answered 'No Comment' to the questions he was asked, including questions which touched upon the question of what had been his intention at the time that he was tattooing the Wenger image onto the back of Mr Greaves on 1 July 2017.

Trial

13. At trial the prosecution called Dr Smith. He gave unchallenged evidence that in his opinion the events of 1 July 2017 had triggered a progressive decline in Greaves' mental health. When he had first been asked to see Greaves, he diagnosed him as, in all probability, having been suffering from severe depression since adolescence; however, he regarded the events of 1 July 2017 as the trigger for the onset and development of post-traumatic stress disorder. He regarded the 1 July 2017 as having been the critical event in relation to the latter. He further stated that over the course of the following two years, he had noticed a progressive decline in Greaves' condition. He was unsure of the extent to which Greaves had complied with the anti-depressant medication regime upon which he had placed Greaves, but was clear that there had been no improvement (as might normally have been expected when the prescribed medication is taken). He confirmed that he considered that Greaves had suffered a progressive and steady deterioration of his wellbeing between July 2017 and the time of his death.

14. Evidence of the unsolicited comment of the defendant recorded upon arrest by PC Dud was adduced by the Crown. Under cross-examination, it was suggested to PC Dud on behalf of the defendant that the words attributed to the defendant had been wrongly recorded by the officer; it was further suggested that what the deceased had actually said were words to the effect that the Wenger tattoo had been completed at the specific request of the deceased and that the defendant could not therefore understand why the deceased had killed himself.

15. The jury were provided with an agreed fact which established that in interview the defendant had been informed that he was being interviewed under suspicion of having committed the offence of wounding with intent, he had been cautioned and had then answered each question he was asked about the circumstances of the tattooing, by saying "No Comment".

16. At the conclusion of the prosecution case, Counsel for Trout made a submission of No Case to Answer in respect of both Count 1 and 2.

17. In the ruling under appeal, the trial judge ruled as follows in upholding the submission made on behalf of the defendant:

> "*I have considered with care the submissions made on behalf of both parties regarding the evidence . I have also had regard to the decisions of the House of Lords in R v Brown and others* [1994] 1 AC 212 *and to the decisions of the Court of Appeal in R v Wallace (Berlinah)* [2018] 2 Cr. App. R. 22 *and R v M(B) [2019] QB 1 which have been cited to me.*
>
> *The following evidence of significance has been adduced during the course of the prosecution case…[**as recited above**].*
>
> *I propose to deal with the counts as they appear on the indictment, whilst recognising that, here, Count 1 would only ever arise in circumstances where a case to answer was established by the Crown in respect of Count 2.*
>
> *Count One concerns the allegation that Trout murdered Greaves.*
>
> *Even had I been satisfied that there was a case to answer on Count Two (which I deal with below), I consider that there is no evidence upon which the jury could safely conclude that the actions of the defendant on 1 July 2017 were really the significant and principal, or even the main, cause of the defendant's death nearly two years later. In my view, the evidence is such that a reasonable jury is likely to conclude that the events which led to the defendant's death were multi-factorial and included, amongst others things – a latent history of depression (long before the deceased chose to visit the defendant's tattoo parlour), a suspicion of non-compliance on the part of the deceased with the regime of anti-depressant medication upon which he had been placed by Dr Smith, and the 2019 diagnosis of terminal cancer to which the deceased made reference in the written note found at his address. Whilst, on one view, the events of 1 July 2017 were undoubtedly part of a chain of events, and in that sense significant, and they led ultimately to the deceased's decision to take the pills, in my opinion a reasonable jury would be likely to come to the conclusion that taking everything into consideration by that stage those events had fallen very much, as it were, into what ought to be seen as part of the background.*
>
> *Additionally, and in my opinion importantly, I do not consider that it would be likely that a jury could safely infer that it was reasonably foreseeable that the response of the deceased to the actions of the defendant on 1 July 2017 would be to take a fatal overdose of paracetamol.*
>
> *In my judgment, a reasonable jury would rather and much more naturally be driven to the conclusion, as I am, that the actions of the deceased in taking his own life, tragic though they may be, amount to an exercise of free will and as such break any chain in a line of causation as there might be said to be. Count 1 will be withdrawn.*

I now come to deal with Count 2. In my judgment the evidence here indicates that the business of licensed tattooing falls within the category of exceptions identified by the House of Lords as lawful activities in R v Brown [1994] 1 AC 212 (See the speech of Lord Templeman at 231F). I note that Mr Greaves had signed a 'consent and disclaimer' form in advance of the performance of the tattooing work on his back which recognised that the quality of the tattoo artist's workmanship could not be guaranteed. I note also that the particulars of Count 2 upon which the Crown chose to proceed failed to particularise any distinction as between the Kane and the Wenger tattoo – alleging simply that the defendant had on 1 July 2017 unlawfully wounded Mr Greaves with intent to do grievous bodily harm.

Furthermore, in light of the remarks made by the defendant upon his arrest I consider that there is insufficient evidence that the defendant acted with an intention to cause really serious harm at the time at which he performed the tattooing work on Mr Greaves' back. It does not seem to me that the remarks made by the defendant upon arrest are capable of supporting an inference that the defendant had acted with the requisite intent. Further, I derive no assistance from the fact that during his interview under caution the defendant chose to answer 'No comment' in relation to the questions he was asked about the circumstances of the tattooing.

Accordingly, I propose to withdraw Count 1 from the jury."

Leading counsel should address Ground 1.

Junior counsel should address Ground 2.

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

REGINA

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-and-

ALEXANDER TROUT

Respondent

RESPONDENT'S SKELETON ARGUMENTS

Grounds of Appeal:

(1) **Count 1:** The trial judge did not err in his approach to the law of causation, nor did he err in substituting his own views of the evidence instead of the jury. Furthermore, there was not enough evidence for a reasonable jury to convict the Defendant in this case.

(2) **Count 2:** The trial judge was correct in his approach to the principles of law which govern intention and consent in relation to s.18 Offences Against the Person Act 1861 ('the OAPA'). There was insufficient evidence for a jury to conclude that the Defendant/Respondent had acted either unlawfully or with intent to cause grievous bodily harm. There was insufficient evidence for the case on Count 2 to proceed beyond the conclusion of the prosecution case.

Ground 1

First Submission: The law of causation is contextually sensitive. In each case, a judge is required to apply the overarching principles of causation subjectively to the facts before them, whilst exercising their discretion.

1. The common law has, over time, recognised three key principles of causation:
    a. Factual Causation
    b. Legal Causation
    c. Novus Actus Interveniens (*R v Hughes* [2013] UKSC 56 at [20])

2. In this case, in light of the relevant principles of causation, the judge carefully weighed up the evidence before him and rightly concluded that there was no case to answer.

3. The case law illustrates that the application of these principles is case-specific and policy-driven. Judges are required to apply these principles using their common sense and discretion because of the subjectivity and nuance that can arise on the facts of any given case (*R v Wallace (Berlinah)* [2018] EWCA Crim 690 at [52] and *R v Kennedy (No2)* [2007] UKHL 38 at [15]).

4. As such, the trial judge correctly identified that whilst the Defendant's actions may have been ***a*** cause in the death of Mr Greaves, they cannot be deemed a ***significant*** cause (*Wallace* at [86]).

5. It is submitted that there are several factors that contributed to the deceased's decision to commit suicide. These factors are of such significance that the Respondent's actions amount to ***a*** cause, as opposed to a ***significant*** cause. They are as follows:
    a. Mr Greaves had suffered from depression since adolescence
    b. There was a suspicion of non-compliance with his anti-depressant medication
    c. On 15 May 2019, Mr Greaves was informed of his terminal liver cancer diagnosis which he referred to in his suicide note
    d. On 1 June 2019, Tottenham Hotspur lost 2-0 to Liverpool FC in the Champions League Final

6. In light of the above, it is submitted that there is too tenuous a link for a causal connection to be drawn between the initial act of the Defendant on 1 July 2017 and the subsequent death of the deceased.

7. As such, no jury properly directed could find that the actions of the Defendant were a significant cause of death and therefore the trial judge did not err in his approach to causation and the first Count was rightly withdrawn.

<u>Second Submission:</u> In addition, or in the alternative, even if the test for legal causation had been satisfied, the deceased's act of volition broke the causal link between the application of the tattoo and the subsequent actions of the deceased.

Voluntariness

8. The concept of voluntariness is malleable and subjective. The criminal law of causation generally respects the principle of individual autonomy and therefore in the circumstances of this case, the count of murder should not have been left to the jury (*R v Kennedy (No2)* [2007] UKHL 38 at [14]).

9. In *Kennedy,* the House of Lords did not outline a threshold of volition that defined involuntary conduct. It is submitted, therefore, that the concept of voluntariness can be interpreted broadly.

10. In this case, it is submitted that the decision and act of committing suicide is voluntary to the extent that this case is more analogous to that of *Kennedy,* where the House of Lords held the deceased's actions were free, deliberate and informed, than the highly unusual case of *Wallace,* where the Court of Appeal held that the deceased had acted involuntarily.

11. As such, the trial Judge rightly acknowledged the free will exercised by the deceased, who acted autonomously and voluntarily when he made the decision to end his life.

Intervening Act

12. It is established law that '*D* ***will*** *not be liable if the victim's subsequent conduct in response to D's act is not within a range of responses that could be regarded as reasonable in the circumstances. Was V's act so "daft" as to be wholly disproportionate to D's act? If so, it will break the chain*." (Smith and Hogan's Criminal Law, 14th edition, at para 4.5.6, cited in *Wallace* at [83])

13. It is argued that the deceased's response to the actions of the defendant on 1 July 2017 to take a fatal overdose of paracetamol was not reasonably foreseeable.

14. Therefore, it is submitted that the prosecution evidence, taken at its highest, is such that a jury properly directed could not properly convict upon it and the trial Judge had grounds to withdraw the first Count from the jury.

Ground 2:

First Submission

15. Although the fact of the victim's consent is not in general a defence to a charge of inflicting grievous bodily harm, the House of Lords in *R v Brown* [1994] 1 A.C. 212 acknowledged that this rule is subject to a number of recognised exceptions, of which tattooing is one (see, *inter alia*, page 231 of Lord Templeman's speech in *Brown*).

16. It is an agreed fact that Mr Greaves signed a consent form in which he accepted that he understood that the quality of the workmanship could not be guaranteed, and that he consented to the process nonetheless.

17. In cases where consent is available as a defence, the burden of proof lies on the Prosecution to disprove the existence of consent, rather than for the Defendant to prove consent was given. At the Respondent's trial, the Crown submitted no evidence that Mr Greaves did not consent to the tattooing. There was therefore no evidence before the jury that there was an absence of consent, and therefore no safe conviction could follow.

18. It is important to note, as the trial judge did, that the Crown in bringing its case against the Respondent made no distinction between the tattoo of Harry Kane and the tattoo of Arsene Wenger. Rather, Count 2 of the indictment merely alleges that the Respondent unlawfully wounded Mr Greaves. As Mr Greaves consented to being tattooed by the Respondent, the wounding was not unlawful.

19. Therefore, as there was insufficient evidence before the jury that Mr Greaves had not consented to being tattooed by the Respondent, there could be no safe conviction under s.18 OAPA. The judge was correct in withdrawing Count 2 from the jury.

Second Submission

20. Further, or in the alternative, there was no evidence before the jury that the Respondent intended to inflict grievous bodily harm, which is an essential requirement of an offence under s.18 Offences Against the Person Act 1861.

21. Under the 1861 Act, a person commits an offence under s.18 if they '*unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, with intent to do some grievous bodily harm to any person*'. For the purpose of the OAPA, '*grievous bodily harm*' means really serious harm, and therefore a person is guilty under s.18 if and only they intend to cause the victim really serious harm (*DPP v Smith* [1961] AC 290).

22. It is not disputed that depression and/or PTSD should be considered really serious harm; rather, it is submitted that there was no evidence before the jury that the Respondent intended to cause Mr Greaves such really serious harm.

23. At the Respondent's trial, the Crown's evidence as to intention was limited to a single unsolicited comment made by the Respondent to the arresting officer, PC Dud. The Crown alleged that the Respondent had said '*I wanted to kind of really annoy and bloody upset him for a while- you know, give him something to remember me by always that kinda hurt him and made him cry, maybe even cause him some ongoing heartache*'. This evidence was challenged by the Defence in cross-examination.

24. However, even if the Respondent had admitted to making this comment, it is submitted that this alone would provide insufficient evidence upon which a jury could convict. It is submitted that none of the consequences allegedly intended by the Respondent amount to really serious harm, and as a result even if the Respondent intended to cause them this would not amount to an intention to cause really serious harm for s.18 OAPA.

25. Therefore, even taking the Crown's case at its highest, there was insufficient evidence that the Respondent intended to cause really serious harm. There could have been no safe conviction under s.18 OAPA, and the trial judge was correct in withdrawing the charge from the jury on this basis.

AFIYA AMESU

ANDREW DIXON

SENIOR COUNSEL FOR THE RESPONDENT

JUNIOR COUNSEL FOR THE RESPONDENT

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

REGINA

Appellant

-and-

ALEXANDER TROUT

Respondent

RESPONDENT'S BUNDLE

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1. S 18 Offences Against the Person Act 1861
2. *R v Hughes* [2013] UKSC 56
3. *R v Wallace (Berlinah)* [2018] EWCA Crim 690
4. *R v Kennedy (No2)* [2007] UKHL 38
5. *R v Brown* [1994] 1 A.C. 212
6. *DPP v Smith* [1961] AC 290
7. *R v M(B)* [2019] QB 1

Offences against the Person Act 1861

1861 CHAPTER 100 24 and 25 Vict

Acts causing or tending to cause Danger to Life or Bodily Harm

18 [X1]**Shooting or attempting to shoot, or wounding with intent to do grievous bodily harm.**

Whosoever shall unlawfully and maliciously by any means whatsoever wound or cause any grievous bodily harm to any person, . . . [F1] with intent, . . . [F1] to do some . . . [F1] grievous bodily harm to any person, or with intent to resist or prevent the lawful apprehension or detainer of any person, shall be guilty of felony, and being convicted thereof shall be liable . . . [F2] to be kept in penal servitude for life . . . [F3]

Editorial Information

X1 Unreliable marginal note

Textual Amendments

F1 Words repealed by Criminal Law Act 1967 (c. 58), **Sch. 3 Pt. III**

F2 Words repealed by Statute Law Revision (No. 2) Act 1893 (c. 54)

F3 Words repealed by Statute Law Revision Act 1892 (c. 19) and Statute Law Revision (No. 2) Act 1893 (c. 54)

Modifications etc. (not altering text)

C1 Ss. 18, 20, 21, 22, 23, 24, 28, 29, 30 extended by Internationally Protected Persons Act 1978 (c. 17, SIF 39:2), **s. 1**

C2 Ss. 18, 20, 21, 22, 23, 28, 29 extended by Aviation Security Act 1982 (c. 36, SIF 9), **s. 6(1)**

C3 Ss. 18, 20 extended (2.10.1991) by Nuclear Material (Offences) Act 1983 (c. 18, SIF 8), **ss. 1(1)**, 8(2); S.I. 1991/1716

C4 Ss. 18, 20, 21, 22, 23, 24, 28, 29 applied by Aviation and Maritime Security Act 1990 (c. 31, SIF 39:2), **ss. 11(7)**, 14(2), 18(2)

C5 S. 18 extended (27.4.1997) by 1997 c. 13, **ss. 1(2)(b)**, 10(2)

Trinity Term
[2013] UKSC 56
On appeal from: [2011] EWCA Crim 1508

JUDGMENT

R *v* Hughes (Appellant)

before

Lord Neuberger, President
Lord Mance
Lord Kerr
Lord Hughes
Lord Toulson

JUDGMENT GIVEN ON

31 July 2013

Heard on 5 June 2013

Appellant	*Respondent*
Robert Smith QC	John Price QC
C J Knox	Sarah Whitehouse
(Instructed by John Donkin Solicitors)	(Instructed by CPS Appeals Unit)

causation. It is trite law, and was common ground before us, that the meaning of causation is heavily context-specific and that Parliament (or in some cases the courts) may apply different legal rules of causation in different situations. Accordingly it is not always safe to suppose that there is a settled or "stable" concept of causation which can be applied in every case. That said, there are well recognised considerations which repeatedly arise in cases turning on causation. For the appellant Hughes, Mr Robert Smith QC relied upon two such recurrent propositions. The first is that a chain of causation between the act of A and a result may be broken by the voluntary, deliberate and informed act of B to bring about that result. The second is the distinction between "cause" in the sense of a sine qua non without which the consequence would not have occurred, and "cause" in the sense of something which was a legally effective cause of that consequence.

Voluntary intervening act

21. Mr Smith submitted that a person is not to be held liable for the free, deliberate and informed act of a second person, not acting in concert with him. He relied on the decision of the House of Lords in *R v Kennedy (No 2)* [2007] UKHL 38; [2008] 1 AC 269, in which that proposition was reiterated in those terms by Lord Bingham at para 14, citing *Hart and Honore's Causation in the law* 2nd ed (1985). He submitted that the independent acts and omissions of Mr Dickinson in driving as he did fell into this category and thus broke the chain of any causation connecting any driving of the defendant to the fatality. It is certainly true that the deliberate act of B may break the chain of causation between something done by A and that deliberate act. That was so in *Kennedy (No 2).* There the charge was unlawful act manslaughter. Kennedy had prepared a syringe of heroin for a man called Bosque, had handed it to him at his request, and had been present when Bosque injected himself. Bosque died of the heroin. The only unlawful act alleged against Kennedy was that he caused heroin to be administered to Bosque (an offence contrary to section 23 of the Offences Against the Person Act 1861). The occurrence whose cause was under investigation was thus not the death of Bosque, but the administration of the drug. Kennedy had doubtless encouraged and assisted Bosque to administer the drug. But Bosque had administered it to himself deliberately and as a matter of free choice. Kennedy had not caused him to administer it.

22. That principle does not assist Mr Hughes in the present case. The occurrence whose cause is under investigation here is the death of Mr Dickinson. He did not voluntarily and deliberately kill himself; he drove dangerously and without thought and as a result caused the collision in which he died. Here, if the driving of Mr Hughes was a cause of the death at all, this is the familiar case of concurrent causes. There are many examples of two or more concurrent causes of an event, all effective causes in law. A road traffic accident is one of the commoner cases, for such events are only too often the result of a combination of

acts or omissions on the part of two or more persons. Where there are multiple legally effective causes, whether of a road traffic accident or of any other event, it suffices if the act or omission under consideration is a significant (or substantial) cause, in the sense that it is not de minimis or minimal. It need not be the only or the principal cause. It must, however, be a cause which is more than de minimis, more than minimal: see *R v Hennigan* (1971) 1 All ER 133. It follows that this appeal depends not on the narrow concept of independent intervening deliberate action (sometimes called novus actus interveniens) but on the broader question whether the driving of Mr Hughes was in law a cause of the death of Mr Dickinson.

"But for" cause and legal cause

23. The law has frequently to confront the distinction between "cause" in the sense of a sine qua non without which the consequence would not have occurred, and "cause" in the sense of something which was a legally effective cause of that consequence. The former, which is often conveniently referred to as a "but for" event, is not necessarily enough to be a legally effective cause. If it were, the woman who asked her neighbour to go to the station in his car to collect her husband would be held to have caused her husband's death if he perished in a fatal road accident on the way home. In the case law there is a well recognised distinction between conduct which sets the stage for an occurrence and conduct which on a common sense view is regarded as instrumental in bringing about the occurrence. There is a helpful review of this topic in the judgment of Glidewell LJ in *Galoo Ltd v Bright Grahame Murray (a firm)* [1994] 1 WLR 1360. Amongst a number of English and Commonwealth cases of high authority, he cited at pp 1373-1374 the judgment of the High Court of Australia in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 515, in which Mason CJ emphasised that it is wrong to place too much weight on the "but for" test to the exclusion of the "common sense" approach which the common law has always favoured, and that ultimately the common law approach is not susceptible to a formula.

24. In the earlier section 3ZB case of *Williams* the principal focus of the argument was the defendant's submission that the new offence under section 3ZB depended on proof of some fault in the driving of the defendant. That submission failed in large part because of the simultaneous creation by the 2006 Act of the second new offence of causing death by careless driving by inserting section 2B into the 1988 Act. The view was taken that this necessarily meant that section 3ZB must catch cases which would not in any event fall within section 2B. The argument in Williams did not focus centrally on the meaning of "causes...death…by driving". In the present case, Mr Smith for the appellant has disclaimed any argument that fault is a necessary element of the offence under section 3ZB. He has concentrated on the meaning of the expression "causes…death…by driving". Logically that is a separate question from whether

Neutral Citation Number: [2018] EWCA Crim 690

Case No: 201705111

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
ON APPEAL FROM THE CROWN COURT AT BRISTOL
MRS JUSTICE MAY
T20157433

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 28/03/2018

Before :

LADY JUSTICE SHARP DBE
MR JUSTICE SPENCER
and
MRS JUSTICE CARR

- -

Between :

R	**Appellant**
- and -	
BW	**Respondent**

- -
- -

Adam Vaitilingam QC and **Ms Rachel Drake** (instructed by **Crown Prosecution Service South West**) for the **Appellant**
Richard Smith QC and **Ms Fiona Elder** (instructed by **Elite Solicitors**) for the **Respondent**

Hearing date : 29 November 2017

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Approved Judgment

Lady Justice Sharp:

Introduction

1. This is an appeal by the prosecution pursuant to section 58 of the Criminal Justice Act 2003 (the 2003 Act) against three rulings made by May J in the course of the trial being held at the Crown Court at Bristol of the defendant/respondent, Berlinah Wallace, whom we shall refer to as the defendant. There was a terminating ruling made on 20 November 2017 at the close of the prosecution case on a submission of no case to answer, and two evidential rulings made on 9 and 15 November 2017. The appeals are brought with the leave of the judge.

2. The defendant was on trial on a two-count indictment. On count 1 she was charged with the murder of Mr Mark van Dongen between 22 September 2015 and 3 January 2016; on count 2 she was charged with applying a corrosive substance with intent, contrary to section 29 of the Offences against the Person Act 1861 (the 1861 Act). The particulars of the latter offence were that on 23 September 2015 she unlawfully and maliciously cast or threw at or upon Mr van Dongen sulphuric acid with intent to burn, maim, disfigure or disable him or to do some grievous bodily harm to him.

3. It was not in dispute that the defendant had thrown sulphuric acid over Mr van Dongen, nor that he sustained truly dreadful injuries as a result, leaving him terribly disfigured, completely paralysed and in a permanent state of unbearable constant physical and psychological pain that could not be ameliorated by his doctors. He died on 2 January 2017. The immediate cause of his death was voluntary euthanasia (a lethal injection) lawfully administered to him in a hospital in Belgium under legislation in force in Belgium, by Belgian doctors in accordance with the relevant provisions of Belgian law. The judge decided his act in asking for euthanasia, and the doctors' actions in providing it, were independent free and voluntary acts which broke the chain of causation between the defendant's conduct in throwing the acid, and Mr van Dongen's death. At the close of the prosecution case, at the invitation of the defence she therefore withdrew the charge of murder from the jury. The central issue raised in this appeal is whether she was justified in doing so.

4. The two evidential rulings appealed against raise discrete issues. It is accepted by the prosecution that neither ruling had any impact, direct or indirect on the ruling the judge made on the submission of no case to answer. However, the prosecution included them in the grounds of appeal, pursuant to section 58(7) of the 2003 Act, lest they should become relevant to the consideration of the case by this Court.

5. For the reasons that follow the prosecution's appeal against the terminating ruling is allowed and the appeal against the evidential rulings is dismissed.

6. This case will therefore remain subject to reporting restrictions. Pursuant to section 71 of the 2003 Act we order that no publication may include a report of these proceedings until the conclusion of the trial unless the Court orders otherwise.

The Facts

7. The facts of this case are tragic and unusual.

8. Mr van Dongen was a Dutch national who came to live and work in Bristol some years ago. He was an engineer and worked on a number of large construction projects around the country, for the most part in Bristol. He would have been thirty years old this year. In 2010 he met and began a relationship with defendant who is now 48 years old. Mr van Dongen and the defendant lived together at the defendant's flat in the Redland area of Bristol.

9. The events that gave rise to the prosecution occurred after the relationship between the defendant and Mr van Dongen had broken down. The case presented at trial was that this happened in about August 2015, after which Mr van Dongen began to spend time with another woman (Ms. Violet Farquharson). By the end of August 2015 he had moved out of the defendant's flat and into that of Ms. Farquharson. The defendant was unhappy about this and pleaded with him to stay with her. On 2 September 2015, therefore shortly after the breakdown of the relationship, the defendant purchased a one-litre bottle of sulphuric acid, online. It was clearly labelled; the label identified the contents as sulphuric acid and warned of the dangers of handling that substance. The bottle was delivered to the defendant a few days later and she kept it in her kitchen. It was part of the prosecution case that after this purchase, the defendant carried out various Google searches relating to acid, including a search for whether one could die from drinking sulphuric acid, and searches for the disfiguring effects of acid attacks.

10. On 22 September 2015 Mr van Dongen went to the defendant's flat at her request. He was later to tell the police that he went because he was concerned about her. The prosecution case was that there was an argument during the course of the evening and the defendant left the flat saying she was going to a hotel for a few days. Mr van Dongen stayed the night, sleeping alone. At about 3 a.m. in the morning Mr van Dongen was asleep in bed, wearing only his boxer shorts. The defendant had returned to the flat; she poured the sulphuric acid into a glass, and went into the bedroom. Waking Mr van Dongen up, she laughed and said: "If I can't have you, no-one else will", and threw the glass of sulphuric acid into his face. The sulphuric acid covered his face and parts of his upper body and dripped onto his lower body as he moved.

11. Covered in burning acid, Mr van Dongen ran into the street, screaming for help. Members of the public came to his aid, and tried to assist him under direction of emergency services. Police and paramedics arrived, and Mr van Dongen was taken to Southmead Hospital. The emergency doctor from the burns unit who admitted him said that as Mr van Dongen saw his outline in a mirror he immediately screamed: "Kill me now, if my face is going to be left looking like this, I don't want to live". The same doctor stated that she had never seen burns like these.

12. The defendant was arrested in her flat almost immediately. The bottle of sulphuric acid recovered from the flat had had the label removed. When interviewed at the police station, the defendant said that she had bought the acid because of a smell from the drains in the flat. She gave no explanation for the removal of the label. She accepted throwing the contents of the glass at Mr van Dongen but said she had done

so thinking it to be water. According to the defendant, Mr van Dongen had filled the glass earlier that evening for her to drink with her nightly tablets.

13. The effects of the acid on Mr van Dongen were catastrophic. He suffered permanent and life changing injuries of the most extreme and appalling nature, causing him permanent and unbearable physical and psychological pain.

14. The acid caused full thickness burns to twenty five per cent of his body. Skin grafting resulted in forty per cent of the total body surface being affected. He was in a coma for 4 months following the attack; and in hospital for a total of 14 months. He spent the first 6 months after the incident in an isolated ward in the Intensive Care Unit. At Southmead Hospital, where he remained after the incident, twenty-nine specialties were involved in his care. He was confined to a hospital bed. His face, chest, and arms were grotesquely scarred. He lost the sight in his left eye and most of the sight in his right eye. His lower left leg had to be amputated. For a long time after he regained consciousness he was unable to move anything other than his tongue. He could not speak for several months, and his speech was permanently affected. Repeated chest and urinary tract infections affected his blood pressure and breathing. He was dialysed, catheterised and repeatedly intubated via a tracheotomy. He had repeated surgery and continued to go in and out of intensive care. Critical illness neuropathy left him permanently paralysed from the neck down. He could not use his hands to do anything. He could not feed or wash himself. He was diagnosed with depression throughout, sometimes saying that he wanted to live, and at other times that he wanted to die. Years of rehabilitation and extensive reconstructive surgery lay ahead, had Mr van Dongen survived. We should record that we have seen (though the jury did not) photographs taken of Mr van Dongen on his arrival at hospital, and during the course of his treatment.

15. On 22 November 2016 Mr van Dongen was discharged from Southmead Hospital to a care home with 24-hour support. This was in accordance with Mr van Dongen's desire to try and live outside hospital. The care home environment proved unsustainable almost immediately. Within hours of Mr van Dongen's arrival there, he became so distressed that he called his father (Mr van Dongen senior) to come for him. Mr van Dongen senior lived in Belgium; he came to this country, arranged for an ambulance to take his son back to Belgium and on 23 November 2016 Mr van Dongen was admitted to the St. Maria Hospital in Overpelt, Belgium.

16. The Belgian authorities have refused to provide the Crown with medical records of Mr van Dongen's treatment in Belgium on the grounds of patient confidentiality. It is known however that whilst he was at the St. Maria Hospital he was seen by many doctors and specialists. Mr van Dongen was clearly physically unable to take his own life. However, euthanasia is lawful in Belgium if carried out in accordance with the Belgian Act on Euthanasia of 28 May 2002 (the Belgian 2002 Act).

17. On about 1 December 2016 Mr van Dongen made an application for euthanasia. His father's evidence was that Mr van Dongen decided to complete the application form when he was told by his Belgian doctors that his paralysis could not be cured - meaning that he would not be able to move his arms. Mr van Dongen senior described this as "the straw that breaks the camel's back". Some 3 weeks after arriving in Belgium, Mr van Dongen developed a lung infection. He was warned that intubation was required because otherwise he might choke to death. He was warned that

intubation carried a 96 per cent risk of the permanent loss of his voice, which he did not want. He wanted to be able to talk to his father "until the last second". Mr van Dongen senior gave evidence of what happened in his son's last few days. The chest infection became very acute. Mr van Dongen was "100 per cent" conscious; he definitely did not want to be intubated; he did not want any more pain.

18. It was an agreed fact at trial that the legal requirements for euthanasia in the Belgian 2002 Act were met. We set out those requirements at paras 20 to 22 below. Two however are of particular note. First, there is a requirement for a 30-day gap between a written request and the act of euthanasia if the physician concerned believes the party requesting euthanasia is "clearly not expected to die in the near future". Secondly, there must be confirmation from two physicians that the person requesting euthanasia is in a "medically futile condition of constant and unbearable physical or mental suffering that cannot be alleviated, resulting from a serious and incurable disorder caused by illness or accident', before euthanasia can be carried out. In this case, there was a period of just over 30 days between Mr van Dongen's completion of the application and the act of euthanasia. Furthermore, one of the facts agreed at trial was that Dr. Seppion, a qualified doctor in Belgium, confirmed that: "Active euthanasia was applied to Mark van Dongen due to unbearable physical and psychological suffering under maximal medicinal support and this was done following the legal framework [under the Belgian 2002 Act]."

19. On 2 January 2017, doctors ended Mr van Dongen's life by inserting drugs via a catheter into his heart, bringing about his immediate death.

The Belgian 2002 Act

20. It is convenient to set out here the relevant provisions of the Belgian 2002 Act. Article 2 provides as follows:

> "For the purpose of this Act, euthanasia is defined as intentionally terminating life by other than the person concerned, at the latter's request."

21. Article 3 of the 2002 Act is the central provision. It provides that:

> "3.1 The physician who performs euthanasia commits no criminal offence when he/she ensures that:
>
> 1) the patient has attained the age of majority or is an emancipated minor, and is legally competent and conscious at the moment of making the request;
>
> 2) the request is voluntary, well-considered and repeated, and is not the result of any external pressure;
>
> 3) the patient is in a medically futile condition of constant and unbearable physical or mental suffering that cannot be alleviated, resulting from a serious and incurable disorder caused by illness or accident;

> and when he/she has respected the conditions and procedures as provided in this Act.
>
> 3.2 Without prejudice to any additional conditions imposed by the physician on his/her own action, before carrying out euthanasia he/she must in each case:
>
> 1) inform the patient about his/her health condition and life expectancy, discuss with the patient his/her request for euthanasia and the possible therapeutic and palliative courses of action and their consequences. Together with the patient, the physician must come to the believe (sic) that there is no reasonable alternative to the patient's situation and that the patient's request is completely voluntary;
>
> 2) be certain of the patient's constant physical or mental suffering and of the durable nature of his/her request. To this end, the physician has several conversations with the patient spread out over a reasonable period of time, taking into account the progress of the patient's condition;
>
> 3) consult another physician about the serious and incurable character of the disorder and inform him/her about the reasons for this consultation……
>
> 3.3 If the physician believes the patient is clearly not expected to die in the near future, he/she must also:
>
> consult a second physician…..
>
> allow at least one month between the patient's written request and the act of euthanasia."

22. Article 14 provides that no physician may be compelled to carry out euthanasia, and no other person may be compelled to assist in carrying it out.

Relevant procedural history

23. On 23 September 2015 the defendant was charged with applying a corrosive fluid with intent contrary to section 29 of the 1861 Act. After Mr van Dongen's death, she was also charged with his murder.

24. The defendant applied to dismiss the murder charge under the Crime and Disorder Act 1998 (schedule 3 para. 2(1)). On 27 March 2017 that application was dismissed by Sir John Royce, sitting as a High Court Judge.

25. After reviewing a considerable number of authorities on causation, Sir John gave these reasons for dismissing the application. It was common ground that a jury here could conclude that the defendant deliberately and unlawfully threw sulphuric acid over Mr van Dongen intending at the least to cause him grievous bodily harm. The

authorities were broadly consistent in relation to the causation direction which would have to be given to a jury on the murder count: they would have to be sure that the defendant's act was a cause of death; it need not be the sole or principal cause, as long it was a substantial cause, which meant a more than minimal cause. The defence submitted that the act of voluntary euthanasia as a free, deliberate and informed decision was a *novus actus interveniens* breaking the chain of causation, in circumstances where Mr van Dongen could survive. Sir John drew an analogy however between the facts of this case and those of a hypothetical one in which a defendant took a victim to a cliff top, handcuffed him, poured petrol over him, set light to him, and the victim then threw himself over the edge of the cliff to his death, preferring to die on the rocks than to endure the pain any longer. Sir John said that a jury would plainly be entitled to conclude that the defendant's acts were at least a substantial cause of the victim's death. He said in his opinion, the position on the facts here was not so materially different. Sir John had earlier described the injuries sustained by Mr van Dongen as disturbing. He said Mr van Dongen's decision to terminate his life had to be considered against the background of his blindness, disfigurement, loss of limb, paralysis, with nothing but a life of frustration, disability, pain and suffering ahead of him. The Belgian doctors could not carry out the act of euthanasia unless it was concluded that the patient was in a "medically futile condition of constant and unbearable physical or mental suffering that cannot be alleviated".

26. Sir John concluded:

> "The jury would be entitled to say that Mr van Dongen's medically futile condition was constant and unbearable. In those circumstances, the jury could conclude his decision to undergo euthanasia did not break the chain of causation. They might even be entitled to say the defendant's act was the main or principal cause of death. They would certainly, in my judgment, be entitled to say it was a least a substantial cause…"

The trial

27. The defendant's trial commenced on 8 November 2017. In opening, the case for the prosecution was put on the basis that in throwing acid over Mr van Dongen, the defendant intended to cause him really serious harm. The prosecution witnesses gave evidence between 9 and 15 November 2015. These witnesses included Mr van Dongen senior, Ms Farquharson, Dr John Pleat, a specialist in burns and plastic surgery who was Mr van Dongen's treating consultant at Southmead Hospital and some of the members of the public who assisted Mr van Dongen at the scene. We have read agreed summaries of the relevant parts of that evidence. Additionally, Mr van Dongen gave two video recorded interviews to the police in July 2016 from his bed at Southmead Hospital, one of which were played to the jury and both of which we have seen. The submission of no case was made on 15 November 2017, and the judge gave her ruling on 20 November 2017. Following the hearing of this appeal, the judge discharged the jury.

The contested rulings

28. It is convenient to consider the two evidential rulings first as they identify the issues that were raised on the evidence which the prosecution wished to adduce before the submission of no case came to be made. We should emphasise however, that although we consider the merits, in the light of our conclusions on the terminating ruling, these matters can be revisited, if necessary, at the retrial.

The first evidential ruling

29. In the absence of direct evidence from the hospital in Belgium, the prosecution sought to adduce evidence of what Mr van Dongen was told by the medical staff in the form of hearsay evidence from Mr van Dongen senior. The prosecution said the purpose of doing so was to show Mr van Dongen's state of mind in deciding to make the request for euthanasia, rather than to establish the truth or accuracy of what he was being told.

30. The judge gave an initial ruling about this on 8 November 2017. In this ruling she acknowledged that Mr van Dongen senior could not give sensible evidence of what Mr van Dongen was thinking and feeling in his last days without speaking of what Mr van Dongen had been told or understood about his condition, treatment and prognosis. In her view, what he was told of his paralysis and of the need for intubation was admissible in order to establish Mr van Dongen's belief about his condition. This she decided was separable from the accuracy or otherwise of the underlying information. The jury could be told that the evidence went only to Mr van Dongen's state of mind and that it could not be treated as evidence of expert medical opinion. On that limited basis, the evidence was admissible hearsay.

31. There was, however, a passage in the father's witness statement that the judge was not prepared to allow. This was that: "Without the euthanasia [Mr van Dongen] would only have lived for another 2-3 days but in an inhumane way."

32. The judge's provisional view was that this evidence was inadmissible because it would be impossible for the jury to divorce the fact of the statement from the truth of its content. She decided however that she would review the position after further inquiries had been made to clarify the evidence.

33. In a further witness statement dated 8 November 2017 Mr van Dongen senior said he did not know the names of the doctors and nurses concerned but (in conversations taking place between Christmas and New Year's Day) they had told his son that he needed to have a tube in his throat to remove liquid from his lungs because he had a lung infection. Without this tube there was a chance he could choke and die as a result of the lung infection. However Mr van Dongen did not want a tube in his throat because there was a chance he could lose his voice and he wanted to be able to talk to his father until the end. The medical staff explained that if the tube was not inserted, and the liquid was not removed, Mr van Dongen would die. Depending on how severe the lung infection was and how it developed, it could be 2 to 3 days before he died but this could extend to 2 to 3 weeks.

34. On 9 November 2017 the judge heard further argument; having done so she adhered to her original view. Thus, she allowed the prosecution to adduce evidence through Mr van Dongen senior that his son had a chest infection; that he was advised that he

needed to have a tube or there was a chance he could die; that he did not want to be intubated as this risked losing his voice; that he had many conversations himself with medical staff; that his "head was 100 per cent"; that he definitely did not want a tube; that he had suffered enough pain, and could not fight anymore. However the judge did not permit the introduction of evidence of statements made by medical or nursing staff regarding Mr van Dongen's "survivable time without intubation". She said in circumstances where a key issue for the jury was or might be what caused Mr van Dongen's decision to die and whether this was a rational consequence of his injuries or a separate possibly irrational exercise of will, the accuracy of medical advice which he said he received in his last days prior to making that choice was a potentially critical consideration. To the extent that the father's evidence could be regarded as conveying statements from medical or nursing staff, it was impossible to divorce the fact of statements made by medical staff from their underlying truth or accuracy as expressions of medical opinion in those last few days.

35. The brief submission of Mr Vaitilingam QC to us was that there was no question of the jury, properly directed, becoming confused about the issues to which the excluded evidence went; the jury would be entitled to find that Mr van Dongen reasonably believed that he was soon to die as a result of the lung infection and that his assisted suicide merely accelerated the process. The judge's decision on this issue was, therefore, wrong.

36. Our conclusion can be shortly stated. We do not consider there is any sound basis for disturbing the judge's decision to draw the line where she did. It is apparent that the judge was astute to permit the prosecution to adduce sufficient evidence to enable the jury to assess Mr van Dongen's state of mind at the material time, to the extent that this was relevant. However she was also acutely conscious of the difficulty the jury might find, however carefully they were directed, in distinguishing the fact of what Mr van Dongen had been told in relation to his survival (if no tube was fitted to relieve his chest infection) from its underlying truth, and of the potential prejudice this might cause to the defence having regard in particular to two factors: the emotive nature of such evidence and the absence of medical records which meant there were no effective means of challenging it.

The second evidential ruling

37. The prosecution did not call evidence from any psychiatrist who had examined Mr van Dongen whilst he was a patient in Southmead Hospital. Nor was there any evidence about his psychiatric condition from the doctors in Belgium. In the absence of such evidence, the prosecution sought to adduce evidence from a consultant forensic psychiatrist, Dr Jayawickrama. He had not examined or treated Mr van Dongen, but produced a report (the report) that reviewed and commented upon the lay and medical evidence of Mr van Dongen's treatment whilst he was at Southmead Hospital.

38. The report identified from the medical notes when Mr van Dongen was seen by the mental health liaison team at Southmead Hospital and the prescription of anti-depressant medication. It seemed Mr van Dongen was seen frequently by the hospital mental health team up to July 2016 but there were no records after this, as Mr van Dongen had, from that point on, refused to see anyone from that team. The report and its conclusions were understandably "hedged about with caveats and qualifications"

as the judge was to put it. The most Dr Jayawickrama could say was that Mr van Dongen's symptoms, as reported to others, could be consistent with a diagnosis of post-traumatic stress disorder (PTSD). Dr Jayawickrama could not himself make such a diagnosis. For the period after July 2016 his report was reliant on the evidence of Ms. Farquharson and her description of flashbacks and night terrors spoken of by Mr van Dongen.

39. The prosecution submitted to the judge that Dr Jayawickrama was entitled to relate and interpret behavioural symptoms described by witnesses and the findings and opinions of mental health professionals; and that the prosecution were entitled to rely on his opinion that the symptoms displayed by Mr van Dongen were consistent with a diagnosis of PTSD and/or depression. Their argument was that if Mr van Dongen was suffering from a recognised psychiatric condition when he left Southmead Hospital, the jury could properly infer he was still suffering from this condition when he took steps to end his life in Belgium, which might be relevant to the issue of causation. The defence objected strongly to the introduction of this evidence. They argued that the prosecution was seeking to fill a gap in the available medical evidence with the opinion of an expert who had never examined the patient, had incomplete medical records of events in the United Kingdom and who had no access to any medical records in Belgium. Further, there was no evidence of examinations made by psychiatrists and psychologists who attended upon Mr van Dongen in Belgium, and there had been no diagnosis of psychiatric illness at the time. Those arguments have been briefly repeated before us.

40. Once again we can deal with the matter shortly. In her ruling the judge acknowledged that the evidence might very well be extremely important but said she had to consider first whether it was admissible and second whether it should nevertheless be excluded under section 78 of the Police and Criminal Evidence Act (PACE) 1984. She observed that though it would be wrong to characterise Dr Jayawickrama's opinion as mere speculation or as so unreliable as to require exclusion, the weight to be attached to his opinion could only be "very slight". She was concerned that to admit the evidence would risk confusing the jury. Weight being a matter for the jury she said she would nevertheless have felt obliged to admit the evidence, despite these concerns, were it not for the total absence of any psychiatric material obtained or disclosed from the hospital in Belgium. This was the "clinching factor" which rendered the admission of the evidence unfair. It was known that Mr van Dongen had been examined by psychiatrists in his last weeks of life but there was no information about their findings save that they must have confirmed unbearable physical and psychological suffering, as required by Belgian law. That was not a diagnosis of a recognisable psychiatric condition. Accordingly in her view, the evidence fell to be excluded under section 78 of PACE 1984 (on the grounds that having regard to all the circumstances, including the circumstances in which the evidence was obtained, the admission of the evidence would have such an adverse effect on the fairness of the proceedings that the court ought not to admit it). We can discern no error in the judge's ruling. In our view the judge was entitled to refuse to admit the evidence of Dr. Jayawickrama for the reasons she gave.

Submission of no case to answer

41. At the close of the prosecution case the defence made a submission of no case to answer on the count of murder.

42. The issue raised by the defence was that of legal causation. The defence conceded that had Mr van Dongen refused treatment and died in consequence, the chain of causation would not necessarily have been broken. It further conceded that had Mr van Dongen committed suicide by his own hand, then it would at least have been arguable that on those facts the case could have been left to the jury. However, whilst the defendant's actions may properly be seen as the "but for", or the factual cause of death, Mr van Dongen's choice to die, combined with the actions of the Belgian doctors who ended his life, constituted an intervening cause, or *novus actus interveniens,* breaking the chain of causation as a matter of law. If Mr van Dongen had been given a lethal injection by a doctor in this jurisdiction that doctor would have faced a charge of murder. Murder in this jurisdiction would be bound to have constituted an independent act. The fact that the killing was lawfully carried out in Belgium made no difference to the effect of the actions of the doctor in breaking the chain of causation.

43. The prosecution submitted however that it was not the task of the court to look for acts that broke the chain of causation. In the criminal context the proper approach was simply to ask the jury to consider the question whether the defendant's actions were a substantial and operating cause of death. The decision of Mr van Dongen to apply for euthanasia, and the doctor's act in giving effect to that decision, were matters which the jury would need to consider in answering that question, but the question itself was a matter of fact for them.

The judge's decision

44. The judge considered the issues of causation raised by this case with evident care. It is apparent that she was troubled by the fact that had the act of euthanasia taken place in this jurisdiction, this would have been murder, which in her view would inevitably have broken the causal link between the defendant's conduct and Mr van Dongen's death. She noted there was no factual dispute to be resolved by the jury as to the manner of Mr van Dongen's death, nor was there any question but that he was in a survivable condition, albeit with a much reduced quality of life, at the time that he died. Further the Belgian doctors were under no legal duty to end his life, and his decision to die, however objectively reasonable some might have considered it to be, was the very opposite of self-preservation. She drew a distinction between the man on the cliff top in the example given by Sir John Royce and the position in the present case. The man on the cliff top was going to die imminently whereas at the time his life was ended, Mr van Dongen had a life expectancy. Further, the circumstances of urgency for the man on the cliff top had been created by the actions of his attacker. Here the actions causing the injuries had occurred many months previously.

45. The judge said it had not been an easy decision. However, she said:

> "It seems to me that if one is to accord proper respect to the decision and actions of persons with free will acting autonomously (whether as a victim or third-party intervener) then the legal result of their free and voluntary choice and/or positive act to end their own or another's life must as I see it be to break with what had gone

before, disconnecting both the choice to die and the death itself from the circumstances generating the occasion for it. When Mark van Dongen made the brave, desperate, profoundly sad decision that his life with such appalling disability was so burdensome that he preferred to leave it, and when the doctors opened the door for him to go and ushered him through, his choice and their actions each disconnected his death, in law, from the culpable activity which had caused his dreadful injuries. In my view, a jury properly directed, could reach no other conclusion and for that reason I have decided that the case of murder must be withdrawn from them."

Discussion

46. "Causation is a central issue in result crimes, because causation is used to link the defendant with the criminal consequences of her action. It is not about imputing fault to the defendant, but rather about demonstrating that her conduct was an imputable (sufficiently proximate) cause of the proscribed harm. The question of fault arises only after causation has been established." See *Glanville Williams*, Criminal Law, 4th edition, edited by Dennis Baker).

47. "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." *Hart and Honoré*, Ch, XII, *Causation in the Law*, 2nd edition, p.326.

48. In *R v Hughes* [2013] UKSC Lord Hughes and Lord Toulson giving the judgment of the Court said:

"20. …It is trite law, and was common ground before us, that the meaning of causation is heavily context-specific and that Parliament (or in some cases the courts) may apply different legal rules of causation in different situations. Accordingly it is not always safe to suppose that there is a settled or "stable" concept of causation which can be applied in every case."

They went on to say:

" That said, there are well-recognised considerations which repeatedly arise in cases turning on causation. For the appellant Hughes, Mr Robert Smith QC relied upon two such recurrent propositions. The first is that a chain of causation between the act of A and a result may be broken by the voluntary, deliberate and informed act of B to bring about that result. The second is the distinction between "cause" in the sense of a sine qua non without which the consequence would not have occurred, and "cause" in the sense of something which was a legally effective cause of that consequence…

22. … Where there are multiple legally effective causes, whether of a road traffic accident or of any other event, it suffices if the act or omission under consideration is a significant (or substantial) cause, in the sense that it is not de minimis or minimal. It need not be the only or the principal cause. It must, however, be a cause which is more than de minimis, more than minimal: see *R v Hennigan* (1971) 1 All ER 133…

> 23. …In the case law there is a well recognised distinction between conduct which sets the stage for an occurrence and conduct which on a common sense view is regarded as instrumental in bringing about the occurrence. There is a helpful review of this topic in the judgment of Glidewell LJ in *Galoo Ltd v Bright Grahame Murray (a firm)* [1994] 1 WLR 1360. Amongst a number of English and Commonwealth cases of high authority, he cited at pp 1373-1374 the judgment of the High Court of Australia in *March v E & MH Stramare Pty Ltd* (1991) 171 CLR 506, 515, in which Mason CJ emphasised that it is wrong to place too much weight on the "but for" test to the exclusion of the "common sense" approach which the common law has always favoured, and that ultimately the common law approach is not susceptible to a formula."

49. The case presented by the prosecution on the facts here was not a complicated one. The defendant deliberately and unlawfully inflicted terrible injuries on Mr van Dongen. Those injuries disfigured and maimed him, leaving him in a permanent state of complete paralysis and unbearable physical and psychological suffering that could not be alleviated by his doctors. This, and the knowledge given to him in Belgium that he would never improve or recover, led to his decision to end his life. Because of the severity of his injuries, he was unable to kill himself, but euthanasia was then lawfully carried out in accordance with his wishes by doctors in Belgium where he was in hospital.

50. The issue that the judge had to address was whether the charge of murder could properly be left to the jury on these facts. More specifically, could a jury properly directed find the conduct of the defendant in throwing acid over Mr van Dongen was a legally sufficient cause of his death; or would the jury be bound to conclude (as, in the event, the judge decided) that the intervening actions of Mr van Dongen in asking for euthanasia and actions of the Belgian doctors in complying with his request had severed the causal connection between her conduct and his death, thereby absolving her of the legal responsibility for his death?

51. The argument for the defence in summary is that the defendant did not kill Mr van Dongen, the doctors in Belgium did. Their free, voluntary and informed act was designed to end life rather than to save it, would be charged as murder in this jurisdiction, and was properly to be regarded as the immediate cause of death, relegating the actions and responsibility of the defendant to no more than the factual context. This was not a case of suicide, where the victim ended his own life; thus Mr van Dongen's conduct did not fall to be looked at in isolation. It was instead inextricably linked with the conduct of the doctors. In any event, Mr van Dongen, unaffected by any psychiatric condition, had a free choice, and his choice of an act, carried out by his doctors and prohibited in this jurisdiction, broke the chain of causation. The prosecution contends however, as it did to the judge, that where causation is in issue in homicide cases, it is a question for the jury whether the injuries caused by a defendant are a substantial and operating cause of death, or whether an act or acts since then has relegated those injuries to history, so that they are no more than the setting in which the subsequent acts occur.

52. The resolution of the issues raised by this appeal is not easy for a number of reasons, which must be acknowledged. First, as has been said many times, causation is a

complex area of the law where the search for a comprehensive test of causation or set of principles has proved to be elusive. The difficulty stems no doubt from the vast array of circumstances in which issues of causation can arise and from the fact, as Mason CJ pointed out in *March v E and MH Stramore* (1991) 171 CLR 506, that considerations of policy and value judgments necessarily enter into the assessment of causation. Secondly, there has been no case in this jurisdiction so far as we are aware, in which the issue of causation has been considered in the context of an act of euthanasia or "mercy killing". Though the factual issues are relatively straightforward, the legal issues on causation that they give rise to are not. Thirdly, it is necessary to avoid an unduly theoretical approach to issues that in the context of a criminal trial will normally have to be resolved by a jury, with appropriate directions from the judge. Fourthly, in the case we are dealing with, the issue of causation has been dealt with part way through the trial, in an appeal against a terminating ruling. This means that the facts have not yet been fully explored. Further, the arguments presented to us on the law have, understandably, been relatively circumscribed and were only briefly canvassed in the appeal; what we say about the law, and our decision in this case, must be viewed with that in mind. In the end however, it seems to us that what divided the parties was not so much matters of legal principle, but the application of the law to these very unusual and challenging facts, involving as they do the horrible predicament and suffering of a dreadfully disfigured and paralysed man in unbearable and intractable pain - unable to kill himself by his own hand, voluntary euthanasia and a charge of murder.

53. It is trite that the first step in establishing causation, is the "but for" analysis. As already indicated, the defence accepted for the purposes of the application below, that the prosecution could establish there was a factual link between the defendant's conduct and Mr van Dongen's death. As Mr Smith QC put it to the judge (in an interesting choice of words): "but for the throwing of the acid, Mr van Dongen would not have taken his own life." There are a large number of events that would be capable of satisfying the "but for" test, however (the fact that the defendant and Mr van Dongen had met and had a relationship for example); and in our view it is necessary to begin the examination of the causation issues raised by considering the closeness of the connection between the relevant events in this case.

54. We have already referred to some of the evidence that Mr van Dongen senior was permitted to give, but it is helpful to give its full flavour (we should add we were told that what he had to say about his son's medical condition was not challenged during cross-examination).

55. In his evidence Mr van Dongen senior said that before he came to England Mark's health was good, and his "mental 100 per cent". As far as he knew, his son had never self-harmed or attempted suicide. As soon as he heard his son was injured, he came over to England; it was 3 to 4 months before Mark was able to communicate; and this was done by sticking out his tongue when his father pointed out a letter. It was 9 months before his son was actually able to speak (the medical evidence was this was through the use of a speaking valve). At some point he was able to move his arms with help, but as time went on, he lost the ability to move his arms and fingers. Going to Belgium was discussed, but he wanted to stay in England as he was quite happy there and had a new girlfriend. Whilst Mark was in hospital, he remained positive. He was happy to be discharged from hospital, as he had been promised one to one care

and there was space for Ms Farquharson to stay with him. He wanted to return to a normal life. When Mr van Dongen came to the care home he found his son screaming and lying in his own faeces. They left England and arrived at the St Maria Hospital the same day.

56. His son was immediately put into the palliative care unit so he could calm down, and the nurses could get used to the way he looked. From then on, his father spent 23 ½ hours a day with him. 8 neurologists came to see his son. Mark and he would then discuss what had been said. Mark was told his paralysis would be permanent. The fact that he couldn't move his arms was "the straw that breaks the camel's back". He then completed the form for euthanasia; he said his life had come to nothing and that if he went home with his father, it was "just a different ceiling to look at." He was on a near maximum dose of painkillers. Psychologists and doctors came to visit and assessed Mark. They all gave their consent to euthanasia. There is a 30-day period after the application, and so the application was possibly made on 1 December 2016, 4 days after Mark arrived in Belgium. The 30-day period ran out on New Year's Eve. Mark was not intubated during his time in Belgium. After he had been there for 3 weeks the doctors said he had a lung infection. He was warned that if he was not intubated there was a chance he would choke and die; he was warned there was a 96 per cent chance of him losing his voice if he were intubated. He did not want the tube. (Dr Pleat said in evidence that when a tracheotomy is in place and used to remove secretions, it is a horrible thing: it makes you feel as if you are going to gag and be sick). He did not want any more pain or surgery and he wanted to be able to talk to his father "until the very last second". The infection became very acute and Mark said he did not want to go any further; he just wanted to die. During his time in Belgium his son was 100 per cent conscious, he was able to hold conversations and was able to speak to medical staff.

57. In addition, as a result of the admissions made at trial in relation to the events in Belgium, including that euthanasia had been carried out in accordance with the requirements of Belgium law, the following was common ground. The physicians "ensured": (i) Mr van Dongen was legally competent and conscious at the moment of making the request for euthanasia; (ii) his request for euthanasia was voluntary, well-considered and repeated, and was not the result of any external pressure; (iii) he was in a medically futile condition of constant and unbearable physical and psychological suffering that could not be alleviated, resulting from a serious and incurable disorder; (iv) the physician concerned, together with Mr van Dongen, had come to the belief that there was no reasonable alternative to Mr van Dongen's situation and that his request for euthanasia was completely voluntary; (v) The physician was certain of Mr van Dongen's constant physical and mental suffering and of the durable nature of his request. To this end, the physician had had several conversations with Mr van Dongen spread out over a reasonable period of time, taking into account the progress of his condition; (vi) The physician had consulted another physician about the serious and incurable character of Mr van Dongen's disorder and had informed him/her about the reasons for this consultation; (vii) The physician believed Mr van Dongen was clearly not expected to die in the near future, and so had consulted a second physician and allowed at least one month between his written request and the act of euthanasia.

58. On the facts of this case it could not sensibly be disputed (or such was the prosecution case) that Mr van Dongen's unbearable physical and psychological suffering at the

time of his death resulted from the dreadful injuries inflicted on him by the defendant. Nor could it be disputed that but for those injuries and that unbearable suffering, Mr van Dongen would not have requested euthanasia nor would or could his doctors have (lawfully) carried it out. The connection between the inflicted injuries and death was therefore a direct and discernible one. It was not blurred, for example, by any pre-existing suicidal tendency on the part of Mr van Dongen, or by any other physical or mental condition he may have had before the injuries were inflicted. Further, though Mr van Dongen was not expected to die in the near future, he remained profoundly damaged by the injuries inflicted on him by the defendant, and continued to suffer severe physical and psychological effects (or sequelae) from those injuries up to the moment of his death. In the circumstances, his position could not realistically be equated with that of someone in a more conventional case, a stabbing for example, whose wounds had healed or nearly healed (with no other effects) - at least without standing reality on its head.

59. It may be thought that a jury could properly conclude on these very special and particular facts that Mr van Dongen's decision to ask for euthanasia and the Belgian doctors' acts in carrying it out resulted from the injuries that the defendant had inflicted upon him. Further, that the jury could properly reach such a conclusion despite the separation in time between the events at either end of the putative chain of causation (the defendant's conduct at one end and Mr van Dongen's death at the other) having regard to the continuing effect of his injuries and to the evidence that he decided to ask for euthanasia when he was told after his arrival in Belgium that his condition of complete paralysis was permanent ("the straw that breaks the camel's back").

60. The intervening acts of Mr van Dongen and the doctors were not, on these facts, random extraneous events, or acts unconnected with the fault element of the defendant's conduct. They were very closely, indeed inextricably, bound up with it. Equally, the injuries and their sequelae were not a random result of the defendant's conduct: on the evidence of Mr van Dongen, the defendant planned to inflict permanent and horrific injuries on him and succeeded ("If I can't have you, no-one else will").

61. Looked at in this way, Mr van Dongen's death, his request to the doctors, and the act of euthanasia itself carried out in accordance with his wishes, were not discrete acts or events independent of the defendant's conduct, nor were they voluntary, if by this is meant they were the product of the sort of free and unfettered volition presupposed by the *novus actus* rule. Instead they were a direct response to the inflicted injuries and to the circumstances created by them for which the defendant was responsible. If the question is then asked whether, on a common sense view, the defendant's conduct merely set the stage for Mr van Dongen's death, or was instrumental in bringing it about, we consider the jury could properly answer that question in the prosecution's favour.

62. In arriving at that conclusion, the following matters are in our view important.

63. As was said by Karakatsanis J giving the judgment of the court in *R v Maybin* [2012] SCC 24; [2012] 2 SCR 30 at [29]: "Any assessment of legal causation should maintain focus on whether *the accused* [our emphasis] should be held legally

responsible for the consequences of his actions, or whether holding the accused responsible for the death would amount to punishing a moral innocent."

64. In that connection, though an assessment has to be made in the overall scheme of things of the causative significance of intervening acts or events, the all-important question on legal causation remains whether "the accused's acts can fairly be said to have made *a* significant contribution to the victim's death". It would be idle to pretend there is complete consistency in the principles that have been applied by the courts to determine causation issues when they have arisen. Nevertheless it is plain that the key factual question when evaluating legal causation in homicide cases – whether more than one cause is said to operate or not – is, as we have said whether the accused acts can fairly be said to have made *a* significant contribution to the victim's death. See further *R v Miller* [1996] 2 Cr. App. R. 245 at 263. We would add that the cause need not be substantial to render a defendant guilty: see *R v Cato* [1976 1 All ER 260 at 265-6, and *R v Malcherek*; *R v Steel* [1981] 1 WLR 690; 2 All ER 422 at 428. In *Maybin* Karakatsanis J also said:

"[60] Courts have used a number of analytical approaches to determine when an intervening act absolves the accused of legal responsibility for manslaughter. These approaches grapple with the issue of the moral connection between the accused's acts and the death; they acknowledge that an intervening act that is reasonably foreseeable to the accused may well not break the chain of causation, and that an independent and intentional act by a third party may in some cases make it unfair to hold the accused responsible. In my view, these approaches may be useful tools depending upon the factual context. However, the analysis must focus on first principles and recognize that these tools do not alter the standard of causation or substitute new tests. The dangerous and unlawful acts of the accused must be a significant contributing cause of the victim's death."

65. In *R v Cheshire* [1991] 93 Cr. App. R. 251 at p.258 Beldam LJ gave the judgment of the court (Beldam LJ, Hidden and Buxton JJ). *Cheshire* was one of a number of well-known cases where the intervening act severing the causal connection was said to be medical intervention. In that case, the victim of two gunshot wounds inflicted by the accused, died two months later in hospital and the accused was charged with his murder. The cause of death was given as cardio-respiratory arrest due to gunshot wounds of the leg and abdomen. At his trial for murder however the accused called expert evidence that by the time of death, the wounds no longer threatened the victim's life, and the victim had died from a rare but not unknown complication from the treatment he had received (respiratory obstruction due to the narrowing of the throat near a tracheotomy scar). It was contended therefore that medical negligence had caused the victim's death. The accused was convicted of murder and appealed on the ground that the judge's direction to the jury on causation had virtually withdrawn the issue of medical negligence as a cause of death. His appeal against conviction was dismissed.

66. After reviewing a number of cases including *R v Jordan*, [1956] 40 Cr. App. R 152, *R v Pagett* [1983] 76 Cr. App. R. 279 at p.288, *R v Smith* [1959] 2 Q.B. 35 and *Evans v Gardiner (No 2)* [1976] V.R. 523 Beldam LJ put the matter in this way:

"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."

67. In *Smith* the appellant had stabbed a fellow soldier with a bayonet. One of the wounds had pierced the victim's lung and had caused bleeding. Whilst being carried to the medical hut or reception centre for treatment, the victim was dropped twice and then, when he reached the treatment centre, he was given treatment which was subsequently shown to have been incorrect. Lord Parker C.J., who gave the judgment of the court said, at pp. 42 to 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 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."

68. A similar approach was taken by the court in *R v Dear* (Rose LJ, Hidden and Buxton JJ). [1]There is a report of the case at [1996] Crim. LR 595, and we have been provided with a transcript. The intervening act in this case was said to be the suicide of the victim. The accused had slashed the deceased's face with a Stanley knife, believing he had sexually assaulted the accused's young daughter. The victim subsequently died, and the accused was charged with his murder. In his direction to the jury, the trial judge left it open to the jury to find that causation could be established if the victim, as an act of suicide motivated by the horrific facial injuries he had sustained in the attack, had re-opened wounds that had healed, or nearly healed. The judge said:

[1] See further, the observations, obiter by Sir Igor Judge, P. in *R v Dhaliwal* [2006] EWCA Crim. 1139 at paras 7, 8 and 31.

"If you conclude that [the deceased] may have taken steps which caused his own death, for example, deliberately reopening his wounds, if you are satisfied that he would not have done that…if the defendant had not attacked and wounded him, if the only reason was because of the attack then the defendant would have caused his death even though the deceased himself assisted therein …[but] if you come to the conclusion that he might have taken his own life in any event whether or not he had been cut in the way that he was…you may think it would not be therefore, the attack, an operating and substantial cause."

69. In dismissing the appeal, Rose LJ endorsed the trial judge's direction. He said:

"The real question in this case, as in *Smith, Blaue and Malcharek* was, as the judge correctly directed the jury, whether the injuries inflicted by the appellant were an operating and significant cause of the death. It is immaterial whether some other cause was operating. It would not, in our judgment, be helpful to juries if the law required them, as [defence counsel] suggest, to decide causation in a case such as the present by embarking on an analysis of whether a victim had treated himself with mere negligence or gross neglect, the latter breaking but the former not breaking the chain of causation between the defendant's wrongful act and the victim's death.

Throughout this century in the civil law, which in this area is concerned with the apportionment of fault and causation for the purpose of compensation, judges and academic writers have grappled with causation and the roles which the concept of novus actus interveniens and foreseeability do or should play in it. Conclusions as to the true analysis have varied from time to time at the highest level. It would in our judgment be a retrograde step if those niceties were to invade the criminal law, which as Beldam LJ pointed out in *Cheshire* at page 255, is not concerned with questions of apportionment.

The correct approach in the criminal law is that enunciated in *Smith* and the other authorities to which we have referred: were the injuries inflicted by the defendant an operating and significant cause of death? That question, in our judgment, is necessarily answered, not by philosophical analysis, but by common sense according to all the circumstances of the particular case.

In the present case the cause of the deceased's death was bleeding from the artery which the defendant had severed. Whether or not the resumption or continuation of that bleeding was deliberately caused by the deceased, the jury were entitled to find that the defendant's conduct made an operative and significant contribution to the death."

70. As Professor John Smith pointed out in his commentary on *Dear* in the Criminal Law Review:

"If the wounds inflicted by D, however maltreated by the deceased's (V's) own acts, were an operating and substantial physical cause of death, then the decision seems to be well supported by the authorities. There was then more than one cause of death and

it is sufficient that the wound inflicted by D was one of two or more causes. If, however, the wounds were effectively healed when D took the Stanley knife to himself, it is not so clear that the wounds were an operating and substantial physical cause of death. Arguably, it was then the same as if he had cut his throat or blown his brains out--acts which would have killed him whether he was wounded or not. The direction was in sufficiently wide terms for the jury to have convicted even if, and, indeed, was in terms which were only necessary only if, they thought that was effectively the situation.

It was apparently regarded as immaterial that P's conduct was unforeseeable. In this respect the decision is not easily reconcilable with the long line of cases referred to in the commentary on *Corbett*[2], above. If, in consequence of being wounded, V had blown his brains out, that line of cases holds that the jury must be satisfied that such an act was within the range of responses which might have been expected from a victim in his situation. If this reaction (whether by blowing his brains out or doing what he actually did) was (in the words used by the defendant in *Roberts* (1971) 55 Cr.App.R. 95[3] so "daft as to make it [V's] own voluntary act", the chain of causation is broken. It seems that, pace *Blaue*, D does not have to take a "daft" victim as he finds him."

He went on to say:

"It is interesting to note (*The Times*, June 14, 1996) that a coroner held that "cowboy builders" had unlawfully killed an elderly man who hanged himself because of his distress at having been cheated by the cowboys into paying £4,000 for minor building work. On the direction in the present case, the conclusion that the cowboys caused the death seems to be correct: the deceased took the action because he had been cheated and he would not have taken that action if he had not been cheated. But, if we have to ask the further question, whether suicide was within the range of responses which might have been expected from a victim of such conduct, the answer is by no means so clear…"

71. Amongst the cases in the long line to which Professor Smith referred were *R v Roberts* [1971] 56 Cr. App. R. 95 and *R v Williams & Davis* [1992] Crim. LR 19.[4] In the former case, the accused made advances to a girl in his car. When he tried to take her coat off, it was "the last straw", and she was injured when she jumped out of the car which was travelling at speed. The accused's appeal against his conviction for assault occasioning actual bodily harm was dismissed. In the latter case, the three accused picked up a hitchhiker who sustained fatal head injuries when he jumped out of the car when it was travelling at 30 mph. The accused were tried on charges of manslaughter and robbery, on the basis that there had been a joint enterprise to rob the deceased, who had met his death trying to escape. One was acquitted and two were convicted of robbery and manslaughter. The convictions for robbery were quashed, as were those for manslaughter which depended on them (because what evidence there

[2] R v Corbett [1996] Crim. LR. 594.
[3] The correct citation is (1971) 56 Cr App R 95.
[4] See further, *R v Lewis* [2010] EWCA Crim. 151.

was of joint enterprise to rob bore equally against all three accused, and given their verdict, the jury must have used the statement of one of the accused against the other).

72. In *Roberts* the judgment of the court was given by Stephenson LJ who said at p.102:

"The test is: Was [the victim's reaction] 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 consequences 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."

73. In *Williams and Davis* it is to be noted that the Court of Appeal said not only should the victim's reaction be reasonably foreseeable, but that this could be gauged by the victim's characteristics and the circumstances in which he or she had been placed (by the accused). At p. 8, Stuart-Smith LJ giving the judgment of the court said:

"…the nature of the threat is of importance in considering both the foreseeability of harm to the victim from the threat and the question whether the deceased's conduct was proportionate to the threat; that is to say that it was within the ambit of reasonableness and not so daft as to make it his own voluntary act which amounted to a *novus actus interveniens* and consequently broke the chain of causation. It should of course be borne in mind that a victim may in the agony of the moment do the wrong thing."

He went on to say:

"The jury should consider whether the deceased's reaction in jumping from the moving car was within the range of response which might be expected from a victim placed in the situation 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."

74. A similar focus on the position of the victim, in the circumstances in which she had been placed (by the unlawful conduct of the accused) is to be found in *R v Blaue*. In *Blaue* the victim of a stabbing refused a blood transfusion which would have saved her life (as she was a Jehovah's Witness), even though she was warned that she might die if she did so. The accused's conviction for manslaughter was upheld. Lawton LJ said:

"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."

75. It is undoubtedly the case that, generally speaking, informed adults of sound mind are treated by the law as autonomous beings able to make their own decisions about how they would act, and that a defendant may not be held responsible for the deliberate act of such a person. See for example *R v Latif R v Shahzad* [1996] 2 Cr. App. R. 92 and *R v Kennedy (No 2)* [2007] UKHL 38, [2008] 1 AC 269, in particular the observations of Lord Bingham of Cornhill at paras 14 and 15. In both of those cases the passage from *Hart and Honoré* mentioned above was cited with approval. In *Kennedy* the accused prepared a syringe of heroin and handed it to B who injected himself, returned the syringe to the accused and died shortly afterwards from the effects of the drug. The House of Lords held that the accused had not "caused" the drug to be administered in a breach of section 23 of the 1861 Act[5]. This was because B had, knowing what he was doing, chosen (freely and voluntarily) whether to inject himself or not.

76. However, it could be said that the position of the drug addict was not truly analogous to that of Mr van Dongen, any more than it would have been to that of the victims in *Dear, Roberts* and *Williams* or to that of the third party doctors in *Cheshire* and *Smith*. *Kennedy* was not concerned, as some of those cases were, and the jury could conclude this one is, with a response by a victim to (extreme) circumstances created by a defendant's unlawful act, which were persisting, and which had put the victim into a position where he made a "choice" that he would never otherwise have had to make or would have made (not therefore, as we have already said, the sort of free and unfettered volition presupposed by the *novus actus* rule). In the circumstances, in our view the fact that the Belgian doctors considered Mr van Dongen's decision/request to be "voluntary" for the purposes of the Belgian law on euthanasia does not determine whether his decision was voluntary for the purposes of the different legal issues arising here. To adapt the words used by Sedley LJ to describe the suicide of a worker in *Corr v IBC Transport* [2006] EWCA Civ. 331, [2007] QB 46 at para 69 (acknowledging as we do the different context in which they were used) the jury may conclude on the very special facts of this case, that there was nothing that could decently be described as voluntary either in the suffering or in the decision by Mr van Dongen to end his life, given the truly terrible situation he was in.

77. We are not persuaded either that the intervention of the doctors is determinative of the issue of legal causation in the defendant's favour. It is not contentious that it would have been unlawful in this jurisdiction to give Mr van Dongen a lethal injection to end his life.[6] See for example, *R (Nicklinson) v Ministry of Justice* [2014] UKSC 38; 3

[5] "Whoever shall unlawfully…administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as to thereby endanger the life of such a person, or so thereby to inflict on such a person any grievous bodily harm, shall be guilty of [and offence]…"

[6] It is by no means clear that the mere fact that an intervening act is unlawful is determinative as to its status as a *novus actus interveniens*: see for example, the obiter observations of Lord Clarke in *R v Gnango* [2011] UKSC

ALL ER 843, *R v Inglis* [2011] 1WLR 1110, *Pretty v Director of Public Prosecutions* [2002] 1 AC 800 and *Airedale NHS Trust v Bland* [1993] AC 789. To be clear, we were not invited by either side to consider any of these cases, or their more specific implications for the matters under consideration in this appeal. Keeping one's eye on first principles however, the focus of the inquiry in this case is the defendant's legal responsibility or otherwise for causing Mr van Dongen's death, not that of the doctors (she is charged with murder and they are not). The intervening act(s) occurred in Belgium where they were lawful. Mr van Dongen's father lived in Belgium; and he brought his son from England to Belgium when the care home which his son went to proved to be unsuitable. On the evidence, which we must assume to be established for present purposes, Mr van Dongen decided to ask for euthanasia after he had arrived in in Belgium and realised the overwhelming magnitude and permanence of his disability ("the straw that breaks the camel's back"). This case must be determined on its own particular facts, and not on a hypothetical basis.

78. It is true, as the judge pointed out, that the doctors were under no positive duty to agree to carry out euthanasia (because Article 14 of the Belgium 2002 Act gives scope for those doctors who did not wish to carry out euthanasia the right to refuse to do so). In this connection we should refer to the decision of the Court of Appeal in *Pagett*.

79. The facts of *Pagett* were these. The accused was charged with the murder of a 16-year old girl who he had taken hostage and used as a human shield in an armed stand-off with the police. She was shot by police, instinctively responding to shots fired by the accused. The accused was charged with her murder and convicted of manslaughter. In the course of his summing up the judge directed the jury that if they found certain facts that he specified to be proved then the accused would have caused or been a cause of her death. These facts included that the accused had fired first; that his shots had caused the officers to fire back; that in firing back, the officers had acted in reasonable self defence or in the performance of their duty as officers or both. In the appeal it was argued amongst other things that the judge should have left it to the jury to determine as an issue of fact whether the accused's act in firing at the officers was a substantial or operative or imputable cause of the death.

80. Goff LJ gave the judgment of court (Goff LJ, Cantley, Farquharson JJ). At p.288 and following he said:

> "Now the whole subject of causation in the law has been the subject of a well-known and most distinguished treatise by Professors Hart and Honoré, *Causation in the Law*. ..Among the examples which the authors give of non-voluntary conduct, which is not effective to relieve the accused of responsibility, are two which are germane to the present case, *viz.* a reasonable act performed for the purpose of self-preservation, and an act done in performance of a legal duty.
>
> There can, we consider, be no doubt that a reasonable act performed for the purpose of self-preservation, being of course itself an act caused by the accused's own act,

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59 2 WLR 17, 1 Cr. App. R. 1 at paras 83 to 91. See further, the discussion of *Pagett* in *Smith and Hogan* 14th edition at para 4.5.6.3, p.98.

does not operate as a *novus actus interveniens*. If authority is needed for this almost self-evident proposition, it is to be found in such cases as *Pitts* (1842) C. & M. 284 , and *Curley* (1909) 2 Cr.App.R. 96. In both these cases, the act performed for the purpose of self-preservation consisted of an act by the victim in attempting to escape from the violence of the accused, which in fact resulted in the victim's death. In each case it was held as a matter of law that, if the victim acted in a reasonable attempt to escape the violence of the accused, the death of the victim was caused by the act of the accused. Now one form of self-preservation is self-defence; for present purposes, we can see no distinction in principle between an attempt to escape the consequences of the accused's act, and a response which takes the form of self-defence. Furthermore, in our judgment, if a reasonable act of self-defence against the act of the accused causes the death of a third party, we can see no reason in principle why the act of self-defence, being an involuntary act caused by the act of the accused, should relieve the accused from criminal responsibility for the death of the third party…

No English authority was cited to us, nor we think to the learned judge, in support of the proposition that an act done in the execution of a legal duty, again of course being an act itself caused by the act of the accused, does not operate as a *novus actus interveniens* ...as a matter of principle such an act cannot be regarded as a voluntary act independent of the wrongful act of the accused… Where, for example, a police officer in the execution of his duty acts to prevent a crime, or to apprehend a person suspected of a crime, the case is surely *a fortiori*. Of course, it is inherent in the requirement that the police officer, or other person, must be acting in the execution of his duty that his act should be reasonable in all the circumstances: see section 3 of the Criminal Law Act 1967…"

He went on to say:

"The principles which we have stated are principles of law… It follows that where, in any particular case, there is an issue concerned with what we have for convenience called *novus actus interveniens*, it will be appropriate for the judge to direct the jury in accordance with these principles. It does not however follow that it is accurate to state broadly that causation is a question of law. On the contrary, generally speaking causation is a question of fact for the jury… But that does not mean that there are no principles of law relating to causation, so that no directions on law are ever to be given to a jury on the question of causation. On the contrary, we have already pointed out one familiar direction which is given on causation, which is that the accused's act need not be the sole, or even the main, cause of the victim's death for his act to be held to have caused the death… in cases where there is an issue whether the act of the victim or of a third party constituted a *novus actus interveniens*, breaking the causal connection between the act of the accused and the death of the victim, it would be appropriate for the judge to direct the jury, of course in the most simple terms, in accordance with the legal principles which they have to apply. It would then fall to the jury to decide the relevant factual issues which, identified with reference to those legal principles, will lead to the conclusion whether or not the prosecution have established the guilt of the accused of the crime of which he is charged…"

81. As can be seen the Court of Appeal held in *Pagett* that an act done in the execution of a legal duty (being an act caused by the act of the accused) does not operate as

a *novus actus interveniens* because as a matter of principle such an act cannot be regarded as a voluntary act, independent of the wrongful act of the accused. However *Pagett* described acts that were *not* to be treated as constituting a voluntary intervening act; the court was not defining the outer limits or boundaries of what *must* be treated as a *novus actus interven*iens in all circumstances. We think it is going too far therefore to say that the fact that the doctors in Belgium were not obliged to carry out Mr van Dongen's wishes, because of the existence of what amounted to a conscience clause in Article 14, precludes a finding by the jury that legal causation is established in this case. On the evidence, the doctors were doing no more than lawfully carrying out Mr van Dongen's wishes. They were acting in accordance with the law. In those circumstances, it seems to us there is little that is meaningful – on the duty issue at least - in the distinction between their conduct and that of the officers in *Pagett* who were surely not obliged to fire at the accused in that case, even if on the facts their conduct in doing so was lawful.

82. Foreseeability was not a feature of the court's decision in *Dear*. Nor was it in *Kennedy*, a point subsequently considered in *R v Dean Girdler* [2009] EWCA Crim. 2666. In *Girdler* it was decided that there was a need for a test which places an outside limit on the culpability of a driver in in circumstances where there is more than a trifling link between the dangerous (or careless) driving and a death in order to avoid consequences which are simply too remote from the driver's culpable conduct. This test where a defendant's case was that there was a new and supervening act or event, was an objective one of reasonable foreseeability (or as reworded for a jury "could [the supervening event] have been sensibly anticipated": see paras 35 and following).

83. We were told that foreseeability was not an issue raised by or before the judge in our case. The following summary by the learned editors of Smith and Hogan's Criminal Law, 14th edition, at para 4.5.6 however provides a helpful statement of the principles which may be applied in determining whether an intervening act by a third party or a victim may operate to "break the chain of causation" (see also the Crown Court Compendium at para 7.9):

"If despite the intervening event, D's conduct remains a "substantial and operative cause" of the result, D will remain responsible; and if the intervention is by another person, that actor may also become liable in such circumstances. Subject to this, and some exceptional cases the principles appear to be as follows: …

(3) In relation to third party interventions, D will not be liable if a third party's intervening act is either;

(a) One of a free, deliberate and informed nature (whether reasonably foreseeable or not);

(b) If not a free, deliberate and informed act, one which was not reasonably foreseeable...

(5) In relation to victims:

(a) D *will* be liable if the victim has a pre-existing condition (which includes, after *Blaue* a religious belief*)* rendering him unusually vulnerable to physical injury…

(b) D *will not* be liable if the victim's subsequent conduct in response to D's act is not within a range of responses that could be regarded as reasonable in the circumstances. Was V's act so "daft" as to be wholly disproportionate to D's act? If so, it will break the chain."

84. We refer also to the observations in *Maybin* at paras 34 and 38. In *Maybin* D and his brother punched V in a bar room brawl, rendering V unconscious; the bar's bouncer then punched V to the head. V died of a brain haemorrhage and the medical evidence could not determine whether the blows of D or the bar bouncer had led to V's death. The trial judge acquitted the brothers and the bouncer of manslaughter. The Court of Appeal of British Columbia Supreme Court allowed the prosecutor's appeal in respect of the brothers, ordering a new trial, but dismissed the appeal in respect of the bouncer. The Supreme Court dismissed the brothers' appeal, finding at [61] that based on the trial judge's finding of fact it was open to him to conclude "that the general nature of the intervening act and the accompanying risk of harm were reasonably foreseeable; and that the act was in direct response to the appellants' unlawful actions." The case was remitted for a retrial. Karakatsanis J said:

"[34] In my view, the chain of causation should not be broken only because the specific subsequent attack by the bouncer was not reasonably foreseeable. Because the time to assess reasonable foreseeability is at the time of the initial assault, rather than at the time of the intervening act, it is too restrictive to require that the precise details of the event be objectively foreseeable. In some cases, while the general nature of the ensuing acts and the risk of further harm may be reasonably likely, the specific manner in which it could occur may be entirely unpredictable. From the perspective of moral responsibility, it is sufficient if the general nature of the intervening act and the risk of non-trivial harm are objectively foreseeable at the time of the dangerous and unlawful acts.

[38] For these reasons, I conclude that it is the general nature of the intervening acts and the accompanying risk of harm that needs to be reasonably foreseeable. Legal causation does not require that the accused must objectively foresee the precise future consequences of their conduct…"

85. It would, as the prosecution say, seem an odd result, if a defendant who paralysed one victim but not another in identical circumstances (so the second could take their own life, but the first could only do so through the intervention of a third party) would be legally responsible for the death of the second victim but not the first. In the event we consider that the jury could conclude on the facts as they were here that the acts of Mr van Dongen and the doctors were not sensibly divisible; that the doctors' (lawful) conduct in carrying out with their hands what he could not carry out with his own was but one link in the chain of events instigated by the defendant and, notwithstanding the intervening act of Mr van Dongen and/or the doctors, the defendant's conduct could fairly be said to have made *a* significant contribution to Mr van Dongen's death. We have not lost sight of the issue of self-preservation and the fact that in none of the cases mentioned in *Pagett* was the victim's response one intended to bring about death (however grave the risk taken that it might do so). But in the light of the decision in *Dear* the seeking of death (suicide in that case) as a response to horrific

injuries does not preclude the jury finding that the defendant's conduct made a significant contribution to Mr van Dongen's death.

86. The prosecution's appeal is accordingly allowed. A new trial will be ordered. It will be a matter for the trial judge to decide with the assistance of counsel the precise form of directions to give to the jury; and inevitably those directions will be tailored to the way the case has developed, by the end of the evidence. It may be helpful if we say however that we consider this wording or something similar may be appropriate:

Deliberate and unlawful act

1. Are you sure that the defendant deliberately threw acid over Mr van Dongen?

Intention

2. Are you sure that at the time of the attack the defendant intended to kill Mr van Dongen or at least cause him serious bodily harm?

Causation

3. In order to convict the defendant on count 1 you must be sure that the defendant's unlawful act of throwing acid over Mr van Dongen caused his death.

This is a question of fact that you should answer using your collective common sense. It is common ground that but for the injuries caused by the acid attack, Mr van Dongen would not have undergone voluntary euthanasia. If you are sure this is the case, go on to ask yourself:

(a) Are you sure that the defendant's unlawful act of throwing acid over Mr van Dongen was a significant and operating cause of death? The injuries do not need to be the only cause of death but they must play more than a minimal part in causing Mr van Dongen's death.

Consider all the circumstances, including the nature and extent of Mr van Dongen's injuries, the passage of time, intervening events, the involvement of the doctors in carrying out the voluntary euthanasia at Mr van Dongen's request, what Mr van Dongen was told and what he said.

If your answer is yes, proceed to question 3(b). If you are not sure, your verdict on count 1 will be not guilty.

(b) Are you sure that at the time of the acid attack it was reasonably foreseeable that the defendant would commit suicide as a result of his injuries? In answering this question consider all the circumstances, including the nature of the attack, what the defendant did and said at the time and whether or not Mr van Dongen's decision to undergo voluntary euthanasia fell within the range of responses which might have been expected from a victim in his situation. If your answer is yes, your verdict on count 1 will be guilty. If your answer is no, your verdict on count 1 will be not guilty.

HOUSE OF LORDS

SESSION 2006–07
47th REPORT
([2007] UKHL 38)

on appeal from: [2005] EWCA Crim 685

APPELLATE COMMITTEE

R.
v.
KENNEDY (ON APPEAL FROM THE COURT OF APPEAL (CRIMINAL DIVISION))

REPORT

Counsel

Appellant:
Patrick O'Connor QC
David Bentley
(Instructed by Bulllivant & Partners)

Respondent:
David Perry QC
Duncan Penny
(Instructed by Crown Prosecution Service)

Hearing date:
30 July 2007

Ordered to be printed: 17 October 2007

(HL Paper 178)

FORTY-SEVENTH REPORT

from the Appellate Committee

17 OCTOBER 2007

R *v.* Kennedy (On Appeal from the Court of Appeal (Criminal Division))

ORDERED TO REPORT

The Committee (Lord Bingham of Cornhill, Lord Rodger of Earlsferry, Baroness Hale of Richmond, Lord Carswell and Lord Mance) have met and considered the cause *R v. Kennedy (On Appeal from the Court of Appeal (Criminal Division)).* We have heard counsel on behalf of the appellants and respondents.

1. This is the considered opinion of the committee.

2. The question certified by the Court of Appeal Criminal Division for the opinion of the House neatly encapsulates the question raised by this appeal:

> "When is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of a class A controlled drug, which is then freely and voluntarily self-administered by the person to whom it was supplied, and the administration of the drug then causes his death?"

3. The agreed facts are clear and simple. The appellant lived in a hostel in which Marco Bosque and Andrew Cody, who shared a room, also lived. On 10 September 1996 the appellant visited the room which Bosque and Cody shared. Bosque was drinking with Cody. According to Cody, Bosque told the appellant that he wanted "a bit to make him sleep" and the appellant told Bosque to take care that he did not go to sleep permanently. The appellant prepared a dose of heroin for the deceased and gave him a syringe ready for injection. The deceased then injected himself and returned the empty syringe to the appellant, who left the room. Bosque then appeared to stop breathing. An ambulance was called and he was taken to hospital, where he was pronounced dead. The cause of death was inhalation of gastric contents while acutely intoxicated by opiates and alcohol.

4. The appellant was tried at the Central Criminal Court on an indictment containing two counts: an unparticularised count of manslaughter; and a count of supplying a class A drug (heroin) to another in contravention of section 4(1) of the Misuse of Drugs Act 1971. The appellant pleaded not guilty to both counts but on 26 November 1997 he was convicted of each. He was sentenced to five years' imprisonment on the first count and three years' concurrent on the second. He was granted leave to appeal against the conviction of manslaughter but his appeal was dismissed by the Court of Appeal Criminal Division (Waller LJ, Hidden J and His Honour Judge Rivlin QC) on 31 July 1998: [1999] Crim LR 65. On that appeal the appellant no longer disputed that he had supplied the heroin to the deceased, and that has not since been in issue.

5. Prompted by doubts as to the soundness of the Court of Appeal's grounds for dismissing the appellant's first appeal and the safety of his conviction, the Criminal Cases Review Commission on 24 February 2004 exercised its power under section 9 of the Criminal Appeal Act 1995 to refer the appellant's manslaughter conviction back to the Court of Appeal, for reasons which it set out in considerable detail. The reference therefore fell to be treated as an appeal, which the Court of Appeal (Lord Woolf CJ, Davis and Field JJ) heard on 31 January and dismissed on 17 March 2005: [2005] EWCA Crim 685, [2005] 1 WLR 2159. This is the decision which the appellant now challenges.

12. Offence (3) covers the situation where the noxious thing is not administered to V but taken by him, provided D causes the noxious thing to be taken by V and V does not make a voluntary and informed decision to take it. If D puts a noxious thing in food which V is about to eat and V, ignorant of the presence of the noxious thing, eats it, D commits offence (3).

13. In the course of his accurate and well-judged submissions on behalf of the crown, Mr David Perry QC accepted that if he could not show that the appellant had committed offence (1) as the unlawful act necessary to found the count of manslaughter he could not hope to show the commission of offences (2) or (3). This concession was rightly made, but the committee heard considerable argument addressed to the concept of causation, which has been misapplied in some of the authorities, and it is desirable that it should be clear why the concession is rightly made.

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, 115. 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 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

LORD SLYNN OF HADLEY. My Lords, I, too would dismiss this appeal for the reasons given in the speech of my noble and learned friend, Lord Brown-Wilkinson.

LORD WOOLF. My Lords, I have had the advantage of reading in draft the speech prepared by my noble and learned friend, Lord Browne-Wilkinson. I agree with it and for the reasons he gives I too would dismiss this appeal.

Appeal dismissed with costs.
Costs to be paid out of legal aid fund subject to Legal Aid Board applying to be heard within four weeks.

Solicitors: Brian Hillman & Co.; Fox Brooks Marshall, Hale.

M. F.

[HOUSE OF LORDS]

REGINA . . . . . RESPONDENT
AND
BROWN (ANTHONY) . . . . . APPELLANT
REGINA . . . . . RESPONDENT
AND
LUCAS . . . . . APPELLANT
REGINA . . . . . RESPONDENT
AND
JAGGARD . . . . . APPELLANT
REGINA . . . . . RESPONDENT
AND
LASKEY . . . . . APPELLANT
REGINA . . . . . RESPONDENT
AND
CARTER . . . . . APPELLANT

[CONJOINED APPEALS]

1992 Dec. 1, 2, 3, 7;
1993 March 11

Lord Templeman, Lord Jauncey of Tullichettle, Lord Lowry, Lord Mustill and Lord Slynn of Hadley

Crime—Assault—Consent—Sado-masochists willingly participating in assaults causing injury and pain against each other for sexual pleasure—Relevance of victim's consent—Whether satisfaction of sado-masochistic libido good reason for injuries—Offences against the Person Act 1861 (24 & 25 Vict. c. 100), ss. 20, 47

The appellants, a group of sado-masochists, willingly and enthusiastically participated in the commission of acts of violence against each other for the sexual pleasure it engendered in the giving and receiving of pain. They pleaded not guilty on arraignment to counts charging various offences under sections 20 and 47 of the Offences against the Person Act 1861,[1] relating to the infliction of wounds or actual bodily harm on genital and other areas of the body of the consenting victim. On a ruling by the trial judge that, in the particular circumstances, the prosecution did not have to prove lack of consent by the victim, the appellants were re-arraigned, pleaded guilty, some to offences under section 20 and all to offences under section 47 and they were convicted. They appealed against conviction on the ground that the judge had erred in his rulings, in that the willing and enthusiastic consent of the victim to the acts on him prevented the prosecution from proving an essential element of the offence, whether charged under section 20 or section 47 of the Act of 1861; the Court of Appeal (Criminal Division) dismissed the appeal.

On appeal by the appellants:—

Held, dismissing the appeals (Lord Mustill and Lord Slynn of Hadley dissenting), that although a prosecutor had to prove absence of consent in order to secure a conviction for mere assault it was not in the public interest that a person should wound or cause actual bodily harm to another for no good reason and, in the absence of such a reason, the victim's consent afforded no defence to a charge under section 20 or 47 of the Act of 1861; that the satisfying of sado-masochistic desires did not constitute such a good reason; and that, since by their pleas some appellants had admitted wounding and all had admitted causing hurt or injury calculated to interfere with the health or comfort of the other party and since such injuries were neither transient nor trifling, the question of consent was immaterial and the judge's ruling had, accordingly, been correct (post, pp. 231D, 234F–G, 235A–B, 236G–H, 237G, 244G–245A, C, 246D–E, 247E–F, 248A, 250C, 253A–B, 255D–E, 256F).

Dictum of Cave J. in *Reg. v. Coney* (1882) 8 Q.B.D. 534, 539; *Rex v. Donovan* [1934] 2 K.B. 498, C.C.A. and *Attorney-General's Reference (No. 6 of 1980)* [1981] Q.B. 715, C.A. applied.

Per Lord Templeman, Lord Jauncey of Tullichettle and Lord Lowry. Articles 7 and 8 of the European Convention on Human Rights have no application to the circumstances of the present case (post, pp. 237B–F, 247D–E, 256C–E).

Decision of the Court of Appeal (Criminal Division) [1992] Q.B. 491; [1992] 2 W.L.R. 441; [1992] 2 All E.R. 552 affirmed.

The following cases are referred to in their Lordships' opinions:

Attorney-General's Reference (No. 6 of 1980) [1981] Q.B. 715; [1981] 3 W.L.R. 125; [1981] 2 All E.R. 1057, C.A.

Collins v. Wilcock [1984] 1 W.L.R. 1172; [1984] 3 All E.R. 374, D.C.

Director of Public Prosecutions v. Smith [1961] A.C. 290; [1960] 3 W.L.R. 546; [1960] 3 All E.R. 161, H.L.(E.)

Fairclough v. Whipp [1951] 2 All E.R. 834, D.C.

[1] Offences against the Person Act 1861, s. 20: see post, p. 230G–H.
S. 47: see post, p. 230E.

J.J.C. (A Minor) v. Eisenhower [1983] 3 All E.R. 230, D.C.
Pallante v. Stadiums Pty. Ltd. (No. 1) [1976] V.R. 331
Raleigh's Case (1603) 2 St.Tr. 1
Reg. v. Boyea, The Times, 6 February 1992, C.A.
Reg. v. Bradshaw (1878) 14 Cox C.C. 83
Reg. v. Bruce (1847) 2 Cox C.C. 262
Reg. v. Ciccarelli (1989) 54 C.C.C. (3d) 121
Reg. v. Clarence (1888) 22 Q.B.D. 23
Reg. v. Coney (1882) 8 Q.B.D. 534
Reg. v. Griffin (1869) 11 Cox C.C. 402
Reg. v. Hopley (1860) 2 F. & F. 202
Reg. v. Jones (Terence) (1986) 83 Cr.App.R. 375, C.A.
Reg. v. McCoy, 1953 (2) S.A. 4
Reg. v. Moore (1898) 14 T.L.R. 229
Reg. v. Mowatt [1968] 1 Q.B. 421; [1967] 3 W.L.R. 1192; [1967] 3 All E.R. 47, C.A.
Reg. v. Orton (1878) 39 L.T. 293
Reg. v. Parmenter [1992] 1 A.C. 699; [1991] 3 W.L.R. 914; [1991] 4 All E.R. 698, H.L.(E.)
Reg. v. Wollaston (1872) 12 Cox C.C. 180
Reg. v. Young (1866) 10 Cox C.C. 371
Rex v. Cheeseman (1836) 7 C. & P. 455
Rex v. Conner (1836) 7 C. & P. 438
Rex v. Donovan [1934] 2 K.B. 498; 25 Cr.App.R. 1, C.C.A.
Rex v. Rice (1803) 3 East 581
Rex v. Taverner (1616) 3 Bulstr. 171
Wilson v. Pringle [1987] Q.B. 237; [1986] 3 W.L.R. 1; [1986] 2 All E.R. 440, C.A.

The following additional cases were cited in argument:

App. No. 9237/81 v. United Kingdom (1984) 6 E.H.R.R. 354
Bravery v. Bravery [1954] 1 W.L.R. 1169; [1954] 3 All E.R. 59, C.A.
Coward v. Baddeley (1859) 4 H. & N. 478
Dudgeon v. United Kingdom (1981) 4 E.H.R.R. 149
F. (Mental Patient: Sterilisation), In re [1990] 2 A.C. 1; [1989] 2 W.L.R. 1025; [1989] 2 All E.R. 545, H.L.(E.)
Fagan v. Metropolitan Police Commissioner [1969] 1 Q.B. 439; [1968] 3 W.L.R. 1120; [1968] 3 All E.R. 442, D.C.
Faulkner v. Talbot [1981] 1 W.L.R. 1528; [1981] 3 All E.R. 468, D.C.
Golder v. United Kingdom (1975) 1 E.H.R.R. 524
Harman v. United Kingdom (1985) 7 E.H.R.R. 146
Malone v. United Kingdom (1982) 5 E.H.R.R. 385
Norris v. Ireland (1989) 13 E.H.R.R. 186
People v. Samuels (1967) 58 Cal.Rptr. 439
Reg. v. Cunningham [1957] 2 Q.B. 396; [1957] 3 W.L.R. 76; [1957] 2 All E.R. 412, C.C.A.
Reg. v. Howell (Errol) [1982] Q.B. 416; [1981] 3 W.L.R. 501; [1981] 3 All E.R. 383, C.A.
Reg. v. Lamb [1967] 2 Q.B. 981; [1967] 3 W.L.R. 888; [1967] 2 All E.R. 1282, C.A.
Reg. v. Mason (1968) 53 Cr.App.R. 12
Reg. v. R. [1992] 1 A.C. 599; [1991] 3 W.L.R. 767; [1991] 4 All E.R. 481, H.L.(E.)
Reg. v. Secretary of State for the Home Department, Ex parte Brind [1991] 1 A.C. 696; [1991] 2 W.L.R. 588; [1990] 1 All E.R. 720, H.L.(E.)

A *Reg. v. Williams (Gladstone)* [1987] 3 All E.R. 411; 78 Cr.App.R. 276
Silver v. United Kingdom (1983) 5 E.H.R.R. 347
Sunday Times v. United Kingdom (1979) 2 E.H.R.R. 245
X v. Republic of Austria, App. No. 1850/63 (1965) 7 Yearbook 190
X v. United Kingdom, App. No. 6683/74) (1975) 3 D.R. 95
X v. United Kingdom, App. 7215/76 (1978) 3 E.H.R.R. 63

B CONJOINED APPEALS from the Court of Appeal (Criminal Division).

These were appeals by the defendants, Anthony John Brown, Saxon Lucas, Roland Leonard Jaggard, Colin Laskey and Christopher Robert Carter, from the judgment dated 19 July 1992 of the Court of Appeal (Criminal Division) (Lord Lane C.J., Rose and Potts JJ.) [1992] Q.B. 491 dismissing their appeals against conviction at the Central Criminal Court on 7 November 1990 before Judge Rant Q.C. The defendants after
C a ruling and re-arraignment had pleaded guilty variously to counts of, inter alia, assaults contrary to sections 20 and 47 of the Offences against the Person Act 1861 and were sentenced to terms of imprisonment.

The Court of Appeal (Criminal Division) granted a certificate under section 33(2) of the Criminal Appeal Act 1968 that a point of law of general public importance was involved in the decision, namely:

D "Where A wounds or assaults B occasioning him actual bodily harm in the course of a sado-masochistic encounter, does the prosecution have to prove lack of consent on the part of B before they can establish A's guilt under section 20 or section 47 of the Offences against the Person Act 1861?"

Leave to appeal was granted.

E

The facts are stated in their Lordships' opinions.

Lady Mallalieu Q.C. and *Adrian Fulford* for Jaggard and Lucas. In view of the public interest elements in the decisions of the courts below it is important to stress the following matters which were not in dispute.
F No complaint had been made to the police about any of the activities which formed the subject matter of the counts in the indictment. The investigation by the police which led to the present prosecution was not directed at uncovering offences of the type charged. No serious or permanent injury had been sustained by any of the appellants as a result of the activities complained of.

The appellants' activities did not involve children, younger persons
G (except for K. with whom there was limited contact) or animals. The activities had all taken place in private, and in all save one occasion the incidents took place on private property, that is, in a private house or garden, or on occasion in the privacy of a hotel room. Participation in the acts complained of was carefully restricted and controlled and was limited to persons with declared like-minded sado-masochistic proclivities
H who wished to participate. The acts were not witnessed by the public at large. There was no desire on the part of the participants that they should be so witnessed. There was no danger or likelihood that they would ever be so witnessed. The appellants had never coerced anybody. The appellants had not used prohibited drugs.

To constitute a wound for the purposes of the section the whole skin must be broken and not merely the outer layer called the epidermis or the cuticles: see *J.J.C. (A Minor) v. Eisenhower* [1983] 3 All E.R. 230.

"Grievous bodily harm" means simply bodily harm that is really serious and it has been said that it is undesirable to attempt a further definition: see *Director of Public Prosecutions v. Smith* [1961] A.C. 290.

In section 20 the words "unlawfully" means that the accused had no lawful excuse such as self-defence. The word "maliciously" means no more than intentionally for present purposes: see *Reg. v. Mowatt* [1968] 1 Q.B. 421.

Three of the appellants pleaded guilty to charges under section 20 when the trial judge ruled that the consent of the victim afforded no defence.

In the present case each of the appellants intentionally inflicted violence upon another (to whom I refer as "the victim") with the consent of the victim and thereby occasioned actual bodily harm or in some cases wounding or grievous bodily harm. Each appellant was therefore guilty of an offence under section 47 or section 20 of the Act of 1861 unless the consent of the victim was effective to prevent the commission of the offence or effective to constitute a defence to the charge.

In some circumstances violence is not punishable under the criminal law. When no actual bodily harm is caused, the consent of the person affected precludes him from complaining. There can be no conviction for the summary offence of common assault if the victim has consented to the assault. Even when violence is intentionally inflicted and results in actual bodily harm, wounding or serious bodily harm the accused is entitled to be acquitted if the injury was a foreseeable incident of a lawful activity in which the person injured was participating. Surgery involves intentional violence resulting in actual or sometimes serious bodily harm but surgery is a lawful activity. Other activities carried on with consent by or on behalf of the injured person have been accepted as lawful notwithstanding that they involve actual bodily harm or may cause serious bodily harm. Ritual circumcision, tattooing, ear-piercing and violent sports including boxing are lawful activities.

In earlier days some other forms of violence were lawful and when they ceased to be lawful they were tolerated until well into the 19th century. Duelling and fighting were at first lawful and then tolerated provided the protagonists were voluntary participants. But where the results of these activities was the maiming of one of the participants, the defence of consent never availed the aggressor; see *Hawkins' Pleas of the Crown*, 8th ed. (1824), vol. 1, ch. 15. A maim was bodily harm whereby a man was deprived of the use of any member of his body which he needed to use in order to fight but a bodily injury was not a maim merely because it was a disfigurement. The act of maim was unlawful because the King was deprived of the services of an able-bodied citizen for the defence of the realm. Violence which maimed was unlawful despite consent to the activity which produced the maiming. In these days there is no difference between maiming on the one hand and wounding or causing grievous bodily harm on the other hand except with regard to sentence.

A experts and can also sound and take into account public opinion. But the question must at this stage be decided by this House in its judicial capacity in order to determine whether the convictions of the appellants should be upheld or quashed.

Counsel for some of the appellants argued that the defence of consent should be extended to the offence of occasioning actual bodily harm under section 47 of the Act of 1861 but should not be available to charges B of serious wounding and the infliction of serious bodily harm under section 20. I do not consider that this solution is practicable. Sado-masochistic participants have no way of foretelling the degree of bodily harm which will result from their encounters. The differences between actual bodily harm and serious bodily harm cannot be satisfactorily applied by a jury in order to determine acquittal or conviction.

C Counsel for the appellants argued that consent should provide a defence to charges under both section 20 and section 47 because, it was said, every person has a right to deal with his body as he pleases. I do not consider that this slogan provides a sufficient guide to the policy decision which must now be made. It is an offence for a person to abuse his own body and mind by taking drugs. Although the law is often broken, the criminal law restrains a practice which is regarded as D dangerous and injurious to individuals and which if allowed and extended is harmful to society generally. In any event the appellants in this case did not mutilate their own bodies. They inflicted bodily harm on willing victims. Suicide is no longer an offence but a person who assists another to commit suicide is guilty of murder or manslaughter.

The assertion was made on behalf of the appellants that the sexual E appetites of sadists and masochists can only be satisfied by the infliction of bodily harm and that the law should not punish the consensual achievement of sexual satisfaction. There was no evidence to support the assertion that sado-masochist activities are essential to the happiness of the appellants or any other participants but the argument would be acceptable if sado-masochism were only concerned with sex, as the appellants contend. In my opinion sado-masochism is not only concerned F with sex. Sado-masochism is also concerned with violence. The evidence discloses that the practices of the appellants were unpredictably dangerous and degrading to body and mind and were developed with increasing barbarity and taught to persons whose consents were dubious or worthless.

A sadist draws pleasure from inflicting or watching cruelty. A G masochist derives pleasure from his own pain or humiliation. The appellants are middle-aged men. The victims were youths some of whom were introduced to sado-masochism before they attained the age of 21. In his judgment in the Court of Appeal, Lord Lane C.J. said that two members of the group of which the appellants formed part, namely one Cadman and the appellant Laskey:

H > "were responsible in part for the corruption of a youth K. . . . It is some comfort at least to be told, as we were, that K. has now it seems settled into a normal heterosexual relationship. Cadman had befriended K. when the boy was 15 years old. He met him in a cafeteria and, so he says, found out that the boy was interested in

H. L. (E.) 1960

ADAMS v. NATIONAL BANK OF GREECE S.A.

Lord Denning.

assets in the new amalgamated company but some only of the liabilities. It has excluded the liabilities on bonds payable in gold or foreign currency. This exclusion is such an unusual provision in an amalgamation, and is so inconsistent with the essence of the transaction, that there is no comity of nations which requires the English courts to recognise it. Seeing that the assets have become irretrievably vested in the new amalgamated company, the English courts are entitled, I think, to accept the amalgamation as effective to create a successio in universum jus and to reject the attempt to detract from it. The bondholders are therefore entitled to treat the new amalgamated company as the guarantor of the bonds, even in respect of liabilities arising after July 16, 1956, as well as those before.

I would allow the appeal accordingly.

Appeal allowed.

Solicitors: *Herbert Smith & Co.; Stibbard, Gibson & Co.*

J. A. G.

[HOUSE OF LORDS.]

C. C. A.

1960
May 9, 10, 18.

DIRECTOR OF PUBLIC PROSECUTIONS . APPELLANT;

AND

SMITH . . . . . RESPONDENT.

Byrne, Sachs and Winn JJ.

Crime—Homicide—Intention to kill or cause grievous bodily harm—Presumption of intention—Extent of application—Homicide Act, 1957 (5 & 6 *Eliz.* 2, *c.* 11), *ss.* 1 (1), 5.

Presumption—Intention—Natural and probable consequence of acts—Homicide.

H. L. (E.)*

1960
June 27, 28, 29, 30; *July* 1, 28.

The respondent was driving a car in the back of which were some sacks of scaffolding clips which had been stolen. A police constable, noticing the sacks, told him to draw in to the kerb, but instead the respondent accelerated. The constable clung on to the side of the car, which pursued an erratic course, but he was finally shaken off and fell in front of another car, receiving fatal injuries. The respondent did not stop but drove on some 200 yards and dumped the stolen property. He then returned, and there was evidence that on being told that the constable was dead he said that he knew the constable personally but had become frightened

* *Present*: VISCOUNT KILMUIR L.C., LORD GODDARD, LORD TUCKER, LORD DENNING and LORD PARKER OF WADDINGTON.

at the constable's actions and "didn't want him to find the gear." The respondent was charged with capital murder. In his summing-up the judge said to the jury: "If you are satisfied that . . . he "must as a reasonable man have contemplated that grievous bodily "harm was likely to result to that officer . . . and that such harm "did happen and the officer died in consequence, then the accused "is guilty of capital murder. . . . On the other hand, if you are "not satisfied that he intended to inflict grievous bodily harm "upon the officer—in other words, if you think he could not as a "reasonable man have contemplated that grievous bodily harm "would result to the officer in consequence of his actions—well, then, "the verdict would be guilty of manslaughter." The respondent was convicted of murder:—

Held, that there was no misdirection by the trial judge.

It is immaterial what the accused in fact contemplated as the probable result of his actions, provided he is in law responsible for them in that he is capable of forming an intent, is not insane within the M'Naghten Rules and cannot establish diminished responsibility. On that assumption, the sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result, and the only test of this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result (post, p. 327).

Once the accused's knowledge of the circumstances and nature of his acts has been ascertained, the only thing that can rebut the presumption that he intends the natural and probable consequences of those acts is proof of incapacity to form an intent, insanity or diminished responsibility (post, p. 331). The test of the reasonable man, properly understood, is a simpler criterion than that of the "presumption of law" and contains all the necessary ingredients of malice aforethought (post, p. 333).

Dictum of Lord Goddard C.J. in *Rex* v. *Steane* [1947] K.B. 997, 1004; 63 T.L.R. 403; [1947] 1 All E.R. 813; 32 Cr.App.R. 61, C.C.A. explained.

Reg. v. *Ward* [1956] 1 Q.B. 351; [1956] 2 W.L.R. 423; [1956] 1 All E.R. 565; 40 Cr.App.R. 1, C.C.A. approved.

There is no warrant for drawing any distinction between the case where serious harm is "certain" to result and that where it is "likely" to result. The true question in each case is whether there is a real probability of grievous bodily harm (post, p. 333).

The expression "grievous bodily harm" should bear its ordinary and natural meaning of "really serious" harm (post, p. 335).

Section 1 (1) of the Homicide Act, 1957, has not abolished malice constituted by a proved intention to inflict grievous bodily harm.

Reg. v. *Vickers* [1957] 2 Q.B. 664; [1957] 3 W.L.R. 326; [1957] 2 All E.R. 741; 41 Cr.App.R. 189, C.C.A. approved.

Decision of the Court of Criminal Appeal (sub nom. *Reg.* v. *Smith*), post, p. 297; [1960] 3 W.L.R. 92; [1960] 2 All E.R. 451 reversed.

H. L. (E.) 1960

DIRECTOR OF PUBLIC PROSECUTIONS v. SMITH.

Viscount Kilmuir L.C.

" sufficient seriously to interfere with the victim's health or " comfort."

" In murder the killer intends to kill, or to inflict some harm " which will seriously interfere for a time with health or comfort."

" If the accused intended to do the officer some harm which " would seriously interfere at least for a time with his health and " comfort, and thus perhaps enable the accused to make good " his escape for the time being at least, but that unfortunately " the officer died instead, that would be murder too."

The direction in these passages was clearly based on the well known direction of Willes J. in *Reg.* v. *Ashman*[17] and on the words used by Graham B. in *Rex* v. *Cox.*[18] Indeed, this is a direction which is commonly given by judges in trials for the statutory offence under section 18 of the Offences against the Person Act, 1861, and has on occasions been given in murder trials: cf. *Reg.* v. *Vickers.*[19]

My Lords, I confess that whether one is considering the crime of murder or the statutory offence, I can find no warrant for giving the words " grievous bodily harm " a meaning other than that which the words convey in their ordinary and natural meaning. " Bodily harm " needs no explanation, and " grievous " means no more and no less than " really serious." In this connection your Lordships were referred to the judgment of the Supreme Court of Victoria in the case of *Rex* v. *Miller.*[20] In giving the judgment of the court, Martin J., having expressed the view that the direction of Willes J. could only be justified, if at all, in the case of the statutory offence, said: " It is not a " question of statutory construction but a question of the intent " required at common law to constitute the crime of murder. " And there does not appear to be any justification for treating " the expression 'grievous bodily harm' or the other similar " expressions used in the authorities upon this common law " question which are cited above as bearing any other than their " ordinary and natural meaning." In my opinion, the view of the law thus expressed by Martin J. is correct, and I would only add that I can see no ground for giving the words a wider meaning when considering the statutory offence.

It was, however, contended before your Lordships on behalf of the respondent that the words ought to be given a more

[17] (1858) 1 F. & F. 88.
[18] (1818) Russ. & Ry. 362, C.C.R.
[19] [1957] 2 Q.B. 664; [1957] 3 W.L.R. 326; [1957] 2 All E.R. 741; 41 Cr.App.R. 189, C.C.A.
[20] [1951] V.L.R. 346, 357.

The Law Reports

Queen's Bench Division

Court of Appeal

Regina *v* M (B)

[2018] EWCA Crim 560

2018 Feb 21; March 22

Lord Burnett of Maldon CJ, Nicol, William Davis JJ

Crime — Assault — Consent — Registered tattooist and body piercer performing body modifications on customers — Whether customers' consent providing defence to charges of wounding with intent to do grievous bodily harm — Offences against the Person Act 1861 (24 & 25 Vict c 100), s 18

The defendant, who was registered with the local authority for the purposes of tattooing and body piercing, carried out body modifications on his customers, including the removal of a customer's ear, the removal of a customer's nipple and the division of a customer's tongue to produce an effect similar to that enjoyed by reptiles. He was charged on indictment in relation to those procedures with three counts of wounding with intent to do grievous bodily harm, contrary to section 18 of the Offences against the Person Act 1861. The prosecution accepted that each customer had consented to the respective procedure being performed. The judge ruled at a preparatory hearing that consent could provide no defence to the charges. The defendant appealed against that ruling on the grounds that there was good reason why consensual body modifications should be permitted.

On the appeal—

Held, dismissing the appeal, that new exceptions to the general rule that the consent of an individual to injury provided no defence to the person who inflicted that injury if the violence caused actual bodily harm or more serious injury should not be recognised on a case-by-case basis, save where there was a close analogy with an existing exception to that rule; that there was no proper analogy between body modification, which involved the removal or mutilation of parts of the body, and tattooing, body piercing or other body adornment; that, rather, the body modifications carried out by the defendant amounted to medical procedures performed for no medical reason by someone who was not qualified to perform them; that, therefore, there was no good reason why body modification should be placed in a special category of exemption from the general rule; and that, accordingly, consent provided no defence to the charges (post, paras 38–46).

R v Brown (Anthony) [1994] 1 AC 212, HL(E), applied.

The following cases are referred to in the judgment of the court:

Attorney General's Reference (No 6 of 1980) [1981] QB 715; [1981] 3 WLR 125; [1981] 2 All ER 1057; 73 Cr App R 63, CA

Director of Public Prosecutions v Smith [1961] AC 290; [1960] 3 WLR 546; [1960] 3 All ER 161; 44 Cr App R 261, HL(E)
Laskey, Jaggard and Brown v United Kingdom CE:ECHR:1997:0219JUD 002162793; 24 EHRR 39
Pallante v Stadiums Pty Ltd (No 1) [1976] VR 331
R v Brown (Anthony) [1994] 1 AC 212; [1993] 2 WLR 556; [1993] 2 All ER 75; 97 Cr App R 44, HL(E)
R v Coney (1882) 8 QBD 534, DC
R v Cunningham [1982] AC 566; [1981] 3 WLR 223; [1981] 2 All ER 863; 73 Cr App R 253, HL(E)
R v Donovan [1934] 2 KB 498; 25 Cr App R 1, CCA
R v I-I [2009] EWCA Crim 1793; [2010] 1 WLR 1125; [2010] 1 Cr App R 10, CA
R v Miller [1954] 2 QB 282; [1954] 2 WLR 138; [1954] 2 All ER 529; 38 Cr App R 1
R v Smith (1837) 8 C & P 173
R v Waltham (1848) 3 Cox CC 442
R v Wilson (Alan) [1997] QB 47; [1996] 3 WLR 125; [1996] 2 Cr App R 241, CA

No additional cases were cited in argument.

The following additional case, although not cited, was referred to in the skeleton arguments:

R v Emmett (Stephen) The Times, 15 October 1999, CA

INTERLOCUTORY APPEAL pursuant to section 35 of the Criminal Procedure and Investigations Act 1996

The defendant, BM, was due to stand trial in the Crown Court at Wolverhampton on an indictment charging three counts of wounding with intent to do grievous bodily harm, contrary to section 18 of the Offences against the Person Act 1861. The procedures performed by the defendant which founded those counts were (1) the removal of a customer's ear; (2) the removal of a customer's nipple; and (3) the division of a customer's tongue to produce an effect similar to that enjoyed by reptiles. It was accepted by the prosecution that each of the customers had consented to the respective procedures being performed. On 29 September 2017, at a preparatory hearing pursuant to section 31(3) of the Criminal Procedure and Investigations Act 1996, Judge Nawaz considered the question whether consent could provide a defence to the counts on the indictment and, on 6 October 2017, he ruled in a written decision, relying on *R v Brown (Anthony)* [1994] 1 AC 212, that consent could not provide a defence to the charges.

The defendant appealed against that ruling pursuant to section 35 of the 1996 Act.

The facts and grounds of appeal are stated in the judgment of the court, post, paras 6–20.

Michael Anning (instructed by *Stevens Solicitors, Longton, Stoke-on Trent*) for the defendant.

The issue in this case is consent. The Crown accepts that each of the purported "victims" did consent to the body modification procedures outlined in the indictment but maintains, relying on expert evidence as to the potential complications arising from such procedures, that where the level of harm is high, as here, in law the victim cannot consent: see *Attorney General's Reference (No 6 of 1980)* [1981] QB 715. However, body

ear; secondly, the removal of a customer's nipple; and thirdly, the division of a customer's tongue to produce an effect similar to that enjoyed by reptiles. The prosecution was content to accept that each of the customers consented to the respective procedures being performed, or at least that it was not possible to disprove that fact. The question arose whether consent could provide a defence to the counts on the indictment.

2 That question was determined at a preparatory hearing held on 29 September 2017, following which Judge Nawaz gave a written decision on 6 October 2017. In a careful ruling, Judge Nawaz determined that consent could provide no defence. His ruling was made under section 31(3) of the Criminal Procedure and Investigations Act 1996. He relied upon the well-known decision of the House of Lords in *R v Brown (Anthony)* [1994] 1 AC 212. This appeal is brought pursuant to section 35(1) of the 1996 Act with leave of Judge Nawaz.

The preparatory hearing

3 It is striking that the ruling did not provoke guilty pleas to any of the counts on the indictment. Mr Anning, who appears for the defendant, has made clear that if the ruling of the judge is upheld then no defence can be put before the jury. He also indicated that, in the circumstances of this case, the alternative counts relating to section 20 of the 1861 Act are redundant. That is because there is no question but that each of the procedures described was performed with the necessary intent for the purposes of section 18. We agree with that assessment.

4 It is clear from the materials before us that the prosecution was at least considering seeking permission to amend the indictment to include counts based upon placing transdermal implants into the scalp of a customer and inserting an object under the skin of the hand of another.

5 The result of the preparatory hearing is clearly untidy in the sense that it has not conclusively determined the practical outcome of the underlying proceedings, while it appears that it was intended to do so. It would have been better, in our opinion, had the issue been resolved in the ordinary way by a ruling, rather than in the course of a preparatory hearing generating the possibility of an interlocutory appeal. Had the defendant then pleaded guilty, the matter could have come to this court in the usual way. This is not one of those cases identified in *R v I-I* [2010] 1 WLR 1125, para 21, where the ruling ought to have been the subject of an interlocutory appeal with a view to saving court time in the trial.

The background facts

6 The defendant was the proprietor of a business in Wolverhampton. He was registered with the local authority for the purpose of piercing and tattooing.

7 Tattooing, electrolysis, acupuncture, semi-permanent skin colouring, ear piercing and other skin piercing may be conducted only in premises that are registered by the relevant local authority. Each practitioner operating from the premises must also be registered. The registration scheme is found in sections 13 to 16 of the Local Government (Miscellaneous Provisions) Act 1982. Registration provides lawful authority to undertake the specified tasks. Local authorities may supplement the registration scheme with

A was concerned with sado-masochistic activity. He submits that there is a good reason why the conduct of the defendant should be permitted, namely that it protects the personal autonomy of his customers. It is wrong, submits Mr Anning, to characterise the procedures carried out by the defendant as medical or surgical. They should be viewed as akin to body adornment, which is widely accepted in British culture and other cultures. What was done by this defendant should be seen as a natural extension of tattooing and
B piercing, the last of which involves wounding by breaking the skin, but to which consent has long been accepted to negative any criminal activity.

35 In short, the case advanced by the defendant is that the procedures he conducted, albeit that they caused really serious bodily harm, should be immunised from the criminal law of assault, just as surgical procedures performed by medical practitioners and those who take part in properly
C organised boxing matches attract protection. The bite of the criminal law should be restricted to regulatory offences, if such are committed.

36 The defendant accepts that the procedures he performed carry medical risk but, submits Mr Anning, so too do body piercing and tattooing.

37 Mr Hankin QC submits that the procedures in question are, in truth, medical and amount to cosmetic surgery. They are serious irreversible procedures not warranted medically. They have adverse physiological
D consequences and involve significant risk. It is not in the public interest to decriminalise such activities when performed with the consent of the customers. He submits that each of the injuries in question amounted to grievous bodily harm, given its ordinary and natural meaning of really serious bodily harm. They go well beyond actual bodily harm and involve much more than a wound, i e breaking the continuity of the skin. It is a big
E and unwarranted step to suggest that an entirely new special category should be recognised.

Discussion

38 We have observed that the exceptions to the general rule confirmed in *R v Brown (Anthony)* [1994] 1 AC 212 deliver no easily articulated
F principle by which any novel situation may be judged. The difficulty is perhaps best illustrated by considering boxing, undoubtedly lawful when organised properly as a sport (but not otherwise), where each protagonist is at liberty to knock out his opponent, not infrequently causing very serious injury indeed. Lord Mustill paid tribute to the valuable judgment of McInerney J in *Pallante v Stadiums Pty Ltd (No 1)* [1976] VR 331 in trying to arrive at an intellectually satisfying account of the apparent immunity of
G professional boxing from criminal process, but concluded that the task is impossible.

39 Instead, the most that might be said about the special cases is that they represent a balance struck by the judges to reflect a series of different interests. There is a general interest of society in limiting the approbation of the law for significant violence, albeit inflicted with consent. There is some
H need to protect from themselves those who have consented, most particularly because they may be vulnerable or even mentally unwell. Moreover, serious injury, even consented to, brings with it risk of unwanted injury, disease or even death and may impose on society as a whole substantial cost. Yet there is a need to reflect the general values of society which have long accepted tattooing and piercing (not just of ears) as

acceptable, along with such things as ritual circumcision, sports and the other sub-categories identified in the cases. That is not to say that each receives universal support from all sections of society, but the exceptions are so deeply embedded in our law and general culture that it would require Parliament to render such activities subject to the ordinary criminal law of assault. We have seen that Parliament has indeed intervened to provide for the regulation of activities such as tattooing, piercing and the like, and had earlier done so as regards children: Tattooing of Minors Act 1969.

40 Whilst the exceptions are incapable of being accommodated within any universally stated test, there are two features which may be thought to underpin almost all of them. First, they may produce discernible social benefit. That is true of the sporting exceptions and may even be true of boxing or "dangerous exhibitions" as entertainment. It is possible that those with a religious hue might also be considered as conferring a social benefit, at least at the time they were recognised. But the second is that it would simply be regarded as unreasonable for the common law to criminalise the activity if engaged in with consent by (or on behalf of) the injured party. That would apply to tattooing and piercing and, again, perhaps to those with a religious hue, including ritual male circumcision.

41 New exceptions should not be recognised on a case-by-case basis, save perhaps where there is a close analogy with an existing exception to the general rule established in *R v Brown (Anthony)*. The recognition of an entirely new exception would involve a value judgment which is policy laden, and on which there may be powerful conflicting views in society. The criminal trial process is inapt to enable a wide ranging inquiry into the underlying policy issues, which are much better explored in the political environment.

42 That said, there is, to our minds, no proper analogy between body modification, which involves the removal of parts of the body or mutilation as seen in tongue splitting, and tattooing, piercing or other body adornment. What the defendant undertook for reward in this case was a series of medical procedures performed for no medical reason. When Lord Lane CJ referred to "reasonable surgical interference" in *Attorney General's Reference (No 6 of 1980)* [1981] QB 715 (quoted in para 23 above) it carried with the implication that elective surgery would only be reasonable if carried out by someone qualified to perform it. The professional and regulatory superstructure which governs how doctors and other medical professionals practice is there to protect the public. The protections provided to patients, some of which are referred to in the medical evidence before the judge, were not available to the defendant's customers or more widely to the customers of those who set themselves up as body modifiers. It is immaterial that this defendant took some trouble to ensure a sterile environment when he operated, or that his work was in some respects tidy and clean. Consent as a defence could not turn on the quality of the work then performed.

43 The protection of the public in this context extends beyond the risks of infection, bungled or poor surgery or an inability to deal with immediate complications. Those seeking body modification of the sort we are concerned with in this appeal invited the defendant to perform irreversible surgery without anaesthetic with profound long-term consequences. The fact that a desire to have an ear or nipple removed or tongue split is incomprehensible to most, may not be sufficient in itself to raise the question whether those who