IN THE COURT OF APPEAL (CRIMINAL DIVISION)
B E T W E E N :

REGINA **Appellant**

-and-

Alexander Trout **Respondent**

APPELLANT'S BUNDLE

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Rosamund Smith Mooting Competition 2021, Semi Final (1)

Moot problem

IN THE COURT OF APPEAL (CRIMINAL DIVISION)

REGINA

Appellant

v.

Alexander Trout

Respondent

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.

Moot problem set by:

Duncan Penny QC
6 KBW College Hill

2 June 2021

Chronology

Date	Event	Reference
1.8.99	Bertie Greaves born	§3
Summer 2017	Greaves visited the Respondent (R) at his licensed tattoo parlour in Archway, London, N19	§3
1.7.17	R completed the tattooing work on Greaves	§4
Summer 2017	Greaves reported the matter to the police; the investigating officer indicated that he intended to take no further action	§6
September 2017	Greaves first saw his general practitioner, who referred him to Dr Smith	§7
January 2018	Greaves was diagnosed with severe depression and Post Traumatic Stress Disorder by Dr Smith	§7
15.5.19	Greaves was diagnosed with terminal liver cancer by his general practitioner	§8
1.6.19	Tottenham Hotspur were defeated 2-0 by Liverpool in the final of the Champions League	§9
3.6.19	Greaves took an overdose of paracetamol tablets	§10
4.6.19	Greaves died at the Whittington Hospital	§10
July 2020	R was arrested	§11
Later 2020	Crown Court: trial - Judge upheld defence submission of no case to answer	§13 §17
21.6.21	CA: Appeal hearing	

IN THE COURT OF APPEAL (CRIMINAL DIVISION)
B E T W E E N :

REGINA **Appellant**

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APPELLANT'S SKELETON ARGUMENT

Grounds of Appeal

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.**

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.**

Ground 1

1. The Learned Judge misdirected himself on the issue of legal causation.

1.1 In order to be a 'cause' of a given result at law, the actions of the defendant need not be the 'significant and principal' or the 'main' cause of the result as the Learned Judge suggested.

1.1.1 For a cause in fact to be a cause in law, it must be an 'operating cause and a substantial cause' of the victim's death: R v Wallace [2018] EWCA Crim 690, [2018] 1 Cr App R 22 at [67]. Sharp LJ quoting R v Smith [1959] 2 QB 35 at 42-43, Lord Parker CJ.

1.1.2 The question in cases of multiple causes is 'whether the accused's acts can fairly be said to have made *a* significant contribution to the victim's death': Wallace at [64], Sharp LJ.

1.1.3 A significant contribution is any contribution more than *de minimis*: R v Cato [1976] 1 WLR 110, 116 E-F, Lord Widgery CJ.

1.1.4 In this case, unchallenged expert evidence established that the Respondent's actions had 'triggered a progressive decline in Greaves's mental health'. The continuing significance of the Respondent's actions is confirmed by the deceased's own suicide note, which says that '[e]ver since that tattoo was placed on my shoulder in Archway, I have struggled to see the point of life.'

1.2 Where the proximate cause of the victim's death is his own actions, they will only break the chain of causation if they are free and voluntary and are not within the range of responses that could be regarded as reasonable in the circumstances:

Wallace at [75-76] and [83-84]. The specific course of action that the victim takes need not be reasonably foreseeable in itself, only the 'general nature of the intervening acts and the accompanying risk of harm'.

1.2.1 What is reasonably foreseeable can be judged by the victim's characteristics and the circumstances in which he had been placed by the accused: Wallace at [73].

1.2.2 The defendant must take his victim as he finds him. What is a reasonable response depends on the individual victim and any particular vulnerability he may have. This includes physical conditions and religious beliefs - R v Blaue [1975] 1 WLR 1411, 1415, Lawton LJ - and must be taken to include poor mental health.

1.2.3 In this case, the deceased had fragile mental health from adolescence, rendering him particularly susceptible to the sort of 'trigger' to which the Respondent deliberately exposed him in the Summer of 2017.

1.2.4 This is not a case of an accidental mishap or a practical joke gone wrong but of a deliberate and calculated attempt by the Respondent to cause lasting and severe emotional distress. What is reasonably foreseeable should, therefore, be judged in light of the Respondent's positive intention that his actions should damage the deceased's mental wellbeing.

Ground 2

2. The Learned Judge erred in his approach to the principles of law which govern intention.

2.1 At the time that the Respondent performed the entirety of the tattooing work on Greaves, the Respondent acted deliberately and with intent to cause harm.

2.2 *'The greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that that consequence was also intended.'* R v Hancock [1986] AC 455, 437 F Lord Scarman.

2.3 Tattooing breaks the skin, causing multiple wounds, such that the essence of the process is the infliction of harm. *'No question but that each of the procedures … was performed with the necessary intent for the purposes of section 18'* R v M (B) [2019] QB 1 at [3], Lord Burnett of Maldon CJ.

2.4 The Learned Judge erred by basing his assessment of intention on the remarks made by the Respondent following his arrest. Given the context of carrying out tattooing work, there is evidence that the Respondent did intend some physical harm, so the question of intention should have been left to the jury.

3. The Learned Judge erred in his approach to the principles of law which govern consent.

3.1 Although licensed tattooing falls within the category of exceptions identified by the House of Lords as lawful activities in R v Brown and others [1994] 1 AC 212, 231 F Lord Templeman, the basis of the exception is that the victim did in fact consent to the tattooing work, and that they understood what was being consented to.

3.2 The 'consent and disclaimer' form concerned the quality of the tattoo artist's workmanship in respect of the tattoo that had been requested by the customer, and not the existence of unrequested additional tattoos. The Learned Judge failed to

consider whether the entirety of the tattooing work was covered by the 'consent and disclaimer' form.

3.3 Furthermore, lawful activities are subject to a reasonable degree of force being used, R v Brown, 277 D Lord Slynn of Hadley; the level of harm that is consented to is qualified by what is reasonable to expect within the ambit of the activity. The Learned Judge failed to consider whether the infliction of unnecessary wounds to produce an unwanted tattoo was part of the accepted tattooing practice.

3.4 Greaves neither requested the Wenger tattoo, nor could it be inferred that he wanted the tattoo bearing in mind his allegiance to Tottenham Hotspur. In the absence of Greaves' consent, a jury would have been entitled to find that the Respondent had acted unlawfully.

3.5 Considering the Respondent's apparent dislike of Greaves and background as an Arsenal fan, and the rivalry between Arsenal and Tottenham Hotspur, there was sufficient evidence for a jury to conclude that the production of the Wenger tattoo was malicious.

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IN THE COURT OF APPEAL (CRIMINAL DIVISION)
B E T W E E N :

REGINA **Appellant**

-and-

Alexander Trout **Respondent**

APPELLANT'S LIST OF AUTHORITIES

List of Authorities

1. R v Wallace [2018] EWCA Crim 690, [2018] 1 Cr App R 22 at [64], [67], [73], [75-76], [83-84].
2. R v Cato [1976] 1 WLR 110, 116 E-F Lord Widgery CJ.
3. R v Blaue [1975] 1 WLR 1411, 1415 H Lawton LJ.
4. R v Hancock [1986] AC 455, 473 F Lord Scarman.
5. R v M (B) [2019] QB 1, [3, 22, 23] Lord Burnett of Maldon CJ.
6. R v Brown and others [1994] 1 AC 212, 231 B-F Lord Templeman, 277 D Lord Slynn of Hadley.

Joe Weeks
Senior Counsel for the Appellant

Elena Margetts
Junior Counsel for the Appellant

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*325 R. v Wallace (Berlinah)

No Substantial Judicial Treatment

Court
Court of Appeal (Criminal Division)

Judgment Date
28 March 2018

Report Citation
[2018] EWCA Crim 690
[2018] 2 Cr. App. R. 22

Court of Appeal (Criminal Division)

Lady Justice Sharp , Mr Justice Spencer and Mrs Justice Carr :

29 November 2017; 28 March 2018

Admissibility; Assisted suicide; Causation; Hearsay evidence; Injuring by corrosive substances; Intervening events; Murder; Psychiatric evidence;

H1 *Homicide—Murder—Causation—Victim injured by corrosive substances thrown at him by defendant—Victim in unbearable constant pain—Victim applying for and receiving euthanasia—Whether death caused by injuries inflicted by defendant—Whether "novus actus interveniens" breaking chain of causation—Whether defendant having case to answer on murder charge*

H2. The defendant threw sulphuric acid at the victim in September 2015. The victim was left disfigured, visually impaired, completely paralysed and in a permanent state of unbearable constant physical and psychological pain that could not be ameliorated by his doctors. In November 2016 the victim's father came to the UK and took him to Belgium, where he lived, admitting him to hospital. The victim was advised that his condition was permanent and that he had no prospect of improvement. The victim applied for euthanasia, which was permitted in principle under Belgian law. He developed a serious lung infection but refused treatment by intubation. Euthanasia was carried out in January 2017. The defendant was charged with murder and applying a corrosive substance with intent. In considering the defendant's application of no case to answer at the end of the prosecution case, the trial judge decided that the victim's act in applying for euthanasia, and the doctors' actions in providing it, were independent free and voluntary acts which broke the chain of causation (each a "novus actus interveniens") between the defendant's conduct in throwing the acid and the victim's death. The judge accordingly withdrew the charge of murder from the jury. The Crown appealed under s.58 of the Criminal Justice Act 2003 .

H3. **Held,** allowing the appeal, that although an assessment had to be made in the overall scheme of the causative significance of intervening acts or events, the all-important question when evaluating legal causation in homicide cases was whether the accused's acts could fairly be said to be a significant and operating cause of the victim's death. The cause need not be substantial to render a defendant guilty. The intervening acts of the victim and the Belgian doctors were not random extraneous events, nor acts unconnected with the fault element of the defendant's conduct: they were inextricably bound up with it. The victim's death, his request for 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 *326 voluntary, if by that it were meant that 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. The fact that the Belgian doctors considered the victim's request as "voluntary" for the purposes of the Belgian law on euthanasia did not determine whether it was voluntary in terms of the legal issues on causation. The jury might conclude on the very special facts of the case that there was nothing that could decently be described as "voluntary" either in the victim's suffering or in his decision to end his life, given the situation he was in, and find that the defendant's conduct was instrumental in bringing about his death. Moreover, the intervention of the doctors was not determinative of causation in the defendant's favour: it

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was not clear that the mere fact that an intervening act was unlawful, as was euthanasia in the UK, determined its status as a novus actus interveniens. In any event, the doctors in this case had been acting lawfully. Nor was it determinative that the doctors were not under a duty to act. The Crown was therefore entitled to bring a murder charge against the defendant and a new trial was ordered (post, [60], [61], [64], [76], [77], [78], [83], [86]).

H4. *R. v Kennedy (Simon) [2007] UKHL 38; [2008] 1 Cr. App. R. 19 (p.256); [2008] 1 A.C. 269; [2007] 3 W.L.R. 612* and *R. v Gnango (Armel) [2011] UKSC 59; [2012] 1 Cr. App. R. 18 (p.219); [2012] 1 A.C. 827; [2012] 2 W.L.R. 17 followed* .

H5. *Corr v IBC Vehicles Ltd [2006] EWCA Civ 331; [2007] Q.B. 46; [2006] 3 W.L.R. 395 applied* .

H6. (For murder and the intervention in the chain of causation of a "novus actus interveniens", see *Archbold* 2018, para.19-7 and following.)

H7 Additional cases referred to in the judgment of the court:

Airedale NHS Trust v Bland [1993] A.C. 789; [1993] 2 W.L.R. 316 HL
Evans v Gardiner (No.2) [1976] V.R. 523 SC (Victoria)
Galoo Ltd v Bright Grahame Murray (a firm) [1994] 1 W.L.R. 1360 CA
March v E & MH Stramare Pty Ltd (1991) 171 C.L.R. 506 High Court, Australia
Pretty v Director of Public Prosecutions [2001] UKHL 61; [2002] 2 Cr. App. R. 1; [2002] 1 A.C. 800; [2001] 3 W.L.R. 1598
R. v Blaue (1975) 61 Cr. App. R. 271; [1975] 1 W.L.R. 1411 CA
R. v Cato (1976) 62 Cr. App. R. 41; [1976] 1 W.L.R. 110 CA
R. v Cheshire (1991) 93 Cr. App. R. 251; [1991] 1 W.L.R. 844 CA
R. v Curley (1909) 2 Cr. App. R. 96 CCA
R. v D [2006] EWCA Crim 1139; [2006] 2 Cr. App. R. 24 (p.348)
R. v Dear [1996] Crim. L.R. 595 CA
R. v Girdler (Dean) [2009] EWCA Crim 2666; [2010] R.T.R. 28 (p.307)
R. v Hennigan (1971) 55 Cr. App. R. 262 CA
R. v Hughes [2013] UKSC 56; [2014] 1 Cr. App. R. 6 (p.46); [2013] 1 W.L.R. 2461
R. v Inglis [2010] EWCA Crim 2637; [2011] 2 Cr. App. R. (S.) 13 (p.66); [2011] 1 W.L.R. 1110
R. v Jordan (1956) 40 Cr. App. R. 152 CCA
R. v Latif [1996] 2 Cr. App. R. 92; [1996] 1 W.L.R. 104 HL
R. v Malcherek (1981) 73 Cr. App. R. 173; [1981] 1 W.L.R. 690 CA
R. v Maybin [2012] S.C.C. 24; [2012] 2 S.C.R. 30
R. v Mellor [1996] 2 Cr. App. R. 245 CA ***327**
R. v Pagett (1983) 76 Cr. App. R. 279 CA
R. v Pitts (1842) C. & M. 284
R. v Roberts (1971) 56 Cr. App. R. 95 CA
R. v Smith (Thomas Joseph) (1959) 43 Cr. App. R. 121; [1959] 2 Q.B. 35; [1959] 2 W.L.R. 623 CtMAC
R. v Williams and Davis (1992) 95 Cr. App. R. 1; [1992] Crim. L.R. 198 CA
R. (Nicklinson) v Ministry of Justice [2014] UKSC 38; [2015] A.C. 657; [2014] 3 W.L.R. 200

Appeal pursuant to s.58 of the Criminal Justice Act 2003

H8. The defendant, Berlinah Wallace, was on trial in the Crown Court at Bristol (May J) on a two-count indictment charging her on count 1 with murder and on count 2 with applying a corrosive substance with intent, contrary to s.29 of the Offences against the Person Act 1861 . On 20 November 2017, at the close of the prosecution case, the defence made a submission

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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 *338 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 & MH Stramare Pty Ltd (1991) 171 C.L.R. 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 *339 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 three to four 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 nine 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-and-a-half hours a day with him. Eight 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, four 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 three weeks the doctors said he had a lung infection. He was warned that if he was not intubated there was a chance ***340** he would choke and die; he was warned there was a 96% 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% 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; and (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.

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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 ***341** 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] S.C.C. 24; [2012] 2 S.C.R. 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

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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's acts can fairly be said to have made *a* significant contribution to the victim's death. See further *R. v Mellor [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) 62 Cr. App. R. 41; [1976] 1 All E.R. 260* at 265–266, and *R. v Malcherek; R. v Steel (1981) 73 Cr. App. R. 173; [1981] 1 W.L.R. 690; 2 All E.R. 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 ***342*** 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 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 288, *R. v Smith (1959) 43 Cr. App. R. 121; [1959] 2 Q.B. 35* and *Evans v Gardiner (No.2) [1976] V.R. 523* Beldam LJ put the matter in this way (93 Cr. App. R. 251 at 257–258):

> "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 defendant 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 ***343*** subsequently shown to have been incorrect. Lord Parker CJ, who gave the judgment of the court said at (43 Cr. App. R. 121 at 131; [1959] 2 Q.B. 35 at 42–43):

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

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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 [1996] Crim. L.R. 595* (Rose LJ, Hidden and Buxton JJ). (See further, the observations, obiter, by Sir Igor Judge P in *R. v D [2006] EWCA Crim 1139; [2006] 2 Cr. App. R. 24* (p.348) at [7], [8] and [31].) There is a report of the case at *[1996] Crim. L.R. 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:

"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 [defendant] 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 ***344*** 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

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> 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* [*R. v Corbett [1996] Crim. LR. 594* .], 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* [The correct citation is *(1971) 56 Cr. App. R. 95* .] 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, ***345** 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 and Davis [1992] Crim. L.R. 198* . (See further, *R. v Lewis [2010] EWCA Crim 151* .) 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 30mph. 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 of robbery were quashed, as were those of manslaughter which depended on them (because what evidence there 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 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 [defendant] 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 (1992) 95 Cr. App. R. 1, 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."

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He went on to say: **346*

> "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 (1975) 61 Cr. App. R. 271* . 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 of 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 [1996] 2 Cr. App. R. 92* and *R. v Kennedy (Simon) [2007] UKHL 38; [2008] 1 Cr. App. R. 19 (p.256); [2008] 1 A.C. 269* , in particular the observations of Lord Bingham of Cornhill at [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 s.23 of the 1861 Act . ("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 [an offence] … .") 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 **347* 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 Vehicles Ltd [2006] EWCA Civ 331; [2007] Q.B. 46* at [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. (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 (Armel) [2011] UKSC 59; [2012] 1 Cr. App. R. 18 (p.219); [2012] 2 W.L.R. 17* at [83]–[91]. See further, the discussion of *R. v Pagett* (1983) 76 Cr. App. R. 279 in *Smith and Hogan* , 14th edn, at para.4.5.6.3, p.98.) See, for example, *R. (Nicklinson) v Ministry of*

Justice [2014] UKSC 38; [2015] A.C. 657 , *R. v Inglis [2010] EWCA Crim 2637; [2011] 2 Cr. App. R. (S.) 13 (p.66); [2011] 1 W.L.R. 1110* , *Pretty v Director of Public Prosecutions [2001] UKHL 61; [2002] 2 Cr. App. R. 1; [2002] 1 A.C. 800* and *Airedale NHS Trust v Bland [1993] A.C. 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 took 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 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 art.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 whom 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 ***348*** 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 76 Cr. App. R. 279, 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, 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

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> 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 ***349** … 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 interveniens 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 art.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 Girdler (Dean) [2009] EWCA Crim 2666; [2010] R.T.R. 28 (p.307)* . 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 [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 edn, 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 ***350** 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 [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 [defendants]' 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 ***351** 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

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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 ***352** 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."

Appeal allowed.

New trial ordered. ***353**

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what may have to be done in addition, rather than postpone the whole of the sentence till all the material is to hand.

So here. This court thinks it would have been unnecessarily cruel to keep the appellant in the dark as to whether, and if so for how long, he was to receive a custodial sentence, simply because the material necessary for dealing with " totting-up " under section 93 (3) was not immediately available, and must take some time to obtain, up to three weeks in the ordinary way. It took longer than 28 days to obtain in this case, because the appellant did his motoring under more than one name. We think that the judge had jurisdiction to do what he did, and that in the circumstances of this case it was not bad practice for him to do it.

The appeal against the additional six months' disqualification accordingly fails.

Appeal dismissed.

Solicitors: *Pariser & Co., Manchester; D. S. Gandy, Manchester.*

L. N. W.

[COURT OF APPEAL]

* REGINA *v.* CATO

REGINA *v.* MORRIS

REGINA *v.* DUDLEY

1975 Oct. 13, 14, 15

Lord Widgery C.J., O'Connor and Jupp JJ.

Crime — Homicide — Manslaughter — Victim dying after being injected with heroin—Whether heroin caused or contributed to death—Consent of victim to injections—Whether unlawful and malicious administration of " noxious thing "— Offences against the Person Act 1861 (24 & 25 *Vict., c.* 100), *s.* 23

The appellant with three friends, M, D and F, went from a public house after closing time to the house that they shared. F produced a bag containing heroin and some syringes and invited the others to have à " fix." They injected each other a number of times until M and D went to bed. The appellant and F continued, each taking his own syringe and filling it with a mixture of heroin and water to his own requirements, then giving the other the syringe to inject him. The following morning the appellant and F were found apparently asleep but subsequently it became clear that they were having difficulty in breathing. The appellant was revived by first aid but F died, the cause of death being that his respiratory system ceased to function as a result of intoxication from drugs. The appellant was charged with manslaughter and with administering a noxious thing contrary to section 23 of the Offences against the Person Act 1861.[1] Medical evidence was given at the trial that there was no evidence of disease causing death; that there was a quantity of morphine in F's body which was consistent with the injection of heroin but which was not sufficient to have been the sole cause of

[1] Offences against the Person Act 1861, s. 23: see post, p. 119E–F.

death; that there was no morphine in F's blood but that the symptoms before death and the appearance of his body were consistent with death resulting from injections of heroin. M and D gave evidence that they thought that the symptoms shown by the appellant and F had been caused by heroin poisoning. The judge directed the jury to consider whether the injection of heroin caused, contributed to or accelerated F's death but did not direct them that the cause or contribution should be substantial. He also directed that F's consent to the injections of heroin was irrelevant to the charge of manslaughter. The appellant was convicted on both counts and was sentenced to four years' imprisonment concurrent on each count.

On appeal against conviction on the grounds, inter alia, that the judge had misdirected the jury on the issue of causation and on whether F's consent was relevant, and that the requirements of section 23 of the Offences against the Person Act 1861 that the substance administered must be "noxious" and administered "maliciously" were not satisfied:—

Held, dismissing the appeal, (1) that the prosecution had to prove that the injection of heroin was a cause of death and not merely de minimis; that, although the judge had not expressly directed the jury that the injection of heroin had to be a substantial cause of death, the jury must have realised that something more than a de minimis contribution was necessary and, accordingly, they had not been misled when considering the question of causation and there was ample evidence to support their verdict of manslaughter (post, p. 117C–D).

(2) That although F's consent to the injection of heroin might be relevant to consideration of whether the appellant had acted with recklessness or gross negligence, the victim's consent was not generally a defence to a charge of manslaughter and in the circumstances of the present case the judge's direction to the jury that consent was irrelevant was not misleading and did not render the conviction unsafe or unsatisfactory (post, pp. 117F–G, 118B–C).

Per curiam. Injecting a person with a mixture of heroin and water, which at the time of the injection and for the purposes of the injection the accused had unlawfully taken into his possession, was an unlawful act in relation to a charge of manslaughter (post, p. 118G–H).

(3) That the use of heroin was potentially harmful and, therefore, it was a "noxious" thing for the purposes of section 23 of the Offences against the Person Act 1861; that proof of foresight of consequence was not required for a finding that the noxious substance was administered "maliciously" where the act was a direct one and accordingly, since the appellant had deliberately inserted a syringe directly into F's body knowing that it contained a noxious substance, his conviction for administering a noxious thing contrary to section 23 would be upheld (post, pp. 119H, 120H).

Reg. v. *Cunningham* [1957] 2 Q.B. 396, C.C.A. distinguished.

The following case is referred to in the judgment of the court:

Reg. v. *Cunningham* [1957] 2 Q.B. 396; [1957] 3 W.L.R. 76; [1957] 2 All E.R. 412, C.C.A.

The following additional cases were cited in argument:

Reg. v. *Blaue* [1975] 1 W.L.R. 1411; [1975] 3 All E.R. 446, C.A.
Reg. v. *Harris (Janet)* [1968] 1 W.L.R. 769; [1968] 2 All E.R. 49, C.A.
Reg. v. *Hennah* (1877) 13 Cox C.C. 547.
Reg. v. *Instan* [1893] 1 Q.B. 450
Reg. v. *Lamb* [1967] 2 Q.B. 981; [1967] 3 W.L.R. 888; [1967] 2 All E.R. 1282, C.A.

Reg. v. *Smith* [1959] 2 Q.B. 35; [1959] 2 W.L.R. 623; [1959] 2 All E.R. 193, Ct.-M.A.C.
Rex v. *Donovan* [1934] 2 K.B. 498, C.C.A.
Rex v. *Dyson* [1908] 2 K.B. 454, C.C.A.

APPEAL against conviction.

In June 1975 at St. Albans Crown Court (Thesiger J.) the appellant, Ronald Philip Cato, was convicted of the manslaughter of Anthony Farmer and of administering a noxious thing to him contrary to section 23 of the Offences against the Person Act 1861. He was sentenced to four years' imprisonment concurrent on both counts. The applicants, Neil Adrian Morris and Melvin Dudley, were convicted of assisting an offender contrary to section 4 (1) of the Criminal Law Act 1967. The applicant Morris was sentenced to Borstal training and Dudley was sentenced to two years' imprisonment. They applied for leave to appeal against sentence and conviction on the ground that their convictions should be quashed if the appellant was not guilty of the offences charged.

The appellant appealed against his convictions on the grounds, inter alia, that the judge had misdirected the jury on the issue of causation and on the relevance or otherwise of Anthony Farmer's consent to the injections of heroin; that heroin was not a " noxious " thing within section 23 of the Offences against the Person Act 1861 and that the judge had failed to direct the jury that " maliciously " in section 23 included foresight of consequences. He also applied for leave to appeal against sentence.

The facts are stated in the judgment of the court.

Louis Blom-Cooper Q.C. and *Geoffrey Robertson* for the appellant.
Anthony Ansell for the applicants.
David Jeffreys for the Crown.

LORD WIDGERY C.J. Following a trial at St. Albans Crown Court in June 1975 the following sentences were imposed upon the appellant, Ronald Philip Cato, and the applicants, Neil Adrian Morris, and Melvin Dudley, in respect of counts in the indictment. The appellant was sentenced to four years' imprisonment on count 1 for manslaughter of Anthony Farmer. He was also sentenced to four years concurrent on a charge under section 23 of the Offences against the Person Act 1861 of administering a noxious thing. The two applicants were not concerned with the manslaughter charge directly. Their offences were of assisting the appellant in what might be described as a " cover-up " of the death of Farmer. In respect of those offences the applicant Morris was sentenced to Borstal training and the applicant Dudley to two years' imprisonment, but in respect of each of them a condition precedent to it was the conviction of the appellant on the manslaughter charge or the charge under section 23. Unless that could be established, then the offences charged against the applicants did not arise. Equally, it is accepted by their counsel that if the appellant's conviction for manslaughter or administering a noxious thing is upheld, then the applicants have nothing further to say in regard to their conviction in this case. Thus, nearly everything in regard to guilt or innocence revolves around the appellant's conviction for manslaughter.

The victim was a young man called Anthony Farmer. The events leading up to his death occurred on July 25, 1974. On that day the appellant and Farmer had been in each other's company for most of the day. The evidence suggests certain intervals when they were apart, but by and large

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only cause of death actually supplied by the evidence was morphine. No natural disease was present and no other drug was identified. Furthermore, the symptoms and the external appearance of the body, and the nature of the final terminal cause, was consistent with poison by the administration of heroin in the way which was described. Further, when the people who lived in the house were giving their evidence about the death of Farmer, it was, as the judge pointed out, quite clear that they thought there was no doubt about what the cause had been. It may be of course that young people living in those circumstances know a great deal about the symptoms of heroin poisoning; I know not.

The judge in the summing up said:

> "Members of the jury, it seems to me that that evidence about the condition of the appellant when he was senseless on the floor and was put to bed, what he looked like and so forth is quite material in regard to the cause of Tony Farmer's death because [the appellant] and he had both been dosing themselves with the same sort of thing, in the same sort of way, in the same sort of number of times, and that is clear evidence in this particular case. The opinions of the people in the house is of course not medical opinion but everybody there seemed to draw the conclusion that probably the heroin injections had caused both of them to be in the condition they were in."

That is an important and proper conclusion, if the jury thought fit to adopt it, because the fact that the appellant very nearly suffered the same fate as Farmer, and showed the same kind of symptoms following the same kind of injections, is a pointer to indicate that the cause of Farmer's condition was the heroin which he had taken; and, furthermore, the jury were entitled, if they thought fit, to be influenced by the fact that the non-medical evidence from the residents was of the kind which the judge related.

Of course behind this whole question of the sufficiency of evidence of causation is the fact that it was not necessary for the prosecution to prove that the heroin was the only cause. As a matter of law, it was sufficient if the prosecution could establish that it was *a* cause, provided it was a cause outside the de minimis range, and effectively bearing upon the acceleration of the moment of the victim's death. When one has that in mind it is, we think, really possible to say that if the jury had been directed to look for heroin as a cause, not de minimis but a cause of substance, and they came back with a verdict of not guilty, the verdict could really be described as a perverse one. The whole background of the evidence was the other way and there certainly was ample evidence, given a proper direction, upon which a charge of manslaughter could be supported.

But what about the proper direction? It will be noted that in none of the versions which I have quoted of the judge's direction on this point, nor in any of those which I have not quoted which appear in the summing up, is there any reference to it being necessary for the cause to be a substantial one. It is said in clear terms in one of the six questions that the jury can consider whether the administration of the heroin was a cause or contributed to or accelerated the death, and in precise terms the word "contributed" is not qualified to show that a substantial contribution is required.

Mr. Blom-Cooper, whose eagle eye misses nothing, sees here, and seeks to exploit here, what is a misdirection on the part of the judge. In other words, taking the judge's words literally it would be possible for the jury to bring in a verdict of guilty of manslaughter even though the contribution was not of substance.

A alleged offender is to be dealt with after he has been taken into custody. Though this is correct as a fact, it is by no means conclusive in favour of Lord Gifford's suggested construction of the subsection. It seems to me plain that the purpose of this section is to enable forces to which the Act applies to have control over deserters and absentees without leave from those forces, irrespective of where those persons were at the time they deserted or went absent. What is to happen to those deserters or absentees
B after they are taken into custody is a matter for those forces and not for the courts of this country. This is the underlying purpose of this Part of this Act.

Lord Gifford referred us to *Reg.* v. *Peterson, Ex parte Hartmann* [1969] V.R. 417, a decision of Newton J. in the Supreme Court of Victoria. That was a decision regarding the true construction of the Defence (Visiting
C Forces) Act 1963 of Australia. It is sufficient to say this of this decision: first, it was a decision upon a different statute from that with which we are concerned; secondly, the language of the Australian statute differs in a number of important respects from the language of the Act of 1952. The long title is different; and the section comparable with section 13 of the English Act does not contain any reference to legislation such as the Army Act 1955. It would be out of place in this court to express any view
D whether one agreed or disagreed with a decision of a distinguished Commonwealth judge upon the construction of a Commonwealth statute. I think that decision is clearly distinguishable. Although Lord Gifford was able to point to various statements in textbooks, including *Halsbury's Laws of England*, 3rd ed., vol. 33, p. 854, and footnotes in *Stone's Justices' Manual*, 170th ed., vol. 1, p. 1063, to support his submission, I am afraid
E that, as a result of our decision, those passages will have to be rewritten. I would dismiss the appeal.

ORMROD L.J. I agree with both the judgments which have been delivered in this court and the judgments in the Divisional Court and have nothing to add. I agree that the appeal should be dismissed.

F *Appeal dismissed.*

Solicitors: *Huntley, Millard & Co., Bromley; Treasury Solicitor.*

A. H. B.

G [COURT OF APPEAL]

* REGINA *v.* BLAUE

1975 June 23; July 16

Lawton L.J., Thompson and Shaw JJ.

H *Crime—Homicide—Causation—Stab wound penetrating lung—Blood transfusion necessary to save life—Refusal on ground of religious beliefs—Whether stab wound operative cause of death—Whether test of reasonableness applicable*

The defendant stabbed a young woman of 18 with a knife, which penetrated her lung. She was taken to hospital where she was told that a blood transfusion and surgery were necessary to save her life. She refused to have a blood transfusion on the ground that it was contrary to her religious beliefs as

a Jehovah's Witness and she died the following day. The cause of death was bleeding into the pleural cavity, which would not have been fatal if she had accepted medical treatment when advised to do so. The defendant was charged with murder. The judge, in directing the jury on the issue of causation, said that they might think that they had little option but to find that the stab wounds were still an operative or substantial cause of death when the victim died. The defendant was convicted of manslaughter on the ground of diminished responsibility.

On appeal against conviction:—

Held, dismissing the appeal, that the death of the victim was caused by loss of blood as a result of the stab wounds inflicted by the defendant and the fact that she had refused a blood transfusion did not break the causal connection between the stabbing and the death; that, since the criminal law did not require the victim to mitigate her injuries, and since an assailant was not entitled to claim that the victim's refusal of medical treatment because of her religious beliefs was unreasonable, the jury were entitled to find that the stab wounds were an operative or substantial cause of death.

Dicta of Maule J. in *Reg.* v. *Holland* (1841) 2 Mood. & R. 351, 352 and Lord Parker C.J. in *Reg.* v. *Smith* [1959] 2 Q.B. 35, 42, C.-M.A.C. applied.

Reg. v. *Jordan* (1956) 40 Cr.App.R. 152, C.C.A. distinguished.

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

Reg. v. *Holland* (1841) 2 Mood. & R. 351.
Reg. v. *Jordan* (1956) 40 Cr.App.R. 152, C.C.A.
Reg. v. *Smith* [1959] 2 Q.B. 35; [1959] 2 W.L.R. 623; [1959] 2 All E.R. 193, C.-M.A.C.
Steele v. *Robert George & Co. (1937) Ltd.* [1942] A.C. 497; [1942] 1 All E.R. 447, H.L.(E.).

The following additional cases were cited in argument:

Imperial Chemical Industries Ltd. v. *Shatwell* [1965] A.C. 656; [1964] 3 W.L.R. 329; [1964] 2 All E.R. 999, H.L.(E.).
Oropesa, The [1943] P. 32; [1943] 1 All E.R. 211, C.A.
Rew's Case (1662) Kel. 26.
Rex v. *McIntyre* (1847) 2 Cox C.C. 379.

APPEAL against conviction.

On October 17, 1974, at Teesside Crown Court (Mocatta J.), the defendant, Ronald Konrad Blaue, was acquitted of murder but convicted of manslaughter on the ground of diminished responsibility (count 1), wounding with intent to do grievous bodily harm (count 2) and indecent assault (count 3). He pleaded guilty to indecently assaulting two other women (counts 4 and 5) and was sentenced to life imprisonment on counts 1 and 2 and to concurrent sentences of 12 months' imprisonment on counts 3, 4 and 5. He appealed against conviction on the ground that the judge had misdirected the jury on causation since the girl's refusal to have a blood transfusion had broken the chain of causation between the stabbing and her death.

The facts are stated in the judgment.

James Comyn Q.C. and *Robin Stewart* for the defendant.
Donald Herrod Q.C. and *David Fenwick* for the Crown.

Cur. adv. vult.

July 16. LAWTON L.J. read the following judgment of the court. On October 17, 1974, at Teesside Crown Court after a trial before Mocatta J. the defendant was acquitted of the murder of Jacolyn Woodhead but was convicted of her manslaughter on the ground of diminished responsibility (count 1). He was also convicted of wounding her with intent to do her grievous bodily harm (count 2) and of indecently assaulting her (count 3). He pleaded guilty to indecently assaulting two other women (counts 4 and 5). He was sentenced to life imprisonment on counts 1 and 2 and to concurrent sentences of 12 months' imprisonment on counts 3, 4 and 5.

The defendant appeals with the leave of this court against his conviction on count 1 and, if his appeal is successful, he applies for leave to appeal against his sentence on count 2.

The victim was aged 18. She was a Jehovah's Witness. She professed the tenets of that sect and lived her life by them. During the late afternoon of May 3, 1974, the defendant came into her house and asked her for sexual intercourse. She refused. He then attacked her with a knife inflicting four serious wounds. One pierced her lung. The defendant ran away. She staggered out into the road. She collapsed outside a neighbour's house. An ambulance took her to hospital, where she arrived at about 7.30 p.m. Soon after she was admitted to the intensive care ward. At about 8.30 p.m. she was examined by the surgical registrar who quickly decided that serious injury had been caused which would require surgery. As she had lost a lot of blood, before there could be an operation there would have to be a blood transfusion. As soon as the girl appreciated that the surgeon was thinking of organising a blood transfusion for her, she said that she should not be given one and that she would not have one. To have one, she said, would be contrary to her religious beliefs as a Jehovah's Witness. She was told that if she did not have a blood transfusion she would die. She said that she did not care if she did die. She was asked to acknowledge in writing that she had refused to have a blood transfusion under any circumstances. She did so. The prosecution admitted at the trial that had she had a blood transfusion when advised to have one she would not have died. She did so at 12.45 a.m. the next day. The evidence called by the prosecution proved that at all relevant times she was conscious and decided as she did deliberately, and knowing what the consequences of her decision would be. In his final speech to the jury, Mr. Herrod for the prosecution accepted that her refusal to have a blood transfusion was *a* cause of her death. The prosecution did not challenge the defence evidence that the defendant was suffering from diminished responsibility.

Towards the end of the trial and before the summing up started counsel on both sides made submissions as to how the case should be put to the jury. Counsel then appearing for the defendant invited the judge to direct the jury to acquit the defendant generally on the count of murder. His argument was that her refusal to have a blood transfusion had broken the chain of causation between the stabbing and her death. As an alternative he submitted that the jury should be left to decide whether the chain of causation had been broken. Mr. Herrod submitted that the judge should direct the jury to convict, because no facts were in issue and when the law was applied to the facts there was only one possible verdict, namely, manslaughter by reason of diminished responsibility.

When the judge came to direct the jury on this issue he did so by telling them that they should apply their common sense. He then went on to tell them they would get some help from the cases to which counsel had referred

in their speeches. He reminded them of what Lord Parker C.J. had said in *Reg.* v. *Smith* [1959] 2 Q.B. 35, 42 and what Maule J. had said 133 years before in *Reg.* v. *Holland* (1841) 2 Mood. & R. 351, 352. He placed particular reliance on what Maule J. had said. The jury, he said, might find it "most material and most helpful." He continued:

> "This is one of those relatively rare cases, you may think, with very little option open to you but to reach the conclusion that was reached by your predecessors as members of the jury in *Reg.* v. *Holland*, namely, 'yes' to the question of causation that the stab was still, at the time of this girl's death, the operative cause of death—or a substantial cause of death. However, that is a matter for you to determine after you have withdrawn to consider your verdict."

Mr. Comyn has criticised that direction on three grounds: first, because *Reg.* v. *Holland* should no longer be considered good law; secondly, because *Reg.* v. *Smith*, when rightly understood, does envisage the possibility of unreasonable conduct on the part of the victim breaking the chain of causation; and thirdly, because the judge in reality directed the jury to find causation proved although he used words which seemed to leave the issue open for them to decide.

In *Reg.* v. *Holland*, 2 Mood. & R. 351, the defendant in the course of a violent assault, had injured one of his victim's fingers. A surgeon had advised amputation because of the danger to life through complications developing. The advice was rejected. A fortnight later the victim died of lockjaw. Maule J. said, at p. 352: "the real question is, whether in the end the wound inflicted by the prisoner was the cause of death." That distinguished judge left the jury to decide that question as did the judge in this case. They had to decide it as juries always do, by pooling their experience of life and using their common sense. They would not have been handicapped by a lack of training in dialectic or moral theology.

Maule J.'s direction to the jury reflected the common law's answer to the problem. He who inflicted an injury which resulted in death could not excuse himself by pleading that his victim could have avoided death by taking greater care of himself: see *Hale's Pleas of the Crown* (1800 ed.), pp. 427–428. The common law in Sir Matthew Hale's time probably was in line with contemporary concepts of ethics. A man who did a wrongful act was deemed *morally* responsible for the natural and probable consequences of that act. Mr. Comyn asked us to remember that since Sir Matthew Hale's day the rigour of the law relating to homicide has been eased in favour of the accused. It has been—but this has come about through the development of the concept of intent, not by reason of a different view of causation. Well known practitioner's textbooks, such as *Halsbury's Laws of England*, 3rd ed., vol. 10 (1955), p. 706 and *Russell on Crime*, 12th ed. (1964), vol. 1, p. 30 continue to reflect the common law approach. Textbooks intended for students or as studies in jurisprudence have queried the common law rule: see *Hart and Honoré, Causation in Law* (1959), pp. 320–321 and *Smith and Hogan, Criminal Law*, 3rd ed. (1973), p. 214.

There have been two cases in recent years which have some bearing upon this topic: *Reg.* v. *Jordan* (1956) 40 Cr.App.R. 152 and *Reg.* v. *Smith* [1959] 2 Q.B. 35. In *Reg.* v. *Jordan* the Court of Criminal Appeal, after conviction, admitted some medical evidence which went to prove that the cause of death was not the blow relied upon by the prosecution but abnormal medical treatment after admission to hospital. This case has

A been criticised but it was probably rightly decided on its facts. Before the abnormal treatment started the injury had almost healed. We share Lord Parker C.J.'s opinion that *Reg.* v. *Jordan* should be regarded as a case decided on its own special facts and not as an authority relaxing the common law approach to causation. In *Reg.* v. *Smith* [1959] 2 Q.B. 35 the man who had been stabbed would probably not have died but for a series of mishaps. These mishaps were said to have broken the chain of B causation. Lord Parker C.J., in the course of his judgment, commented as follows, at p. 42:

> "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 C original wounding is merely the setting in which another cause operates can it be said that the death does not flow from the wound. Putting it 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."

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

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

As was pointed out to Mr. Comyn in the course of argument, two cases, each raising the same issue of reasonableness because of religious beliefs, could produce different verdicts depending on where the cases were tried. A jury drawn from Preston, sometimes said to be the most G Catholic town in England, might have different views about martyrdom to one drawn from the inner suburbs of London. Mr. Comyn accepted that this might be so: it was, he said, inherent in trial by jury. It is not inherent in the common law as expounded by Sir Matthew Hale and Maule J. It has long been the policy of the law that those who use violence on other people must take their victims as they find them. This in our judgment means the whole man, not just the physical man. It H 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 casual connection between the act and death.

If a victim's personal representatives claim compensation for his death the concept of foreseeability can operate in favour of the wrong-

doer in the assessment of such compensation: the wrongdoer is entitled to expect his victim to mitigate his damage by accepting treatment of a normal kind: see *Steele* v. *R. George & Co. (1937) Ltd.* [1942] A.C. 497. As Mr. Herrod pointed out, the criminal law is concerned with the maintenance of law and order and the protection of the public generally. A policy of the common law applicable to the settlement of tortious liability between subjects may not be, and in our judgment is not, appropriate for the criminal law.

The issue of the cause of death in a trial for either murder or manslaughter is one of fact for the jury to decide. But if, as in this case, there is no conflict of evidence and all the jury has to do is to apply the law to the admitted facts, the judge is entitled to tell the jury what the result of that application will be. In this case the judge would have been entitled to have told the jury that the defendant's stab wound was an operative cause of death. The appeal fails.

Appeal dismissed.
Application to certify point of law of general public importance involved refused.

Solicitors: *Swinburne & Jackson, Durham; Director of Public Prosecutions.*

J. W.

[COURT OF APPEAL]

* ROYAL TRUST CO. OF CANADA *v.* MARKHAM AND ANOTHER

1975 July 16, 17

Megaw and Browne L.JJ. and Sir John Pennycuick

Mortgage—Possession—Suspension of order—Order for possession of dwelling house made by registrar—Proviso that no warrant be issued without leave of court—Mortgagors' proposal to sell property to enable sums due to be paid—Whether right to suspend order—Administration of Justice Act 1970 (*c.* 31), *s.* 36 (1) (2) (*b*) [1]*—Administration of Justice Act* 1973 (*c.* 15), *s.* 8 (1) (2) [2]

The plaintiff mortgagees brought an action against the defendant mortgagors claiming possession of the mortgaged property, a dwelling house, on the ground of non-payment of instalments of interest due. The county court registrar made an order for possession with the proviso "that there be no warrant issued without leave of the court." The defendants did not give evidence; the court was informed by the plaintiffs that the defendants had put the property in the hands of estate agents at an asking price which the plaintiffs considered to be excessive. On appeal by the plaintiffs, the judge upheld the registrar's order.

On appeal by the plaintiffs:—

Held, (1) that on a true construction of section 36 of the Administration of Justice Act 1970 the court had no jurisdiction

[1] Administration of Justice Act 1970, s. 36 (1) (2) (*b*): see post, p. 1420F–H.
[2] Administration of Justice Act 1973, s. 8 (1) (2): see post, p. 1421C–F.

Appeal dismissed.
Costs of appellant and respondent to be paid out of central funds pursuant to section 6 of Costs of Criminal Cases Act 1973.

Solicitors: Sharpe Pritchard & Co. for Ian S. Manson, Birmingham; Tanfields, Dudley.

J. A. G.

[HOUSE OF LORDS]

REGINA . . . . . APPELLANT

AND

HANCOCK . . . . . FIRST RESPONDENT

AND

SHANKLAND . . . . . SECOND RESPONDENT

1985 Oct. 21; 31 — Lord Lane C.J., Leonard and Rose JJ.

Dec. 11, 12; 1986 Feb. 27 — Lord Scarman, Lord Keith of Kinkel, Lord Roskill, Lord Brightman and Lord Griffiths

Crime—Homicide—Murder—Mental element—Concrete block dropped from bridge on to highway killing taxi driver—Prime purpose not to kill or cause injury—Whether death natural consequence of action—Whether foreseeability of probable consequences relevant—Whether meaning of intent requiring elaboration

The defendants, who were miners on strike, pushed a block of concrete and a concrete post from a bridge over a three-lane highway on which a miner was being taken to work by taxi. The block hit the taxi's windscreen and the driver was killed. The defendants were tried on a charge of murder. The case for the Crown was that the defendants had agreed that they would together perform acts, each having the intention either to kill or cause serious injury, that they did act in concert and that the acts in fact done by the defendant who pushed the block killed the taxi driver. The defendants' case was that their intention was not to kill or harm anyone since they thought that the block and post were positioned over the middle lane when the taxi was being driven in the nearside lane, and that their intention was only to block the road or to frighten. In relation to the intent necessary to sustain a charge of murder, the judge adhering to the guidelines laid down by the House of Lords in *Reg. v. Moloney* [1985] A.C. 905, 929, directed the jury that they might find it helpful to ask themselves, "Was death or serious injury a natural consequence of what was done? Did a defendant foresee that consequence as a natural consequence?" The defendants were convicted and appealed. The Court of

Appeal, holding that the judge's direction was inadequate and potentially misleading and that he should have explained to the jury that in the context of foreseeability and intent "natural consequence" meant highly likely, quashed the convictions for murder and substituted verdicts of manslaughter.

On appeal by the Crown:—

Held, dismissing the appeal, that where it was necessary to direct a jury on the issue of intent by reference to foresight of consequences, the words "natural consequences" were not by themselves sufficient to imply probability; that the judge should refer to probability and explain to the jury that the greater the probability of the consequence the more likely it was that the consequence was foreseen, and that if it was foreseen the more likely it was that it was intended; and that, since the judge's direction was liable to have misled the jury into concentrating exclusively on the causal link between the act and its consequences, the Court of Appeal had been right to quash the convictions for murder (post, pp. 472A–E, 473C–F, 474G—475A).

Dictum of Lord Bridge of Harwich in *Reg. v. Moloney* [1985] A.C. 905, 929, H.L.(E.) disapproved.

Per curiam. The laying down of guidelines by the Court of Appeal for use in directing juries in cases of complexity is a function to be exercised sparingly, and limited to cases of real difficulty. If it is done, the guidelines should avoid generalisation so far as is possible and encourage the jury to exercise their common sense in reaching what is their decision on the facts. Guidelines are not rules of law: judges should not think they must use them. A judge's duty is to direct the jury in law and help them on the particular facts of the case. The use of the guidelines formulated by Lord Lane C.J. in the Court of Appeal in the present case is not recommended (post, pp. 473G–H, 474E–F, G—475A).

Decision of the Court of Appeal (Criminal Division) post, p. 457F; [1985] 3 W.L.R. 1014 affirmed.

The following cases are referred to in the opinion of Lord Scarman:

Reg. v. Hyam [1975] A.C. 55; [1974] 2 W.L.R. 607; [1974] 2 All E.R. 41, H.L.(E.)

Reg. v. Moloney [1985] A.C. 905; [1985] 2 W.L.R. 648; [1985] 1 All E.R. 1025, H.L.(E.)

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

The following additional cases were cited in argument in the House of Lords.

Leung Kam-Kwok v. The Queen (1984) 81 Cr.App.R. 83, P.C.

Rex v. Steane [1947] K.B. 997; [1947] 1 All E.R. 813, C.C.A.

Southern Portland Cement Ltd. v. Cooper [1974] A.C. 623; [1974] 2 W.L.R. 152; [1974] 1 All E.R. 87, P.C.

The following cases are referred to in the judgment of the Court of Appeal:

Reg. v. Hyam [1975] A.C. 55; [1974] 2 W.L.R. 607; [1974] 2 All E.R. 41, H.L.(E.)

Reg. v. Moloney [1985] A.C. 905; [1985] 2 W.L.R. 648; [1985] 1 All E.R. 1025, H.L.(E.)

Reg. v. Smith [1961] A.C. 290; [1960] 3 W.L.R. 92; [1960] 2 All E.R. 450, C.C.A.
Rex v. Steane [1947] K.B. 997; [1947] 1 All E.R. 813, C.C.A.

No additional cases were cited in argument in the Court of Appeal.

APPEALS against conviction.

The appellants, Reginald Dean Hancock and Russell Shankland, in the Crown Court at Cardiff (Mann J. and a jury), together with a co-defendant, Anthony Glyndwr Williams, were tried on an indictment charging in count 1, murder; in count 2, conspiracy to damage property intending to endanger the life of another; and, in count 3, conspiring to damage property being reckless as to whether the life of another would be endangered. On 16 May 1985 the appellants were convicted by a majority of 10 to 2 on count 1 and the jury were discharged from returning verdicts against them on counts 2 and 3. The co-defendant was found not guilty by direction on count 1 and was acquitted on counts 2 and 3. Each appellant was sentenced to life imprisonment. They applied for leave to appeal against conviction on the ground, inter alia, that the jury had been misdirected on the question of intent. Leave to appeal was granted by the court at the outset of the hearing of the application.

The facts are stated in the judgment.

Gareth Williams Q.C. and *Christopher Pitchford* for Hancock.
John Prosser Q.C. and *Lord Elystan-Morgan* for Shankland.
Martin Thomas Q.C. and *Philip Rees* for the Crown.

Cur. adv. vult.

4 November. LORD LANE C.J. read the following judgment of the court. On 16 May 1985 at the Crown Court at Cardiff, before Mann J. and a jury, these appellants (leave having been given to them by this court to appeal against conviction) were convicted of murder on count 1 of the indictment by a majority verdict after a trial lasting eight working days. They were sentenced to life imprisonment. The jury were discharged from giving verdicts on count 2 (conspiracy to damage property intending to endanger the life of another) and count 3 (conspiracy to damage property being reckless as to whether the life of another would thereby be endangered).

Another man, Anthony Glyndwr Williams, was found not guilty by direction on count 1 (murder) and acquitted on counts 2 and 3.

A considerable body of the facts was not in dispute. At about 5.15 a.m. on 30 November 1984 a convoy taking a miner, David Williams, to work during the miners' strike was travelling in the near side lane of the Heads of the Valleys Road and passing under Rhymney Bridge. The convoy comprised the following vehicles: first, a police motor cycle; next a police Land Rover with driver and observer; third, a taxi driven by David Wilkie with David Williams, the miner, as a passenger; and finally a police Sherpa van bringing up the rear.

He referred to the rule of evidence that a man is presumed to intend the natural and probable consequences of his acts, and went on to observe that the House of Lords in *Smith*'s case [1961] A.C. 290 had treated the presumption as irrebuttable, but that Parliament intervened by section 8 of the Criminal Justice Act 1967 to return the law to the path from which it had been diverted, leaving the presumption as no more than an inference open to the jury to draw if in all the circumstances it appears to them proper to draw it.

Yet he omitted any reference in his guidelines to probability. He did so because he included probability in the meaning which he attributed to "natural." My Lords, I very much doubt whether a jury without further explanation would think that "probable" added nothing to "natural." I agree with the Court of Appeal that the probability of a consequence is a factor of sufficient importance to be drawn specifically to the attention of the jury and to be explained. In a murder case where it is necessary to direct a jury on the issue of intent by reference to foresight of consequences the probability of death or serious injury resulting from the act done may be critically important. Its importance will depend on the degree of probability: if the likelihood that death or serious injury will result is high, the probability of that result may, as Lord Bridge of Harwich noted and the Lord Chief Justice emphasised, be seen as overwhelming evidence of the existence of the intent to kill or injure. Failure to explain the relevance of probability may, therefore, mislead a jury into thinking that it is of little or no importance and into concentrating exclusively on the causal link between the act and its consequence. In framing his guidelines Lord Bridge of Harwich [1985] A.C. 905, 929G, emphasised that he did not believe it necessary to do more than to invite the jury to consider his two questions. Neither question makes any reference (beyond the use of the word "natural") to probability. I am not surprised that when in this case the judge faithfully followed this guidance the jury found themselves perplexed and unsure. In my judgment, therefore, the *Moloney* guidelines as they stand are unsafe and misleading. They require a reference to probability. They also require an explanation that the greater the probability of a consequence the more likely it is that the consequence was foreseen and that if that consequence was foreseen the greater the probability is that that consequence was also intended. But juries also require to be reminded that the decision is theirs to be reached upon a consideration of all the evidence.

Accordingly, I accept the view of the Court of Appeal that the *Moloney* guidelines are defective. I am, however, not persuaded that guidelines of general application, albeit within a limited class of case, are wise or desirable. Lord Lane C.J. formulated in this case ante, p. 461D–G guidelines for the assistance of juries but for the reason which follows, I would not advise their use by trial judges when summing up to a jury.

I fear that their elaborate structure may well create difficulty. Juries are not chosen for their understanding of a logical and phased process leading by question and answer to a conclusion but are expected to exercise practical common sense. They want help on the practical

problems encountered in evaluating the evidence of a particular case and reaching a conclusion. It is better, I suggest, notwithstanding my respect for the comprehensive formulation of the Court of Appeal's guidelines, that the trial judge should follow the traditional course of a summing up. He must explain the nature of the offence charged, give directions as to the law applicable to the particular facts of the case, explain the incidence and burden of proof, put both sides' cases making especially sure that the defence is put; he should offer help in understanding and weighing up all the evidence and should make certain that the jury understand that whereas the law is for him the facts are for them to decide. Guidelines, if given, are not to be treated as rules of law but as a guide indicating the sort of approach the jury may properly adopt to the evidence when coming to their decision on the facts.

In a case where foresight of a consequence is part of the evidence supporting a prosecution submission that the accused intended the consequence, the judge, if he thinks some general observations would help the jury, could well, having in mind section 8 of the Criminal Justice Act 1967, emphasise that the probability, however high, of a consequence is only a factor, though it may in some cases be a very significant factor, to be considered with all the other evidence in determining whether the accused intended to bring it about. The distinction between the offence and the evidence relied on to prove it is vital. Lord Bridge's speech in *Moloney* made the distinction crystal clear: it would be a disservice to the law to allow his guidelines to mislead a jury into overlooking it.

For these reasons I would hold that the *Moloney* guidelines are defective and should not be used as they stand without further explanation. The laying down of guidelines for use in directing juries in cases of complexity is a function which can be usefully exercised by the Court of Appeal. But it should be done sparingly, and limited to cases of real difficulty. If it is done, the guidelines should avoid generalisation so far as is possible and encourage the jury to exercise their common sense in reaching what is their decision on the facts. Guidelines are not rules of law: judges should not think that they must use them. A judge's duty is to direct the jury in law and to help them upon the particular facts of the case.

Accordingly, I would answer the certified question in the affirmative and would dismiss the appeal. I would propose that the costs of all parties be paid out of central funds.

LORD KEITH OF KINKEL. My Lords, I have had the benefit of reading in advance the speech of my noble and learned friend Lord Scarman. I agree with it, and for the reasons he gives would dismiss the appeal.

LORD ROSKILL. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Scarman. For the reasons he gives I too would dismiss this appeal.

LORD BRIGHTMAN. My Lords, for the reasons given in the speech of my noble and learned friend Lord Scarman, I too would dismiss this appeal.

LORD GRIFFITHS. My Lords, I have had the advantage of reading in draft the speech delivered by my noble and learned friend Lord Scarman. For the reasons he gives I too would dismiss this appeal.

Appeal dismissed.
Costs out of central funds.

Solicitors: Director of Public Prosecutions; Cartwrights, Cardiff; Gareth J. Davies, Bargoed.

S. H.

[HOUSE OF LORDS]

RAHMANI AND OTHERS . . . . . RESPONDENTS

AND

DIGGINES . . . . . APPELLANT

[On appeal from REGINA v. DIGGINES, *Ex parte* RAHMANI AND OTHERS]

1985 Dec. 16; 1986 March 20 — Lord Scarman, Lord Elwyn-Jones, Lord Roskill, Lord Templeman and Lord Mackay of Clashfern

Immigration—Limited leave to enter—Application to extend stay—Applicants' appeal from Secretary of State's refusal to extend stay—Request for oral hearing—Adjudicator informed by applicants' advisers that applicants untraceable—Dismissal of appeal without hearing—Whether applicants entitled to be heard—Whether adjudicator having reason to be satisfied that no person authorised to represent applicants at hearing—Immigration Appeals (Procedure) Rules 1972 (S.I. 1972 No. 1684), r.12 (a)(c)

The Immigration Appeals (Procedure) Rules 1972 provide by rule 12:

"An appellate authority may determine an appeal without a hearing if—(*a*) no party to the appeal has requested a hearing; or (*b*) the appellate authority has decided, after giving every other party to the appeal an opportunity of replying to any representations submitted in writing by or on behalf of the appellant, to allow the appeal; or (*c*) the appellate authority is satisfied that the appellant is outside the United Kingdom or that it is impracticable to give him notice of a hearing and, in either case, that no person is authorised to represent him at a hearing; . . ."

In 1979, the principal applicant, a married woman, was admitted to the United Kingdom as a student with leave to stay for seven months, later extended to September 1980. On 16

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

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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

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A modification is in a category on its own; it should not be characterised as medical or surgical; rather it is more in line with body adornment, which is widely accepted in British and other cultures and is within the boundaries imposed by Parliament which ensure a proper balance between personal freedom and risk of harm. It is a natural extension of tattooing and piercing which also carry medical risk and to which consent has long been accepted to negative any criminal activity. There is no good reason to extend the B scope of the offences covered by section 18 of the Offences against the Person Act 1861 to cover this sort of activity. It is for the legislature to decide whether matters such as body modification, if carried out with consent, amount to the causing of harm: see *R v Brown (Anthony)* [1994] 1 AC 212, 274, per Lord Mustill.

C *Jonas Hankin QC* (instructed by *Crown Prosecution Service, Appeals Unit*) for the Crown.

The level of harm in these procedures and those like them is such that the person harmed may not consent in law. *R v Brown (Anthony)* [1994] 1 AC 212 decides that where actual or grievous bodily harm is caused consent will be no defence in the absence of a good reason. The court can be entirely satisfied that the threshold of criminality has been passed so that the D question of consent does not arise where the procedure is not performed by a medically qualified person for legitimate medical purposes. The conduct in question does not represent one of the exceptional categories in which victim's consent is recognised. It is clear from the expert medical evidence provided to the court that procedures of this kind require surgical intervention by a medically qualified person with the requisite training and E regulatory background. There is no clear rationale as to what amounts to a reasonable surgical interference but the limit is the Offences against the Person Act 1861 as explained by *R v Brown (Anthony)* and it is by reference to that case that the court should judge these procedures. The level of harm in this case is very high and was also intended; indeed, it is the very object of the process. There is some need to protect from themselves those who have consented to extreme body modification, because they may be vulnerable or F even mentally unwell. Public health considerations outweigh any question of personal autonomy. None of these procedures is needed in the public interest.

Anning replied.

The court took time for consideration.

G

22 March 2018. **LORD BURNETT OF MALDON CJ** handed down the following judgment of the court.

1 The defendant is by trade a tattooist and body piercer who added "body modification" to his services. He operates from premises in Wolverhampton. He is due to stand trial in the Crown Court at Wolverhampton on an H 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. There are three alternative counts of inflicting grievous bodily harm, contrary to section 20 of the same Act. The procedures performed by the defendant which found these counts were first, the removal of a customer's

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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

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A byelaws directed, in particular, at cleanliness and hygiene. Undertaking the specified task without being registered is an offence—see section 16. But the same tasks performed by or under the supervision of a medical practitioner do not fall within the scheme of registration: see sections 14(8) and 15(8). That, no doubt, is because the provision of medical services is closely regulated by other legislation. In considering the grant of a licence local
B authorities consider matters such as hygiene, cleaning, sterilisation, provision for the disposal of waste and the like. Details of qualifications, training and experience of the individuals giving the treatments are also sought by the local authority.

8 Body modification, which is a term which encompasses each of the procedures in issue in this case (and many more), is unregulated and those who practice it require no particular training or qualification. Anyone can
C set himself up as a body modifier. We are told that the defendant in fact attended various short courses, but he has no medical qualifications which equip him to carry out these surgical procedures, deal with adverse consequences and still less to make any judgments about the mental health of his customers.

9 On 23 July 2015 a customer named EL had his left ear removed by the
D defendant. He signed a consent form. The consent form described the defendant as a "qualified modification artist", although what that means is opaque. The form then seeks confirmation whether the customer suffers from various diseases or is taking medication, of the sort familiar to anyone attending a doctor or dentist. It continues:

> "Our promise to you . . . is to look after you before, during and after
E your procedure. We promise that the environment of your treatment is clean and sterile to a high standard. All that we ask is that you continue with our hard work and take care of your modification when you leave the studio. We will educate you the best we can on how to do this before you leave the studio."

The customer then signed a declaration to the effect that he was aware that
F the process involved risk, that he had chosen to have the procedure done of his own free will and finally that he will not hold the "artist responsible in anyway for any problems or medical conditions that may arise" from the procedure.

10 EL's ear was removed without anaesthetic.

11 The tongue splitting was undertaken with a scalpel on an unknown female on 23 July 2012, also without anaesthetic. Although no consent
G form was signed (or at least none is in the papers before us), relating to the tongue splitting or nipple removal, the prosecution accept that consent was given. Similarly, the nipple was removed from an unknown male on 16 August 2012 without anaesthetic.

12 Uncontroversial evidence was served by the prosecution and placed before the judge by agreement from John Murphy, an ear, nose and throat
H consultant, and also from Nigel Mercer, a consultant plastic surgeon.

13 Removal of an ear gives rise to a risk of moderate-to-severe hearing loss and injury to the facial nerve. As Mr Murphy explains, removal of the pinna (the visible ear) can cause the ear canal to close. That is difficult to correct surgically. The function of the pinna is to catch sound and funnel it into the ear. Some hearing loss will follow the removal of the pinna.

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Furthermore, the facial nerve is located immediately in front and below the pinna and thus its removal, particularly by an unskilled "surgeon", carries a risk of facial paralysis. Mr Murphy also explains that at a practical level, loss of the pinna makes it difficult to wear spectacles and also to use a hearing aid. He notes the inevitable risk of infection attending such a procedure. Mr Mercer confirms that total ear removal or partial ear removal would never be done by a plastic surgeon for aesthetic reasons although both may be required for medical reasons. He explains that to perform any cosmetic surgery in the United Kingdom the doctor concerned must be listed on a specialist register held by the General Medical Council. This is a requirement of the Health and Social Care Act 2001. The General Medical Council has issued guidelines to assist cosmetic surgeons. Before a procedure is carried out, the surgeon would meet the patient on at least two occasions. The potential complications and risks would be explained and noted. Mr Mercer indicates that there is no requirement to perform a psychiatric assessment before carrying out cosmetic surgery. None the less, a cosmetic surgeon would be on the look out for potential psychiatric or psychological problems and, if necessary, refer the patient for an assessment. The General Medical Council has also introduced rules which require a two-week cooling off period before surgery is performed to enable a patient to change his or her mind.

14 Proper informed consent would be obtained and recorded in the approved forms.

15 If an ear were to be removed, it would be done under sterile conditions in an operating theatre. The ear is well served by blood vessels and so its removal would cause a good deal of bleeding. The ear canal is also an area which carries a lot of bacteria which enhances the risk of infection. About a week after the operation any patient would have a follow-up appointment to remove sutures, check for infection and make an assessment of how the procedure has gone. Some months later the patient would be seen again to examine the scar before finally being discharged.

16 Mr Mercer has seen photographs of EL's head. He accepts that the procedure "has been done quite well in that the skin edge is cleanly cut" but the stitching was not done to the standard of a plastic surgeon.

17 Mr Mercer also saw images in relation to the nipple removal. After the nipple was removed, the skin was closed in a straight line. In his opinion, a plastic surgeon would not remove nipples for aesthetic reasons, but only for medical reasons.

18 Although this appeal does not involve the procedure, Mr Mercer also comments on another form of body modification occasionally performed by those who started as body piercers. It is to reroute the urethra in a male by inserting a piece of metal at the base of the penis. This, again, is not a procedure that would be undertaken by a plastic surgeon. It merely illustrates the very broad range of activities that can fall within the ambit of the broad term of "body modification".

19 Mr Mercer viewed the tongue splitting. This too would never be done by a reputable surgeon for aesthetic purposes, or indeed any other purpose. There are particular risks associated with it. First, the tongue will bleed very heavily. Secondly, it is liable to swell up after incisions are made. Furthermore, the mouth is a very dirty environment and hard to keep sterile.

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A Infection is an ever-present risk. Splitting the tongue to create a forked tongue has adverse impact on both speech and feeding.

20 A plastic surgeon would be alert to the possibility that a patient was suffering from body dysmorphic disorder if he or she presented with extreme demands for cosmetic surgery. That would give rise to real questions about whether the patient concerned was able to make a rational and informed B decision about surgery and at least prompt the surgeon to consider a referral to a psychiatrist or psychologist.

The law

21 The question whether the consent of a victim could provide a defence to offences of causing actual bodily harm, contrary to section 47 of C the Offences against the Person Act 1861, or wounding contrary to section 20, was authoritatively considered in the case of *R v Brown (Anthony)* [1994] 1 AC 212. The circumstances were unorthodox in that the injuries were inflicted during the course of consensual extreme sado-masochistic sex. A majority of the House of Lords, with Lord Mustill and Lord Slynn of Hadley dissenting, concluded that consent provided no defence. The headnote in the official report captures the ratio of the D decision

> "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 E 1861 Act."

The satisfaction of sado-masochistic desires did not constitute such a good reason.

22 Actual bodily harm means any injury "calculated to interfere with the health or comfort of the [victim]" but must be more than transient or trifling: *R v Miller* [1954] 2 QB 282, 292. A wound is caused when the F whole of the skin, dermis and epidermis, is broken including the inner skin within the cheek, lip or urethra: *R v Smith* (1837) 8 C & P 173; *R v Waltham* (1848) 3 Cox CC 442. Section 20 of the 1861 Act covers both wounding and also the infliction of grievous bodily harm. That means really serious bodily harm: *Director of Public Prosecutions v Smith* [1961] AC 290; *R v Cunningham* [1982] AC 566.

G **23** The decision in *R v Brown (Anthony)* flowed from detailed consideration of three earlier authorities, *R v Coney* (1882) 8 QBD 534, *R v Donovan* [1934] 2 KB 498 and *Attorney General's Reference (No 6 of 1980)* [1981] QB 715. The *Coney* case concerned spectators at a prize fight who were prosecuted as secondary participants in any offence committed by the fighters. The *Donovan* case concerned caning for sexual gratification. *Attorney General's Reference (No 6 of 1980)* concerned a fight, not in the H course of properly conducted sport. It was held that where two people fight in those circumstances intending or causing actual bodily harm, it is no defence for a person charged that the other consented, whether the fight is held in public or in private. Lord Lane CJ explained that it was not in the public interest that people should cause each other actual bodily harm for no

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good reason. He encapsulated the principles in the following passage of his judgment between pp 718–719:

> "We think that it can be taken as a starting point that it is an essential element of an assault that the act is done contrary to the will and without the consent of the victim; and it is doubtless for this reason that the burden lies on the prosecution to negative consent . . ."
>
> "But the cases show that the courts will make an exception to this principle where the public interest requires . . ."
>
> "Bearing in mind the various cases and the views of the textbook writers cited to us, and starting with the proposition that ordinarily an act consented to will not constitute an assault, the question is: at what point does the public interest require the court to hold otherwise?
>
> "In answering this question the diversity of view expressed in the previous decisions such as [*R v Coney* and *R v Donovan*] make some selection and a partly new approach necessary. Accordingly, we have not followed the dicta which would make an act, even if consensual, an assault if it occurred in public, on the ground that it constituted a breach of the peace, and was therefore itself unlawful. These dicta reflect the conditions of the times when they were uttered . . ."
>
> "The answer to this question, in our judgment, is that it is not in the public interest that people should try to cause, or should cause, each other actual bodily harm for no good reason . . . So in our judgment, it is immaterial whether the act occurs in private or in public; it is an assault if actual bodily harm is intended and/or caused. This means that most fights will be unlawful regardless of consent.
>
> "Nothing which we have said is intended to cast doubt upon the accepted legality of properly conducted games and sports, lawful chastisement or correction, reasonable surgical interference, dangerous exhibitions etc. These apparent exceptions can be justified as involving the exercise of a legal right, in the case of chastisement or correction, or as needed in the public interest, in other cases."

24 The majority of the House of Lords endorsed the approach of Lord Lane CJ, with the result that for the defendants to avoid criminal liability, it was necessary for the committee to conclude that the conduct in question fell into a special exception to which the general rule did not apply. It is perhaps not unfair to suggest that the special categories hitherto identified in the cases do not lend themselves to a coherent statement of underlying principle. They are at best ad hoc, and reflect the values of society recognised from time to time by the judges. Some were referred to in the final paragraph of the quotation we have set out from Lord Lane CJ's judgment in *Attorney General's Reference (No 6 of 1980)*. Each of the categories was discussed by the Law Commission in its consultation paper, *Consent and Offences against the Person* (Consultation Paper No 134) (1994), completed on 14 December 1993, between paras 9.1–11.23. Its second consultation paper, *Consent in the Criminal Law* (Consultation Paper No 139) (1995), contains a comprehensive exposition of the law relating to each of the exceptions.

25 In *R v Brown (Anthony)* [1994] 1 AC 212 itself Lord Templeman explained, at p 231F, that "Ritual circumcision, tattooing, [and] ear-piercing . . . are lawful activities". Lord Mustill, at p 267C, identified "bravado (as where a boastful man challenges another to try to hurt him with

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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

A 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 B 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 C 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 D 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 E 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. F 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.

G

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. H 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.

was an exception where the person touched expressly or impliedly consented. As Robert Goff L.J. put it in *Collins v. Wilcock* [1984] 1 W.L.R. 1172, 1177: "Generally speaking, consent is a defence to battery." As the word "generally" suggests the exception was itself subject to exceptions. Thus in *Stephen, Digest of the Criminal Law*, 3rd ed., it is stated in article 206 "Everyone has a right to consent to the infliction upon himself of bodily harm not amounting to a maim." By way of footnote it is explained that "Injuries short of maims are not criminal at common law unless they are assaults, but an assault is inconsistent with consent." Maim could not be the subject matter of consent since it rendered a man less able to fight or defend himself: *Hawkins' Pleas of the Crown*, 8th ed., vol. 1, ch. 15, p. 107. Nor could a person consent to the infliction of death (*Stephen, Digest of the Criminal Law*, 3rd ed., article 207) or to an infliction of bodily harm in such manner as to amount to a breach of the peace: article 208. It was "uncertain to what extent any person has a right to consent to his being put in danger of death or bodily harm by the act of another" (article 209), where the example given suggests that dangerous acts rendering serious bodily harm likely were contemplated.

The law has recognised cases where consent, expressed or implied, can be a defence to what would otherwise be an assault and cases where consent cannot be a defence. The former include surgical operations, sports, the chastisement of children, jostling in a crowd, but all subject to a reasonable degree of force being used, tattooing and earpiercing; the latter include death and maiming. None of these situations, in most cases pragmatically accepted, either covers or is analogous to the facts of the present case.

It is, however, suggested that the answer to the question certified flows from the decisions in three cases.

The first is *Reg. v. Coney*, 8 Q.B.D. 534. This is a somewhat remarkable case in that not only the two participants in a prize-fight but a number of observers were convicted of a common assault. The case was said to be relevant to the present question since it was decided that consent was not a defence to common assault. It is, however, accepted in the present appeal that consent can be a defence to common assault. Moreover it is plain from the judgment as a whole that a fight of this kind, since in public, either did, or had a direct tendency to, create a breach of the peace. It drew large crowds who gambled, who might have got excited and have fought among themselves. Moreover it was plain that such fights were brutal—the fighters went out to kill or very gravely injure their opponents and they fought until one of them died or was very gravely injured. As Mathew J. put it, at p. 544:

> "the chief incentive to the wretched combatants to fight on until (as happens too often) dreadful injuries have been inflicted and life endangered or sacrificed, is the presence of spectators watching with keen interest every incident of the fight."

This emphasis on the risk of a breach of the peace and the great danger to the combatants is to be found in all of the judgments in the