2.1 The elements of crime

2.1.1 General

The criminal law does not seek to punish people for their evil thoughts; an accused must be proved to be responsible for conduct or the existence of a state of affairs prohibited by the criminal law before liability may arise. Whether liability arises will depend further on the accused’s state of mind at the time; usually intention or recklessness is required.

A Latin maxim encapsulates this principle—*actus non facit reum, nisi mens sit rea*—the act itself does not constitute guilt unless done with a guilty mind. The conduct or state of affairs which a particular offence prohibits is called the *actus reus* and the state of mind which the accused must be proved to have had at the time of the conduct or during the existence of the state of affairs is called the *mens rea*.

It is important to note that the terms *actus reus* and *mens rea*, are simply useful labels to be attributed to the constituent parts of any crime being analysed; they do not have any meaning in themselves. They have no greater meaning than, for example, the terms ‘obverse’ and ‘reverse’ used when describing coins. Just as the words and designs on coins will vary so too will the *actus reus* and *mens rea* of different crimes.

It is particularly important when analysing the *mens rea* of offences to realise that this term is not prescriptive. In some offences nothing short of intention to bring about the prohibited consequence will suffice (e.g., theft, Chapter 11 post) whereas in others recklessness will suffice (e.g., assault, Chapter 10 post). While the Latin maxim above is a useful tool it is not a universal truth. There are many offences, largely of a minor and regulatory nature, where *mens rea* is not required. These are called strict liability offences and are of statutory creation (see 4.2 post). In such cases proof by the prosecution of *mens rea* is not required in respect of at least one element of the *actus reus*. 
The use of the Latin terms *actus reus* and *mens rea* has been criticised. In *Miller [1983] 2 AC 161*, 174 Lord Diplock stated that:

> it would . . . be conducive to clarity of analysis of the ingredients of a crime that is created by statute . . . if we were to avoid bad Latin and instead to think and speak . . . about the conduct of the accused and his state of mind at the time of that conduct, instead of speaking of *actus reus* and *mens rea*.

The Law Commission in its Draft Criminal Code Bill (Law Com No. 177) uses the terms ‘external elements’ and ‘fault element’. However, the terms *actus reus* and *mens rea* are so widely used that they will be retained for the purposes of exposition in this book.

While most crimes may be analysed in terms of *actus reus* and *mens rea*, a few crimes exist where these concepts merge. In some offences the *actus reus* may only be proved by proving *mens rea*. For example, s. 1(1) of the Prevention of Crime Act 1953 makes it an offence for any person, without lawful authority or reasonable excuse, to have with him in any public place any offensive weapon. Section 1(4) defines ‘offensive weapon’ as ‘any article made or adapted for use for causing injury to the person, or intended by the person having it with him for such use’. If, for example, the accused is found carrying a pick-axe handle in a public place, the issue whether this amounts to the *actus reus* of the offence will depend on his intention at the time as this article does not fall into either of the first two categories of articles ‘made or adapted for use for causing injury’. If there is no intent to use it to cause injury then there is no offensive weapon and thus no *actus reus*. In some other offences the *actus reus* implies a mental element. For example, if the accused is charged with possession of a controlled drug such as heroin or cannabis contrary to s. 5 of the Misuse of Drugs Act 1971 it is necessary to prove that he knew he possessed the thing which turns out to be the drug even though he does not know its nature (see *DPP v Brooks [1974] AC 862*; *Boyesen [1982] AC 768*); it is not possible to possess something if you do not know of its existence and thus in the absence of this mental element of knowledge there can be no *actus reus*.

### 2.1.2 Defences

So far the suggestion has been that if the prosecution prove the commission of an *actus reus* by the accused with the necessary *mens rea* criminal liability will have been established. This ignores the fact that the accused may be able to rely upon some justification or excuse to avoid criminal liability. Do justifications or excuses, more commonly referred to as defences, form part of the definition of a crime or are they outside the definition, operating like a trump card in bridge? Glanville Williams in *Criminal Law: The General Part* (2nd edn, 1961) expresses the view that all the constituents of a crime are either *actus reus* or *mens rea* stating (at p. 20):

> *Actus reus* includes . . . not merely the whole objective situation that has to be proved by the prosecution, but also the absence of any ground of justification or excuse, whether such justification or excuse be stated in any statute creating the crime or implied by the courts in accordance with general principles.
An alternative view expressed by D.J. Lanham, ‘Larsonneur Revisited’ [1976] Crim LR 276, is that a crime is ‘made up of three ingredients, actus reus, mens rea and (a negative element) absence of a valid defence’. Which view is correct is not crucial; it can even be argued that both are partially correct if a distinction is drawn between justifications and excuses. A.T.H. Smith, ‘On Actus Reus and Mens Rea’ in Reshaping the Criminal Law (ed. Glazebrook, 1978), states (at p. 99):

the distinction is that we excuse the actor because he is not sufficiently culpable or at fault, whereas we justify an act because we regard it as the most appropriate course of action in the circumstances, even though it may result in harm that would, in the absence of justification, amount to a crime.

**Example**

An example of a justification is self-defence. If, for example, D is charged with unlawfully and maliciously wounding V contrary to s. 20 of the Offences Against the Person Act 1861 he may admit that he did wound V and that he intended to do so, but he would not be convicted if he did so only in response to V’s murderous assault upon him. In such circumstances the wounding of V would not be unlawful as it would be justified by the defence of self-defence. As the wounding was not unlawful it can be said that there was no actus reus; similarly as D only intended to wound V in circumstances where this was justified, there was no intention to wound V unlawfully (see further 6.5.2.3 post). By contrast, if D wounded V because he was told to do so by X who was holding D’s wife hostage threatening to kill her if he did not obey, D could plead the defence of duress. In this situation, D intended to wound V and did so unlawfully (as he had no justification for so doing) but the defence of duress would operate to excuse him from the consequences of conviction and punishment. There has been an actus reus and mens rea but the defence of duress is superimposed much as a trump card might be played in bridge (see further 6.2 post).

### 2.2 Defining an actus reus

Each crime must be looked at individually to determine what must be proved to establish its actus reus. In the case of a common law crime (such as murder) the definition of its actus reus is to be found in the decisions of the courts; in the case of a statutory crime (such as theft) the definition of the actus reus is to be found in the statute as interpreted judicially in decided cases. Generally, however, it is necessary to know which elements of the definition of an offence comprise the actus reus. The term actus reus has a much wider meaning than the ‘act’ prohibited by the law which it implies. A useful working definition is that it comprises all the elements of the definition of the offence except those which relate to the mental element (mens rea) required on the part of the accused. The definition of an offence may prohibit acts or omissions (conduct); it may prohibit these only in particular circumstances. In some cases the definition of the offence may require particular consequences to ensue from the conduct. A distinction which flows
from this is that between ‘conduct crimes’ and ‘result crimes’. A ‘conduct crime’ prohibits conduct regardless of consequences whereas a ‘result crime’ prohibits particular consequences which ensue from conduct on the part of the accused. In a limited number of cases, offences prohibit particular states of affairs without reference to conduct or its consequences. The ambit of the criminal law may be illustrated by the following examples of offences.

Example

An example of a ‘conduct crime’ is perjury which is committed whenever D makes a statement on oath which he does not believe to be true. The offence is committed whether or not the statement is believed. In other words, the result of D’s prohibited conduct is irrelevant; it is the conduct and not the consequence which is prohibited. The relevant circumstance in the *actus reus* of this offence is that the statement is made on oath. Another conduct crime is rape, which is committed where D penetrates with his penis the vagina, anus, or mouth of another person who does not consent. The relevant circumstance in the *actus reus* of this offence is that the other person is not consenting at the time of the penetration. An example of a ‘result crime’ is murder where it must be proved that D’s conduct caused the deceased’s death. If the intended result of the death of the victim does not occur, the law of attempts, under the Criminal Attempts Act 1981, provides for a charge of attempted murder—a ‘conduct crime’. An example of a ‘state of affairs’ offence, where the definition of the *actus reus* is concerned neither with conduct nor its consequences, is being in charge of a motor vehicle on a road or other public place while unfit to drive through drink or drugs contrary to s. 4(2) of the Road Traffic Act 1988. If D is in charge of the vehicle (a state of affairs) it matters not whether he was driving the vehicle, sitting in it or asleep in it.

2.3 Proving an *actus reus*

It has already been stated that the criminal law does not seek to punish people for their evil thoughts or intentions. If D has the *mens rea* for a particular offence but does not bring about the *actus reus* he is not guilty of committing that offence. This is illustrated by the case of *Deller* (1952) 36 Cr App R 184.

P was selling a car to D and accepted D’s car in part exchange after D represented to him that it was ‘free from all encumbrances’. D believed this representation to be false as he had previously executed a document with a finance company which purported to be a hire purchase agreement in respect of the car. If this agreement was valid the car was not free from encumbrances and D had lied to P. If, however, the agreement was in reality a loan on the security of the car it was void as it had not been registered under the Bills of Sale Act 1878 and thus D’s representation would, in fact, be true. D was charged with, and convicted of, obtaining P’s car by false pretences contrary to s. 32 of the Larceny Act 1916. As the jury found the agreement was a loan on the security of the car, the Court of Criminal Appeal quashed D’s conviction as this agreement was void and thus the car was unencumbered. There were, accordingly, no false pretences because ‘it may be quite accidentally and, strange as it may sound,
dishonestly, the appellant had told the truth' (per Hilbery J at p. 191). D quite clearly intended to make false representations but the representations he made were true; while he had mens rea there was no actus reus. If such facts were to recur the correct charge would be attempted fraud by false representation.

2.4 Conduct must be voluntary

2.4.1 General

D is driving his car when suddenly, without warning, he suffers a heart attack which renders him incapable of continuing to exercise control over the vehicle. D slumps over the steering wheel and his foot pushes the accelerator pedal to the floor while the car careens through a traffic light which is showing red. The vehicle continues along the road and crashes into the rear of E's car which is stopped at a zebra crossing. E's vehicle is forced on to the crossing where it hits V breaking his leg. If D was charged with failure to stop at a red traffic light, dangerous driving and criminal damage to E's car, and E was charged with failing to accord precedence to a pedestrian on a zebra crossing and causing V grievous bodily harm, could they be convicted, have they committed the actus reus of any of these offences?

Where the actus reus of an offence requires conduct on the part of the accused, whether an act or omission, liability will only accrue where the conduct is willed; it is not sufficient that the accused by his bodily movements performed the prohibited conduct or brought about the prohibited consequence defined by the actus reus of the offence. In Bratty v A-G for Northern Ireland [1963] AC 386 (at p. 409), Lord Denning stated that the ‘requirement that it should be a voluntary act is essential, not only in a murder case, but also in every criminal case’. In offences requiring mens rea, if the conduct is not willed there will also be an absence of mens rea on the part of the accused, but even if the offence is one of strict liability, requiring no proof of mens rea, it is still necessary to prove that the accused's conduct was voluntary. To convict and impose punishment on an accused who was not responsible for his conduct would be unjust.

In the example above, driving through a red traffic light is a strict liability offence. There is no need to prove that D was aware that the light was red and drove through it intentionally. The only matter which the prosecution need to prove is that D was driving the vehicle when it went through the red traffic light. However, as D had been incapacitated by the heart attack, there was at the time no voluntary act of driving and thus no actus reus. The charge of dangerous driving would similarly fail. The charge of criminal damage would also fail as, although D's car caused damage to E's car when it crashed into it, this was not the result of a voluntary or willed act on the part of D. Had D felt warning pains before the heart attack and continued driving he might be liable, particularly if he had previously had such an attack and recognised the pains as warning symptoms.
In Kay v Butterworth (1945) 173 LT 191 (see also Hill v Baxter [1958] 1 QB 277), D was driving home after night-shift work when, overcome by sleep, he drove into a party of soldiers. He was convicted of driving without due care and attention and dangerous driving as, realising that he was becoming drowsy, he should have stopped and it was immaterial that he was not conscious of his actions when the accident happened. Humphreys J stated:

A person, however, who through no fault of his own, becomes unconscious while driving, for example, by being struck by a stone, or by being taken ill, ought not to be liable at criminal law.

In Bell [1984] 3 All ER 842, further examples of involuntary conduct for which no criminal liability may attach were given by Goff LJ who stated (at p. 846):

a motorist . . . [who] has been attacked while driving by, for example, a swarm of bees or a malevolent passenger, or because he has been affected by a sudden blinding pain, or because he has become suddenly unconscious by reason of a black-out, or because his vehicle has suffered some failure, for example, through a blow-out or through the brakes failing.

In the example above E would be acquitted as his failure to accord precedence to a pedestrian was due to the external application of force on his vehicle which was beyond his control (see Leicester v Pearson [1952] 2 QB 668). Similarly, there was no voluntary act on E’s part which caused V’s injury.

In the example of D and E a distinction may be drawn between the causes of their involuntary conduct. E’s conduct was caused by the external application of physical force. Another example would be where A is carving the Sunday joint when B seizes his hand holding the knife and thrusts it into C killing him. If A was charged with murder he would be acquitted as there was no voluntary act on his part. In our earlier example D’s involuntary conduct was due to his loss of consciousness. Where a person does physical acts while in a state of unconsciousness this is referred to as automatism. For example, a person may perform physical acts while concussed or in a state of somnambulism or while suffering a fit or seizure. Automatism will be considered further in Chapter 5.

2.4.2 State of affairs offences

While most offences require voluntary conduct on the part of the accused to establish their actus reus, there are some offences which prohibit the existence of a state of affairs. An example given above is s. 4(2) of the Road Traffic Act 1988, being in charge of a motor vehicle on a road or other public place while unfit to drive through drink or drugs. For as long as the accused is in charge of the vehicle while unfit the actus reus is committed. This is so even though the accused may not be responsible for his unfitness, as where his soft drink has been laced with alcohol, although this may constitute a special reason for not disqualifying him from driving (see Shippam [1971] RTR 209; Pugsley v Hunter [1973] RTR 284).

While there may be strong public policy reasons for adopting an ‘absolute liability’ approach to ‘situational’ road traffic offences because of the obvious dangers
involved to members of the public, it is questionable whether this approach should be adopted in other cases of ‘state of affairs’ offences. The courts, however, have not shown any reluctance to convict people of situational offences where they have not been responsible for bringing about the prohibited state of affairs.

In *Larsonneur* (1933) 97 JP 206, L, a French citizen was required to leave the United Kingdom. She went to Eire but was deported and brought back to Holyhead by the Irish police who handed her over to British police officers. On a charge under the Aliens Order 1920 that she ‘being an alien to whom leave to land in the United Kingdom has been refused, was found in the United Kingdom’ L was convicted. The Court of Criminal Appeal upheld her conviction, Hewart CJ referring to the circumstances of compulsion which brought about her return to the United Kingdom as ‘perfectly immaterial’.

The Court was totally unconcerned to discover whether L had caused that state of affairs. The suspicion must be that the Court would have upheld her conviction even if a group of kidnappers had removed her from Eire and had brought her to the United Kingdom; a requirement of culpability (i.e. voluntariness) on the part of the accused leading to the creation of the state of affairs would have been desirable and could easily have been implied by the Court of Criminal Appeal in its construction of the statute.

Just when it was thought that *Larsonneur* was an aberrant decision which could be shunted into a siding and forgotten, the Divisional Court revived the controversy with its decision in *Winzar v Chief Constable of Kent, The Times*, 28 March 1983.

W had been brought to hospital on a stretcher. He was diagnosed as being merely drunk and was asked to leave. When he was later found slumped on a seat in the corridor the police were summoned. They removed him to the road, concluded he was drunk and placed him in their police car. W was charged with being found drunk on the highway contrary to s. 12 of the Licensing Act 1872. The Divisional Court construed the words ‘found drunk’ to mean ‘perceived to be drunk’ and upheld his conviction on the basis that, as the purpose of the offence was to deal with the nuisance of public drunkenness, it was sufficient to establish guilt to prove that the person was drunk while in a public place; how he came to be there was considered to be irrelevant.

The report does not indicate how W came to be taken to hospital. If he had been found lying in the street originally there might be no cause for complaint. The decision, however, is expressed in broad terms and may be criticised on two bases. First, it is arguable that the officers first perceived W’s condition while he was in hospital; by taking him outside to the public highway they had procured the commission of the offence. Secondly, in the absence of express words in the statute dispensing with the need to prove voluntary conduct on the part of the accused bringing into existence the prohibited state of affairs, the requirement of voluntariness should have been implied on the basis that penal statutes should be construed strictly in favour of the accused. (This is a presumption of statutory interpretation honoured more in the breach than in the observance in recent years.)

The decision in *Winzar* may be contrasted with *Martin v State* 31 Ala. App. 334, 17 So. 2d 427 (1944) where the Alabama Court of Appeals reversed the trial court’s conviction of being drunk on a public highway on the ground that a voluntary
appearance on the highway is a prerequisite of a conviction. The appellant had been in his own house drunk when police officers forcibly entered his house, carried him into the street and then arrested him. If this factual situation occurred in England the broad terms of the decisions in Larsonneur and Winzar would dictate a contrary result. It is to be hoped that courts will apply these two cases narrowly and look for culpability on the part of the accused in bringing about the prohibited state of affairs before convicting. The degree of culpability required need not be very great. An objective requirement that the creation of the state of affairs be reasonably foreseeable at the time the accused embarked on the course of conduct which ultimately led to that state of affairs would suffice. For example, if the accused is drinking in a public house it is reasonably foreseeable that he will end up on the public highway either at closing time or if he leaves or is ejected earlier. If, however, he is drinking at home, it is not reasonably foreseeable that this will happen. Thus if Winzar had been at home unconscious from his drinking when a third party summoned the ambulance to take him to hospital, the reasonable foreseeability test would not be satisfied. If, however, he had been drinking in a public house when he collapsed the test would be satisfied, albeit the roundabout way in which he ended up on the highway could not have been foreseen at the time he commenced his drinking.

2.5 Omissions

2.5.1 General

A, knowing that B cannot swim, pushes him into the deep end of the swimming pool intending that he should drown. C, a swimmer using the pool, ignores B’s struggles and his cries for help. D, the lifeguard employed by the council to rescue anyone in difficulty, ignores B’s cries, believing them to be a prank of which there have been many that day. E, B’s father who is swimming in the pool, also ignores B’s cries, reckoning that it is time that his wimpish son either sinks to oblivion or learns to swim. B drowns. Will A, C, D, and E be liable for unlawful homicide (i.e. either murder or manslaughter depending on their mens rea)? A is the only one to have performed a positive act which caused B’s death. C, D, and E failed to act to save B but they did not do any positive act to cause his death. If liability is to arise it would depend on there being a duty upon them to act to prevent B’s death although they are not responsible for the existence of the life-threatening situation.

Generally the common law was concerned to prohibit particular results from occurring and it punished an accused for causing the prohibited result by his positive acts. Gradually the courts came to recognise limited liability for omissions where a duty to act could be implied, the accused failed to act, and the prohibited result ensued. Not all offences, however, are capable of commission by omission. It is a question for the courts whether a particular offence is capable of commission by omission (see, for example, Firth (1990) 91 Cr App R 217, 12.3.2.2 post). Some
offences cannot be committed by omission, for example, burglary and robbery. In some offences the definition of the *actus reus* may make it clear that it may only be committed by an act. In *Ahmad* (1986) 84 Cr App R 64, A, a landlord, was charged with doing acts calculated to interfere with the peace or comfort of a residential occupier with intent to cause him to give up occupation of the premises contrary to s. 1(3) of the Protection from Eviction Act 1977. The relevant acts had been done by A without the necessary intent but he subsequently omitted to rectify the situation with the intention of causing his tenant to give up occupation of the premises. The court strictly construed the statute holding that the requirement of doing acts could not be satisfied by an omission.

Murder or manslaughter may be committed by omission. In the example above D and E could be found liable for unlawful homicide provided *mens rea* could be established as the courts have recognised a duty to arise under contract (see *Pittwood* (1902) 19 TLR 37, 2.5.2.2.1 post) and a duty on the part of parents to care for their children and protect them from physical harm (see *Gibbins and Proctor* (1918) 13 Cr App R 134, 2.5.2.2.2 post). A problem in relation to D and E, however, is that they did not actually cause B’s death in the sense in which causation is generally understood (see 2.6 post). The courts do not appear to have grappled with the principles of causation specifically in relation to omissions. The Law Commission in its Draft Criminal Code Bill (Law Com No. 177) specifically addresses this issue in clause 17(1) which states: ‘... a person causes a result ... when ... (b) he omits to do an act which might prevent its occurrence and which he is under a duty to do according to the law relating to the offence’.

With regard to C, he would not be liable as there is no general duty to be a ‘Good Samaritan’. The position of the common law was summarised in *Lord Macaulay’s Works* (ed. Lady Trevelyan), Vol. VII, p. 497:

In general ... the penal law must content itself with keeping men from doing positive harm, and must leave to public opinion, and to the teachers of morality and religion, the offence of furnishing men with motives for doing positive good. It is evident that to attempt to punish men by law for not rendering to others all the service which it is their [moral] duty to render to others would be preposterous. We must grant impunity to the vast majority of those omissions which a benevolent morality would pronounce reprehensible, and must content ourselves with punishing such omissions only when they are distinguished from the rest by some circumstance which marks them out as peculiarly fit objects of penal legislation.

While C’s disregard of B’s plight and failure to render assistance may be morally reprehensible it falls outside the ambit of the criminal law.

### 2.5.2 Classifying omissions

*Key Point*

The analysis of offences into *conduct crimes* and *result crimes* is useful when examining liability for omissions. G. P. Fletcher in *Rethinking Criminal Law* (1978) distinguishes two forms of liability for omissions. The first type he designates ‘breach of duty to act’, where liability may
be imposed for breach of a statutory obligation to act. This relates to conduct crimes where there is no requirement for the occurrence of harm to be proved. The second type of liability which relates to result crimes he designates ‘commission by omission’, where liability is imposed ‘for failing to intervene, when necessary, to prevent the occurrence of a serious harm such as death or the destruction of property’ (at p. 421). Fletcher’s classification will be used to examine the situations in which the criminal law imposes liability for omissions.

2.5.2.1 Breach of duty to act

Various statutes impose duties to act on individuals in specified circumstances. An individual finding himself in the specified circumstances who fails to perform that duty will commit an offence. For example, a motorist who, without reasonable excuse, fails to provide a police officer with a specimen of breath when required to do so under s. 6 of the Road Traffic Act 1988, or who, when at a police station, similarly fails to provide a specimen of breath, blood, or urine when required to do so under s. 7 of the 1988 Act, is guilty of an offence. The penalty for these offences of omission is the same as the offences of commission of which the motorist was suspected. Thus a motorist suspected of driving a vehicle while unfit due to drink or drugs is liable to the same penalty whether he provides the specimen which would establish his guilt or whether he refuses to provide it. Another example of an offence of omission created by statute is failure by a motorist to stop and provide his name and address to any person reasonably requiring it where his vehicle has been involved in an accident where there has been inter alia injury to another person or damage to another vehicle (s. 170(4) of the Road Traffic Act 1988). A more serious offence relating to non-disclosure of information is created by s. 19 of the Terrorism Act 2000. If information comes to the attention of D in the course of his trade, profession, business, or employment giving rise to a belief or suspicion that another person has committed one of a range of offences under the Act, D commits an offence if he does not disclose his belief or suspicion and the information on which it is based to the police as soon as is reasonably practicable.

The above examples are all of statutory creation where it is specifically stated that failure to perform the duty imposed by the statute is an offence. In some situations the common law has recognised an offence where a duty imposed by common law or statute has been neglected.

In Dytham [1979] QB 722, D, a police constable, was on duty in uniform near a club when a man was ejected from the club and kicked to death by a ‘bouncer’. D took no steps to intervene and when the incident was over he drove off having told a bystander that he was going off duty. D was charged with the common law offence of misconduct whilst acting as an officer of justice, in that he had wilfully and without reasonable excuse or justification neglected to perform his duty to preserve the Queen’s Peace and to protect the person of the deceased or arrest his assailants or otherwise bring them to justice. D contended that there was no such offence known to the law and that misconduct required a positive act or an element of corruption but mere nonfeasance was not enough. The Court of Appeal, in upholding his conviction, placed
reliance on a passage in Stephen’s *Digest of Criminal Law* which stated:

Every public officer commits a misdemeanour who wilfully neglects to perform any duty which he is bound either by common law or by statute to perform provided that the discharge of such duty is not attended with greater danger than a man of ordinary firmness and activity may be expected to encounter.

Lord Widgery stipulated the requirements of the offence as being wilful neglect not mere inadvertence, and the neglect must be culpable in the sense that it is without reasonable excuse or justification. He stated (at p. 727):

This . . . element of culpability . . . is not restricted to corruption or dishonesty but . . . must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment. Whether such a situation is revealed by the evidence is a matter that a jury has to decide.

It is interesting that Dytham was charged with a conduct crime and not the result crime of manslaughter. This is presumably because it was considered that causation could not be established as it would be impossible to prove that the victim would not have died but for Dytham’s failure to perform his duty.

Misconduct in a public office would appear to be an offence applicable to all holders of public office. The nature of the offence obviously will vary depending upon the duties, statutory or common law, placed upon the office holder (see also *A-G’s Ref (No. 3 of 2003)* [2004] EWCA Crim 868). Another common law offence which may be committed by omission in breach of a duty, in this case a statutory one, is cheating the revenue (see *Mavji* [1987] 1 WLR 1388).

2.5.2.2 Commission by omission

The situations examined so far have involved ‘conduct crimes’. Is it possible to commit a ‘result crime’ by omitting to act? Not all omissions will give rise to liability; liability will depend on there being a duty, recognised by the law, to act or intervene in the circumstances. There are several situations in which the law has recognised the existence of such duties; these are outlined below. Most of the cases which have arisen concern murder or manslaughter. There has been some doubt whether less serious offences against the person which require the commission of an assault (i.e. in the broader sense of that term which includes a battery) may be committed by omission. There is no decision which states that an assault requires an act and J. C. Smith argues that such a requirement is unnecessary (see Smith, ‘Liability for omissions in criminal law’ (1984) 4 *Legal Studies* 88). The situations in which a duty may arise are not closed; new situations may give rise to the recognition of a duty.

In *Khan and Khan* [1998] Crim LR 830 two drug dealers appealed from convictions of manslaughter arising out of their supply of heroin to the deceased and their failure to summon medical assistance when she went into a coma following her consumption
of the drug. In quashing their convictions Swinton Thomas LJ stated:

To extend the duty to summon medical assistance to a drug dealer who supplies heroin to a person who subsequently dies on the facts of this case would undoubtedly enlarge the class of persons to whom, on previous authority, such a duty may be owed. It may be correct to hold that such a duty does arise. . . . Unfortunately, the question as to the existence or otherwise of [such] a duty . . . was not . . . at any time considered by the Judge, and the jury was given no direction in relation to it.

In a future case such a duty may be recognised. A potential difficulty to which the case gives rise relates to the way in which a duty may be recognised. Swinton Thomas LJ said that it was for the judge to rule whether the facts were capable of giving rise to a duty and, if so, for the jury to decide whether there was such a duty. The danger is that the jury may be unduly influenced by the fact of death and conclude that there must have been a duty to prevent such a death. In a later case, Singh (Gurpal) [1999] Crim LR 582 (see 9.3.3.2 post) the Court of Appeal affirmed the trial judge’s decision that whether a situation gave rise to a duty was a question of law for the judge to determine which, it is submitted, is the better view.

2.5.2.2.1 **Duty arising out of contract**

Where the failure to fulfil a contractual obligation is likely to endanger lives, the criminal law will impose a duty to act. The duty will be owed not only to other parties to the contract but also to any other person whose life may be endangered. In *Pittwood* (1902) 19 TLR 37 the accused was convicted of gross negligence manslaughter following the death of a road user who was hit by a train on a level crossing. The accused was employed by the railway company to look after the crossing and ensure that the gate was shut when a train was due to pass. When the collision occurred the accused was away from his post having left the gate open. His actions were regarded as grossly negligent, and his contention that his contractual obligations gave rise to no duty to the public was dismissed as he was paid to keep the gate shut and protect the public.

2.5.2.2.2 **Duty arising out of relationship**

The existence of close relationships can give rise to a duty to act. It is generally accepted at common law (although there is little direct authority) that parents are under a duty to their children to protect them from physical harm and spouses are under a duty to aid each other (see *Smith* [1979] Crim LR 251, 2.5.2.2.3 post). In *Gibbins and Proctor* (1918) 13 Cr App R 134, a man and woman with whom he was living were convicted of the murder of the man’s child, it having starved to death because they withheld food from it. In the case of the man he had breached the duty parents owe their children. The woman, by taking money to buy food, had assumed a duty towards the child (see 2.5.2.2.3 post).

2.5.2.2.3 **Duty arising from the assumption of care for another**

If a person voluntarily undertakes to care for another person who is unable to care for himself, whether from infancy, mental illness or other infirmity, a duty will be owed to that person (see *Nicholls* (1874) 13 Cox CC 75). The duty may arise from an express undertaking to care for the other, as in *Nicholls* where a grandmother took into her home her grandchild after its mother died, or it may be
implied as in *Instan* [1893] 1 QB 450. In the latter case D, who was without independent means, lived with her aunt who became ill and for the last twelve days of her life was unable to care for herself or summon help. D did not give her any food or seek medical assistance but she continued to live with the aunt and eat her food. D was convicted of manslaughter on the basis that by remaining with the aunt a duty was imposed on her to care for the aunt, which duty she had wilfully and deliberately left unperformed.

The principle in *Instan* has been greatly extended by *Stone and Dobinson* [1977] QB 354, so that a duty to care for another may be easily incurred although onerous or difficult to execute.

S’s sister F came to live with him and his mistress D in 1972. F was suffering from anorexia nervosa and, although initially able to look after herself, her condition deteriorated until she was confined to bed by July 1975. S was 67, partially deaf, nearly blind, and of low intelligence. D was 43 but was described as ‘ineffectual and inadequate’. S and D tried to find F’s doctor but failed. They took F such little food as she required. D and a neighbour once gave her a bed bath. S and D were unable to use a telephone and no one was informed of F’s condition. A neighbour was unsuccessful in getting a local doctor to attend. When F died S and D were convicted of manslaughter and on appeal their convictions were upheld, the Court of Appeal being satisfied that the jury were entitled to find that S and D, by the minimal attention they had given F, had assumed a duty to care for her and had been grossly negligent in the performance of this duty as a result of which F had died.

It is unclear from the judgment whether it would have been held that S and D had incurred a duty to care for F if, when she became infirm and unable to care for herself, they had simply ignored her.

The principle in *Stone and Dobinson* was followed in *Ruffell* [2003] EWCA Crim 122, where the Court of Appeal upheld the defendant’s conviction of manslaughter. On an evening in February V was at D’s house at D’s invitation and both partook of a mixture of heroin and cocaine. V lapsed into unconsciousness and D engaged in some efforts to revive him—placing him by a window to get some fresh air, splashing water on his face, placing him in a bath, wrapping him in towels and placing him by a radiator. The following morning D telephoned V’s mother informing her that he was sick due to drinking vodka and that he was sitting on D’s doorstep. V’s mother asked D to take V inside and cover him with a blanket. D agreed to do so but did not, returning to bed to sleep. Three hours later V was found on the path by workmen and neighbours. He was taken to hospital but pronounced dead three hours later. The cause of death was hypothermia and opiate intoxication. The trial judge directed the jury that they could find that D had assumed a duty of care from the fact that V was a guest in D’s house and a friend of D, and that D had sought to revive him following his taking of the drugs. If they considered that D had assumed this duty, they were entitled to consider whether putting V outside amounted to a breach of that duty. The jury convicted D and the Court of Appeal upheld the conviction endorsing the trial judge’s direction to the jury.

An issue which is left unresolved in the case law is whether a person who is under a duty to care for another, whether due to relationship or because the duty is imposed as a result of care rendered to a helpless or infirm person, may
be released from that duty by the person to whom it is owed. For example, if the person wishes to die and does not want medical attention, is the ‘carer’ under a duty to contravene their requests and obtain medical aid? In Smith [1979] Crim LR 251, S was charged with manslaughter following the death of his wife. She had a marked aversion to doctors and medical treatment and would not allow her husband to seek medical attention after she had given birth to a still-born child at home. When she finally gave him permission it was too late and she died before the doctor arrived. Medical evidence was that she could have been saved had medical aid been sought originally. In summing-up to the jury Griffiths J directed them:

to balance the weight that it is right to give to his wife’s wish to avoid calling a doctor against her capacity to make rational decisions. If she does not appear too ill it may be reasonable to abide by her wishes. On the other hand, if she appeared desperately ill then whatever she may say it may be right to override.

The suggestion seems to be that if a person is capable of making rational decisions he may release a carer from his duty of care. In this case the jury could not agree on the charge of manslaughter and were discharged from giving a verdict. This was only a first instance decision and it left unresolved the question whether a person may release another from the duty of care in anticipation of that duty arising. For example, could an ageing wife release her husband from his duty of care by telling him that if she falls ill at any time in the future she wants to be left to die at home without medical attention being called?

The answer to this question was given by the House of Lords in the course of its decision in Airedale NHS Trust v Bland [1993] 2 WLR 316. An application was made by the Trust for a declaration whether it was lawful for doctors to withdraw life-supporting medical treatment, including artificial feeding through a nasogastric tube, from a patient in one of its hospitals who was in a persistent vegetative state with no prospect of recovery or improvement, when it was known that the discontinuance of the treatment would cause his death within a matter of weeks. The House of Lords held that the treatment could be removed and a doctor would not be acting unlawfully in so doing (see further R (Burke) v GMC [2004] EWHC 1879 (Admin)).

Lord Goff of Chieveley, giving the leading judgment, stated several principles which apply in the treatment of patients. First, there was no absolute rule that a patient’s life had to be prolonged regardless of the circumstances. While the fundamental principle was the sanctity of human life, this principle was not absolute. His Lordship was recognising that respect for human dignity demands that the quality of the life in question must be considered. Secondly, the principle of self-determination required that respect be given to the expressed wishes of the patient. Thus, if an adult of sound mind refused treatment the doctors responsible for his care had to give effect to his wishes. If the patient was incapable of communicating, an earlier expression of refusal of consent to treatment in certain circumstances would be effective. Where, however, the patient was both incapable of communicating and had given no earlier indication of his wishes there was no absolute obligation upon the doctor to prolong his life regardless of the circumstances. The question was what was in the best interests of the patient. Where a patient is incapable of giving consent, treatment may be provided if it is in
his best interests (see In re F (Mental Patient: Sterilisation) [1990] 2 AC 1, 10.1.1.3.2 post). Likewise it may be discontinued if this is in his best interests. His Lordship considered that the question should be carefully formulated as it was not whether it was in the patient’s best interests that treatment should be ended but rather whether it was in his best interests that treatment which had the effect of artificially prolonging his life should be continued. Such treatment would not be appropriate where it had no therapeutic purpose, which would be the case where it was futile because the patient was unconscious and had no prospect of any improvement in his condition.

Thirdly, where the above conditions pertained, the treatment being futile, there was no duty on a doctor to continue life-supporting treatment as it was not in the best interests of his patient. Accordingly, although the discontinuance of treatment would amount to an omission, it would not be unlawful as it would not be in breach of duty to the patient. Similar principles applied with regard to the decision whether to put a patient on life-supporting treatment in the first place. Finally, Lord Goff emphasised that doctors in deciding whether to initiate or discontinue life-support treatment for a patient had to act in accordance with a responsible and competent body of relevant professional opinion on the principles set down in Bolam v Friern Hospital Management Committee [1957] 1 WLR 582. In Airedale NHS Trust v Bland guidance was to be found in a ‘Discussion Paper on Treatment of Patients in Persistent Vegetative State’ issued in September 1992 by the Medical Ethics Committee of the British Medical Association which provided four safeguards which should be observed before discontinuing life-support for such patients:

1. Every effort should be made at rehabilitation for at least six months after injury.
2. The diagnosis of irreversible PVS should not be considered confirmed until at least 12 months after the injury.
3. The diagnosis should be agreed by at least two other independent doctors.
4. Generally, the wishes of the patient’s immediate family would be given great weight.

In all cases where it is decided to end life-support treatment the opinion of the Family Division of the High Court should be sought. This latter requirement might subsequently be relaxed by the President of the Family Division in light of experience.

2.5.2.2.4 Duty arising from creation of a dangerous situation
Where a person inadvertently and without the appropriate mens rea does an act which starts a chain of events which, if uninterrupted, will result in harm to another or his property (or any other interest protected by the criminal law), that person, on becoming aware that he was the cause, is under a duty to take such steps as lie within his power to prevent or minimise the risk of harm. If, before the harm occurs, he realises what he has done and with appropriate mens rea he fails to take such steps, he will be criminally liable. The authority for this principle is Miller [1983] 2 AC 161.

D, a vagrant who was squatting in a house, awoke to find that a cigarette he had been smoking had set fire to the mattress on which he was lying. He did not attempt to extinguish the fire but moved to another room. The house caught fire. D was convicted of arson contrary to s. 1(1) and (3) of the Criminal Damage Act 1971. The
House of Lords dismissed his appeal against conviction holding that when D became aware of what he had done in setting the mattress on fire he was under a duty to take such steps as were within his power to prevent or minimise the damage to the property at risk. Lord Diplock stated (at p. 181):

I see no rational ground for excluding from conduct capable of giving rise to criminal liability, conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created, if at the time of such conduct one's state of mind is such as constitutes a necessary ingredient of the offence.

The steps which an accused is required to take to counteract the danger he has caused are such as are reasonable in the circumstances. Clearly he would not be expected to attempt to put out a raging inferno; all that might be required is a telephone call summoning the fire brigade. In the case of a minor fire he might reasonably be required to extinguish it himself if all that would be required was a bucket of water or that he stamp on it with his shoe.

In DPP v Santana-Bermudez [2003] EWHC Admin 2908, the Administrative Court applied the Miller principle in unusual circumstances. V, a police officer, sought to carry out a lawful search of D and asked him to turn out his pockets, the contents of which included some syringes. She then asked him if he was sure that he had no more needles. He lied to her and her finger was pierced by a hypodermic needle when she commenced a search of his pockets. The Administrative Court held that where someone by act or word or a combination thereof created a danger and thereby exposed another to a reasonably foreseeable risk of injury which materialised, this could amount to the *actus reus* of assault occasioning actual bodily harm.

In this situation it was clearly D’s duty to tell the truth. Whether a conviction would ensue would depend upon proof of intention or recklessness. This decision may appear to conflict with the Divisional Court’s decision in Fagan v Metropolitan Police Commissioner [1969] 1 QB 439 (see 2.7 post; 10.1.1.2 post) where it was stated that an omission could not constitute an assault. However, the Miller principle is founded upon there being an initial act which creates the danger and the Court in Fagan, necessarily, did not address the principle as stated in Miller. In the instant case it would have been possible for the Administrative Court to have arrived at the same conclusion by means of the ‘continuing act’ analysis (see Professor Ashworth’s commentary to Santana-Bermudez [2004] Crim LR 471).

**The incidence of this duty to act arises from the creation of the accused of the dangerous situation.** The House of Lords spoke in terms of a physical act on the part of the accused setting the train of events in motion. They did not address the question whether an initial omission which set in motion a train of events which placed a person or property in peril might found liability.
decides to do nothing either to try to stop his car or warn the children of the danger. V, one of the children, is hit by his car sustaining a broken leg. If D is charged with causing grievous bodily harm with intent contrary to s. 18 of the Offences Against the Person Act 1861 would he be liable? There was no physical act on the part of D which caused the injury but rather an omission, i.e. his failure to apply the handbrake. Should the principle of Miller be extended?

2.6 Causation

2.6.1 General

Where an accused is charged with a result crime, it is necessary for the prosecution to prove that his acts or omissions caused the prohibited consequence. In murder or manslaughter, for example, it is necessary to prove that the accused, by his acts or omissions, caused the death of the victim. Similarly, in criminal damage, it is necessary to prove that the accused's acts or omissions caused damage to, or destruction of, property belonging to another. If the death, damage, or destruction occurred because of some other cause then the offence has not been committed even though all the other elements of the actus reus are present and the accused had the necessary mens rea. The accused, however, may be guilty of some other offence such as attempt (see White, 2.6.2 post). In the case of result crimes for which liability is strict (see 4.2.1 post) causation may be established even though the accused did not intend or have knowledge of the harm or was not negligent thereto (see Southern Water Authority v Pegrum and Pegrum [1989] Crim LR 442; National Rivers Authority v Yorkshire Water Services [1994] Crim LR 451; Environment Agency v Empress Car Co. (Abertillery) [1999] 2 AC 22).

The issue of causation is for the jury to decide upon. The cases which have given rise to problems have usually involved homicide. But, even in homicide cases, causation rarely becomes an issue, as how the victim came to die is usually not in dispute. Where there is a dispute it is the duty of the trial judge to direct the jury on the legal principles relating to causation, but it is for the jury, applying those principles, to decide if the causal link between the accused's conduct and the prohibited consequence has been established. Usually it will be sufficient to direct the jury 'simply that in law the accused's act need not be the sole cause, or even the main cause, of the victim's death, it being enough that his act [or omission] contributed significantly to that result' (Pagett (1983) 76 Cr App R 279, per Robert Goff LJ). Occasionally, when a particular problem relating to causation arises, such as whether the act of a third party has broken the chain of causation, it is (per Robert Goff LJ at p. 290):

for the judge to direct the jury... 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.
In simplifying causation for the jury, the judge may refer to the two principles of causation namely that an accused can only be convicted if they are satisfied that his conduct was both a \textit{factual cause} and a \textit{legal cause} of the victim's death. The discussion will centre on homicide but the principles are equally applicable to other offences where causation may be in issue.

2.6.2 \textbf{Factual causation}

The accused's conduct must be a \textit{sine qua non} of the prohibited consequence. In other words it must be established that the consequence would not have occurred as and when it did \textit{but for} the accused's conduct. This is sometimes referred to as the \textit{`but for' test}. In \textit{White} [1910] 2 KB 124 D put cyanide into his mother's drink with intent to kill her. Later his mother was found dead with the glass containing the poisoned drink beside her three parts full. Medical evidence established that she had died of heart failure and not from poisoning. D was acquitted of murder as he had not caused her death and thus there was no \textit{actus reus}. He was, however, convicted of attempted murder.

The fact that factual causation is established, however, does not mean that legal causation can be established.

\begin{example}
A shows B a job advertisement. B applies for the job and C, the employer, invites her for interview. On her way to the interview B is attacked by D while walking through a park and killed. But for A showing B the advertisement she would not have applied for the job and but for C inviting her for interview she would not have been in the park and been killed as and when she was. No one would argue, however, that A's and C's acts should be regarded as legal causes of B's death. It is D's acts which are the legal cause of B's death.
\end{example}

2.6.3 \textbf{Legal causation}

Not all but-for causes are legal causes of an event. Legal causation is closely connected to ideas of responsibility and culpability. Glanville Williams in \textit{Textbook of Criminal Law} (2nd edn) states (at p. 381):

\begin{quote}
When one has settled the question of but-for causation, the further test to be applied to the but-for cause in order to qualify it for legal recognition is not a test of causation but a moral reaction. The question is whether the result can fairly be said to be imputable to the defendant. . . . If the term 'cause' must be used, it can best be distinguished in this meaning as the 'imputable' or 'responsible' or 'blamable' cause, to indicate the value-judgment involved.
\end{quote}

The discussion which follows will examine the conditions for the attribution of legal causation.

2.6.3.1 \textbf{Consequence must be attributable to a culpable act}

If the culpable act the accused performed did not contribute to the consequence legal causation will not be established. Thus although D may have been
grossly negligent in performing an act he will not be held responsible for a prohibited consequence which would have occurred whether or not he was negligent. This is illustrated by the case of *Dalloway* (1847) 2 Cox 273.

D was driving a horse and cart without holding the reins which were lying loose on the horse’s back. A child ran in front of the cart and was killed. Erle J directed the jury that if the driver could have saved the child by using the reins they should convict him of manslaughter, but if they thought he could not have saved the child by pulling the reins they must acquit him. The jury acquitted him presumably satisfied that the child’s death could not have been avoided and thus the child’s death was not attributable to the accused’s negligence. But for the cart being on the road the child would not have died, but driving a cart on the road is not itself a culpable act.

The principle in *Dalloway* would similarly apply on a charge of causing death by dangerous driving if the death would have occurred regardless of the manner of the accused’s driving.

### 2.6.3.2 The culpable act must be a more than minimal cause of the consequence

In homicide the accused’s act may be considered a cause of death if it has accelerated the victim’s death. It is no answer to a charge of murder or manslaughter to say that the victim was dying from a fatal disease or injury and would have died within a short time had the accused not hastened his death (see *Dyson* [1908] 2 KB 454). If, however, the act of the accused produces only a very trivial acceleration of the death of the victim, it may be ignored under the *de minimis* principle (see *Hennigan* [1971] 3 All ER 133 and *Cato* [1976] 1 WLR 110). On occasions judges have stated that the accused’s act must be a ‘substantial’ cause of the victim’s death. This would tend to state the principle too favourably for the accused (see *Malcherek and Steel* [1981] 1 WLR 690). In *Pagett*, Robert Goff LJ stated that ‘the accused’s act need not be the sole cause, or even the main cause, of the victim’s death, it being enough that his act contributed significantly to that result’. Whatever the terminology used the idea which is sought to be communicated to the jury is that the **accused’s contribution to the death of the victim must be more than minimal**. The test is far from scientific as what is sought from the jury is not an exact measurement but, to use Williams’ term, a ‘moral reaction’; is the death of the victim morally attributable to the accused? This is, perhaps, what Devlin J had in mind when he directed the jury in *Adams* [1957] Crim LR 365.

**Dr Adams** was charged with murder of one of his patients by means of administering pain-relieving drugs. Devlin J directed the jury that it did not matter that the patient’s death was inevitable and that her days were numbered:

> If her life were cut short by weeks or months it was just as much murder as if it was cut short by years. The law knows no special defence [by which doctors might be justified in administering drugs which would shorten life in cases of severe pain,] but that did not mean that a doctor who was aiding the sick and dying had to calculate in minutes, or even in hours, and perhaps not in days or weeks, the effect upon a patient’s life of the medicines which he administers or else be in peril of a charge of murder. If the first purpose of medicine, the restoration of health, can no longer be achieved there is still much for a doctor to do, and he is entitled to do all that is proper and necessary to relieve pain and suffering, even if the
measures he takes may incidentally shorten life. . . . The law is the same for all, and what I have said to you rests simply upon this: no act is murder which does not cause death. ‘Cause’ means nothing philosophical or technical or scientific. It means what you twelve men and women sitting as a jury in the jury box would regard in a common-sense way as the cause.

In such circumstances a jury would presumably not find causation, as their moral reaction would be that the doctor was seeking to relieve pain and only incidentally accelerated the patient’s death. If, however, the pain-relieving drugs were administered not by a doctor but by the sole beneficiary under her will, and were administered to hasten the inheritance, one could assume that a jury would exhibit a different moral reaction and would find causation to be established.

2.6.3.3 The culpable act need not be the sole cause

The act of the accused need be neither the sole nor the main cause of the prohibited consequence. Other causes contributing to the consequence may be the acts of others or even of the deceased himself.

2.6.3.3.1 The actions of third parties

In *Benge* (1865) 4 F & F 504, the actions of third parties contributed significantly to the deaths. D, the foreman of a track-laying crew, misread the railway time-table so that the track was up at a time when a train was due. D placed a signalman with a flag 540 yards up the line although the company regulations specified 1,000 yards. The driver of the engine was not keeping a good lookout and several deaths resulted from the ensuing accident. D argued that if the signalman had gone the correct distance and the driver had kept a proper lookout there would not have been an accident. D was convicted of manslaughter after Pigott B directed the jury that if D’s conduct mainly or substantially caused the accident it mattered not that it might have been avoided if the others had not been negligent.

The facts of cases need not be as unusual as *Benge*. For example, if A and B both attack C, A stabbing him in the lung and B stabbing him in the abdomen, both would be liable for homicide if he dies as a result of the combined effect of the wounds even though neither wound was, of itself, mortal. There are other circumstances, however, where a subsequent act may supersede an antecedent act which otherwise would have caused death. For example, A poisons B with a slow acting poison. Before it takes effect C decapitates B with an axe. In this situation C’s act is the sole cause of B’s death. A, however, could be charged with attempted murder.

2.6.3.3.2 The actions of the victim

The deceased by his negligence may contribute to his own death. For example, if D is driving in excess of the speed limit when V, who is blind, walks across the road and is hit by D killing him, it matters not that V’s negligence contributed to his death if D could have avoided hitting him had he been observing the speed limit (see *Longbottom* (1849) 3 Cox CC 439).

Where the victim brings about his own death this may be legally attributable to the accused where he has caused the victim reasonably to apprehend violence to himself and he has died in seeking to escape. In such a situation D will only be
found to have caused V’s injuries or death where V’s response to D’s violence or threat of violence was ‘within the range of responses which might be expected from a victim placed in the situation which he was’ (Williams [1992] 2 All ER 183, 191 per Stuart-Smith LJ). V’s response must be ‘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’ (ibid). In deciding whether V’s response was reasonably foreseeable 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’ (ibid). (See also Roberts (1971) 56 Cr App R 95, Mackie (1973) 57 Cr App R 453, DPP v Daley [1979] 2 WLR 239 and Hayward, 2.6.3.4 post.)

In Marforam [2000] Crim LR 372, D argued on appeal that for, the purposes of the question whether a reasonable person could have foreseen the victim’s attempt to escape as a possible consequence of D’s assault, the reasonable person should be the same age and sex as the defendant. In this case D was aged 16. The Court of Appeal ruled that as the issue concerned the effect of the defendant’s conduct on the victim’s mind, the test had to be objective to avoid the absurdity where there were two defendants of one being held not to have caused the injury because he had not foreseen the victim’s flight, and the other being held to have caused it because he had foreseen the victim’s flight.

2.6.3.4 The accused must take his victim as he finds him

The accused cannot complain if his victim is particularly susceptible to physical injury as where, for example, he suffers from brittle bones or haemophilia; if death ensues from an injury which would not have been fatal in a person of sound health it will still be attributable to the accused. In Martin (1832) 5 C & P 128 Parke J stated (at p. 130):

> It is said that the deceased was in a bad state of health; but that is perfectly immaterial, as, if the prisoner was so unfortunate as to accelerate her death, he must answer for it.

The accused will be liable, even though he does not physically assault the victim, if he so frightens the victim that a pre-existing condition is exacerbated resulting in death.

In Hayward (1908) 21 Cox CC 692, D, who was in a state of violent excitement, was heard to express his intention of ‘giving his wife something’ when she returned home. When she did so an argument ensued and D chased her from the house using violent threats. She collapsed in the road and died. Medical evidence was given that she was suffering from an abnormal condition such that any combination of fright or strong emotion and physical exertion might cause death. Ridley J directed the jury that no proof of actual physical violence was necessary, but that death from fright alone, caused by an illegal act, such as threats or violence, would be sufficient (cf. Watson [1989] 2 All ER 865).

The principle that the accused must take his victim as he finds him is not limited to consequences flowing from pre-existing medical or physiological conditions; it has been extended to cover the victim’s mental condition or religious beliefs.
In Blaue [1975] 1 WLR 1411, D stabbed a girl, the wound penetrating a lung. At hospital she was told that a blood transfusion and surgery were necessary to save her life. She died after refusing a blood transfusion as it was contrary to her beliefs as a Jehovah’s Witness. Medical evidence indicated that she would not have died if she had accepted the transfusion. On appeal from his conviction for manslaughter, D argued that the deceased’s refusal of a transfusion was unreasonable and broke the chain of causation. The Court of Appeal rejected this argument in categorical terms. Lawton LJ stated (at p. 1415):

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 the 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.

It has been argued that had the Court of Appeal adopted the ‘reasonable foresight’ test used in the ‘flight’ cases above there would have been no need for a value judgment to be made on the reasonableness of the victim’s religious beliefs; the only issue would be whether such refusal of treatment was reasonably foreseeable. This is the position in the law of tort. Lawton LJ distinguished between crime and tort stating that ‘the criminal law is concerned with the maintenance of law and order and the protection of the public generally’. Glanville Williams, in a casenote (1976) Cambridge Law Journal 15, observes that this argument ignores the fact that Blaue was in any event punishable severely for wounding with intent. The need to protect the public could be reflected in the sentence for such an offence just as much as in the sentence for manslaughter. In such a circumstance the label under which punishment is imposed would appear to be purely symbolic. Symbolism, however, may sometimes serve a purpose. Had the victim been unable to obtain medical assistance it would have been unarguable that the wound caused her death. Why should Blaue be allowed to avoid a conviction for manslaughter because of his victim’s choice not to accept medical treatment? The victim’s omission did nothing to interrupt the chain of causation flowing from Blaue’s initiating act.

Where V commits suicide following D’s attack on him, this will break the chain of causation if it is done for a reason other than the attack on him. In Dear [1996] Crim LR 595, the Court of Appeal accepted that if V had reopened wounds inflicted on him by D because of shame over an alleged sexual assault by V on D’s daughter (which was the background to D’s attack on him) rather than because of the fact of the attack (which was serious and had disfigured him), this would break the chain of causation. As the evidence to this effect was described as ‘tenuous’ and had been put before the jury with an adequate direction, the Court saw no grounds for overturning D’s conviction of murder. The Court emphasised that death resulted from bleeding from an artery which D had severed and thus, whether or not V had reopened the wound, D’s ‘conduct made an operative and significant contribution to the death’. The Court, however, did not address the question whether, if the victim commits suicide because of an attack by D, it must be proved that such
suicide was a reasonably foreseeable consequence of D’s acts before causation can be established. In *R v D* [2006] EWCA 1139, [2006] Crim LR 923, the Court of Appeal, in quashing a conviction for manslaughter, *obiter* left open the possibility of such a conviction where it was triggered by a physical assault which represented the culmination of a course of abusive conduct, and the final assault played a significant part in causing the victim to commit suicide where the victim was someone with a fragile and vulnerable personality. The Court of Appeal left many questions unanswered in this case. The physical assault had not left any wound which could constitute an operating cause at the time of death. It is suggested, by analogy with the *Roberts* line of cases (2.6.3.3.2 ante) that reasonable foreseeability should be a requirement if suicide is not to be regarded as breaking the chain of causation. It is also not clear what the position would be if the victim of an offence commits suicide due to the distress caused by an offence (for example a rape, indecent assault, or continuous harassment) and there is no wound caused by D operating at the time of death. Such offences might just cross the threshold of dangerousness for the purposes of constructive manslaughter but whether there is causation is another matter. In the absence of any operating and substantial physical cause of death flowing from D’s acts, it would seem that death in such cases flows rather from V’s acts. There is a difference between physical weaknesses which make a victim more vulnerable to, or beliefs which inhibit the victim from seeking medical treatment for, injuries inflicted by D and emotional factors which prompt V to do positive acts to himself or herself which become the operating and substantial cause of death.

2.6.3.5 Intervening events and acts

Between the initial act or omission of the accused which sets in motion the train of events which result in the prohibited consequence occurring, other events or acts may intervene. The question will arise whether such an event or act amounts to a *novus actus interveniens*, that is a new act which intervenes to break the chain of causation. The general principle is that an intervention by a third party will constitute a *novus actus* where it is ‘free, deliberate and informed’ (*Pagett* (1983) 76 Cr App R 279, 288, per Sir Robert Goff LJ, quoting Hart and Honore, *Causation in the Law*; see also *Latif* [1996] 1 WLR 104, 115, *per* Lord Steyn). A natural event will do so where it is not reasonably foreseeable. There are several situations in which it may be argued that the chain of causation has been broken.

2.6.3.5.1 Medical treatment

Where the accused inflicts an injury upon his victim which requires medical treatment, is he to be held liable if that treatment is improper or negligent? While it may be foreseeable that a person who is injured will require medical treatment, is it foreseeable that he might receive improper or negligent treatment?

In *Jordan* (1956) 40 Cr App R 152, D stabbed V who was taken to hospital and the wound was stitched. Eight days later V died. D was convicted of murder. On appeal fresh evidence was called which disclosed that at the time of death the wound was healed but D had died as a result of 1) a Terramycin injection to prevent infection,
administered after V had shown intolerance to a previous injection, and 2) the intravenous introduction of large quantities of liquid which had caused V’s lungs to become waterlogged. The treatment was described as ‘palpably wrong’ and the Court of Appeal quashed the conviction as, if the jury had heard this evidence, they ‘would have felt precluded from saying that they were satisfied that death was caused by the stab wound’. The problem with the judgment is that no clear principle was stated for determining when the chain of causation might be broken by medical treatment. Hallett J stated (at p. 157):

We are disposed to accept it as the law that death resulting from any normal treatment employed to deal with a felonious injury may be regarded as caused by the felonious injury but we do not think it necessary . . . to formulate . . . the correct test which ought to be laid down with regard to what is necessary to be proved in order to establish causal connection between the death and the felonious injury. It is sufficient to point out here that this was not normal treatment.

Treatment which is ‘not normal’, however, is not necessarily ‘palpably wrong’.

In Smith [1959] 2 QB 35, D, a soldier, stabbed V twice with a bayonet in a barrack room fight. Another soldier carrying V to the medical reception station twice dropped him. The medical staff were under pressure as others had been injured in the fight. They did not realise that one of V’s wounds had pierced a lung and caused a haemorrhage and gave V treatment which, in light of this information, was described at D’s trial as ‘thoroughly bad and might well have affected his chances of recovery’. V died and D was convicted of murder. On appeal D’s counsel sought to argue that the treatment he received was abnormal and that, if the treatment impeded the chance of V recovering, the death did not result from the wound. The appeal was dismissed, Lord Parker CJ stating (at pp. 42, 43):

if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death did 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.

Where the medical treatment is negligent but the wound is still operating, it would seem that both the perpetrator of the wound and the doctor treating it could be said to have caused the death. In such a situation, however, there would be little likelihood of a prosecution for manslaughter being brought against the doctor. Where, however, the wound has healed and negligent treatment independently causes death a prosecution of the doctor may ensue.

It is arguable that had the jury been in full possession of the facts in Jordan they legitimately could have found that the wound was simply the setting in which the palpably wrong treatment operated to cause death. An analogous example might be where a doctor administers a drug to V mistaking him for another patient and V dies as a result.
In *Cheshire* [1991] 3 All ER 670, the Court of Appeal shifted the point of focus away from the question whether the original wound was still an operating cause at the time of death to whether death was attributable to the *acts* of the accused.

D had shot V in the leg and abdomen. Respiratory problems had ensued necessitating a tracheotomy. V suffered further respiratory problems and infections culminating in his death two months after the shooting due to cardio-respiratory arrest. This occurred because V’s windpipe had become obstructed due to narrowing where the tracheotomy had been performed, a rare but not unknown complication. The medical staff failed to diagnose and treat this problem. Although the gunshot wounds were healed at the time of death, the Court of Appeal upheld D’s conviction of murder on the basis that the respiratory complications were a direct consequence of D’s *acts* which, despite medical negligence, remained a significant cause of V’s death.

This is undoubtedly correct as the failure of diagnosis did not cause V to die but simply hindered measures being taken which might have kept him alive. There are similarities with *Smith* who also suffered the misfortune of misdiagnosis. The Court of Appeal was of opinion that only in the most extraordinary and unusual case would medical treatment break the chain of causation as ‘treatment which falls short of the standard expected of the competent medical practitioner is unfortunately only too frequent in human experience for it to be considered abnormal in the sense of extraordinary’ (*per* Beldam LJ, at p. 675). By ‘extraordinary’ it appears his Lordship meant ‘unforeseeable’. His Lordship went on to suggest the terms in which a jury should be directed where they have to consider whether negligent medical treatment, rather than the injuries inflicted by D, were the cause of V’s death (at p. 677):

> 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 submitted that only in rare cases where positive treatment is given, either in terms of surgical operation or medicinal prescription, will medical negligence supervene to become an independent cause of death rendering the accused’s acts ‘insignificant’. Examples might be where poison is administered in mistake for a drug, or a drug is administered in an excessive quantity resulting in an overdose, or medical staff continue to administer a drug to which V has displayed intolerance and V dies as a result, or an unnecessary operation is performed in the course of which V dies. If, however, due to misdiagnosis treatment which would have been effectual if administered is not given and V dies, the death can still be linked directly to D’s original act as in *Smith* and *Cheshire*. The situation is no different from that where D refuses medical treatment (2.6.3.5.2 post) or where medical treatment is not available. If there is negligence in the treatment of V, for example, a doctor operating to save his life makes a mistake and V dies during the operation, D’s acts will remain a cause of death as such an eventuality is not so extraordinary...
as to be unforeseeable; the operation was a direct result of D wounding V and thus was not independent of D’s acts. The crucial issue is whether the accused’s acts contributed significantly to the victim’s death and, if they did, it matters not whether the medical treatment was incompetent or mistaken (see Mellor [1996] 2 Cr App R 245).

Where as a result of D’s acts V is prevented from undergoing treatment for a condition from which he is suffering (in this case a duodenal ulcer) and he dies as a result of not receiving that treatment, D’s acts remain the cause of V’s death unless the decision not to treat the pre-existing condition was an ‘extraordinary and unusual’ one (see McKechnie (1992) 94 Cr App R 51). A problem which has arisen in recent years due to advances in medical technology is that of a victim who has suffered serious injuries whose life is sustained by a life-support machine. If the machine is switched off by the doctors treating the victim, who is responsible for the death? This issue arose in two appeals heard together by the Court of Appeal: Malcherek and Steel [1981] 1 WLR 690. Both appellants had caused serious injuries to their victims whose lives were sustained by life-support machines. When the doctors treating the victims concluded, after extensive tests, that they were ‘brain dead’, they switched off the machines, whereupon the victims ceased breathing, their hearts ceased beating and their blood ceased circulating and ‘conventional death’ occurred. The Court of Appeal upheld the convictions for murder, Lord Lane CJ stating (at p. 696):

> There is no evidence in the present case here that at the time of conventional death, after the life-support machinery was disconnected, the original wound or injury was other than a continuing, operating and indeed substantial cause of the death of the victim.

While it was immaterial whether the doctors’ actions were also causes of death, the Court of Appeal did state obiter that they regarded such a suggestion by counsel for the appellants as ‘bizarre’. This is undoubtedly correct as when the doctors switched off the machines they merely ceased artificially to sustain lives which had been effectively ended by the initial injuries.

*Malcherek and Steel* dealt with switching off life-support machines where the victims are already ‘brain dead’. It is assumed that the same principles apply where life-supporting treatment is removed from a patient in a persistent vegetative state (see Airedale NHS Trust v Bland, 2.5.2.2.3 ante). In deciding that case the House of Lords were not addressing the issue of causation, but in the course of his speech Lord Goff stated that in discontinuing life-supporting treatment a doctor is ‘simply allowing the patient to die in the sense that he [is] desisting from taking a step which might prevent his patient from dying as a result of his pre-existing condition’. If the victim is in a persistent vegetative state as a result of the accused’s act, his death after discontinuance of life-supporting treatment would also be caused by the accused’s act.

### 2.6.3.5.2 Neglect by the victim

If the victim mistreats or neglects to treat injuries perpetrated by the accused, this will not prevent legal attribution of responsibility to the accused where death results. In *Wall* (1802) 28 State Tr 51, the governor of a colony was convicted of murder of a soldier whom he had sentenced to an illegal flogging of 800 lashes, although the soldier aggravated his condition by drinking spirits while in hospital.
MacDonald LCB directed the jury that:

there is no apology for a man if he puts another in so dangerous and hazardous a situ-
action by his treatment of him, that some degree of unskilfulness and mistaken treatment of himself may possibly accelerate the fatal catastrophe. One man is not at liberty to put another into such perilous circumstances as these, and to make it depend upon his own prudence, knowledge, skill or experience what may hurry on or complete that catastro-
phe, or on the other hand may render him service.

In *Holland* (1841) 2 Mood & R 351, D cut V severely on the finger. The wound became infected and V ignored medical advice that he should have the finger amputated or his life might be endangered. The wound caused lockjaw and V died. Maule J directed the jury that it made no difference whether the wound was instantly mortal, or whether it became so by reason of the deceased not having adopted the best mode of treatment as ‘the real question is, whether in the end the wound inflicted by the prisoner was the cause of death’. The jury convicted D of murder. Medical science has advanced greatly and a refusal of treatment today in such a case might be regarded as unreasonable. The reasonableness of the victim’s conduct, however, is not a relevant issue when considering causation (see *Blaue, 2.6.3.4 ante*). In *Dear* [1996] Crim LR 595 (2.6.3.4 ante) Rose LJ stated:

It would not, in our judgment, be helpful to juries if the law required them . . . 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.

It would seem that the accused also has to accept his victim’s phobias, irrationality or stupidity. These matters, however, would be pertinent when sentencing an accused convicted of manslaughter where the death could easily have been avoided had the deceased not mistreated or neglected to treat the injury but, of course, they would not be relevant on a murder conviction where the only sentence available is life imprisonment.

2.6.3.5.3 Naturally occurring events

If D renders V unconscious and leaves him lying on a beach with an incoming tide, V’s drowning will be attributable to D. In such a situation, while the original injury did not, of itself, cause death, this will not avail D as the event was objectively fore-
seeable as likely to occur in the normal course of events. By contrast, if D renders V unconscious and leaves him in a building and thereafter the building collapses in an earthquake, V’s death will not be attributable to D as V was not left in a position of obvious danger and such an event would not be expected to occur in the normal course of events.

2.6.3.5.4 Intervention by a third party

The acts of a third party may intervene to break the chain of causation as where, for example, the injured victim dies when the ambulance in which he is being taken to hospital crashes, or, while in hospital he is attacked and killed by an insane patient who has escaped from the psychiatric ward. Where the act of the third party is a rea-
sonable act of self-defence in response to the act of the accused, or a reasonable act
done in the execution of a duty to prevent crime or arrest an offender, this will not break the chain of causation (Pagett (1983) 76 Cr App R 279). In Pagett D fired a shotgun at police officers attempting to arrest him while holding V against her will and using her body as a shield. The officers returned fire and killed V. D was convicted of manslaughter and his conviction upheld by the Court of Appeal. The same principle would apply if the police had returned fire hitting a bystander.

There are, however, two problematic cases which have arisen in this area of third party interventions. In Environment Agency v Empress Car Co. (Abertillery) [1999] 2 AC 22, D Co. had on its land a diesel tank which had an outlet pipe connected to it which led to a drum. The outlet pipe was controlled by a tap which was not locked. An unknown person opened the tap resulting in the contents of the tank draining into the drum, overflowing and polluting a river. D Co. was charged with causing polluting matter to enter controlled waters contrary to s. 85(1) of the Water Resources Act 1991. D Co. denied causing pollution but was convicted. The House of Lords dismissed D Co.’s appeal. Incredibly the leading judgment by Lord Hoffmann drew no distinction between deliberate acts of third parties and interventions of nature stating that:

The true common sense distinction is, in my view, between acts and events which, although not necessarily foreseeable in the particular case, are in the generality a normal and familiar fact of life, and acts or events which are abnormal and extraordinary . . . There is nothing unusual about people putting unlawful substances into the sewage system and the same, regretfully, is true about ordinary vandalism. So when these things happen, one does not say: that was an extraordinary coincidence, which negatived the causal connection between the original act of accumulating the polluting substance and its escape. In the context of section 85(1), the defendant’s accumulation has still caused the pollution.

There is something almost perverse about reasoning which concludes that D should be responsible for a result which he did not cause simply because the act of vandalism by which it was caused was not so extraordinary as to be unforeseeable. There is a major difference between a natural event and the action of a third party: the act of the third party is ‘free, deliberate and informed’. In the instant case it was also malicious. In such a case D’s liability ends up depending on the choices and actions of others rather than his own choices and actions. It is to be hoped that the Empress decision is confined in its ambit to pollution offences. If not it will create considerable confusion in the law relating to the liability of secondary parties where a person may be convicted for aiding or abetting another to commit an offence (see Chapter 7, post).

The second problem case is that of Kennedy [1999] Crim LR 65. D supplied a syringe filled with heroin to V who paid him and injected it and subsequently died. D was convicted of manslaughter. The Court of Appeal placed considerable emphasis on the fact that D’s supply of the syringe amounted to encouragement to V to inject himself. A person who encourages another to commit an offence may be liable as an accessory to that offence because of the encouragement offered, not because the encouragement causes the relevant consequence—it is the principal who causes it. In the instant case, however, V, being the deceased, could not be the principal to manslaughter, only D could be that, but V’s injection of himself with heroin was the immediate cause of his death (cf. Dalby, 9.3.3.1.2 post). As in the
Empress case D merely produced the setting in which a third party’s free, deliberate and informed act intervened. D did not force, induce, or deceive V into injecting himself; his appeal should have been allowed.

In Dias [2001] EWCA Crim 2986, where the facts were similar to Kennedy, the Court of Appeal quashed the conviction of D for manslaughter as self-injection by the deceased was not unlawful and thus there was no offence which D could have encouraged. The Court, however, left unresolved whether a conviction of constructive manslaughter could have been upheld had the case been presented to the jury on the basis of unlawfully causing a noxious thing to be administered to the deceased. The Court expressed the view that the deceased’s self-injection ‘might well have been seen as an intervening act’ which would probably have broken the chain of causation between the supply of the heroin to the deceased and his death. The Court, however, considered that this issue should have been left to the jury to determine. Unfortunately it did not enlarge on the circumstances in which self-injection would not have the effect of breaking the chain of causation. It is submitted that this should only arise where D forces V to inject himself or deceives V as to the nature of the substance in the syringe or V, by reason of his age or mental condition, is unable to understand what he is doing.

Since the decision in Dias the Court of Appeal has had several opportunities to clarify the uncertainties in this area. Sadly, on each occasion, it has either avoided the issue or further added to the confusion. In Richards [2002] EWCA Crim 3175, which was referred to the Court of Appeal by the Criminal Cases Review Commission, the Court quashed D’s conviction for manslaughter following his guilty plea at trial where he had supplied a heroin-filled syringe to V who had self-injected and died. The Court followed its decision in Dias reasoning that self-injection, being the causative act, was not an unlawful act and thus could not found a conviction for manslaughter.

In Rogers [2003] EWCA 945, the Court expressed its agreement with its decision in Dias and with Sir John Smith’s criticisms of the reasoning in Kennedy (see [1999] Crim LR 65) concluding that ‘in so far as that reasoning was based on self-injection being an unlawful act, it was wrong’. In Rogers, however, the Court upheld D’s conviction for manslaughter as, in this case, D had not simply supplied the heroin-filled syringe but had, in addition, applied a tourniquet to V’s arm to help raise a vein into which V then self-injected the heroin. The Court came up with the novel view that it was immaterial whether or not V was committing a criminal offence as D ‘was playing a part in the mechanics of the injection which caused death’. By so doing the Court was able to conclude, almost by a conjuror’s sleight of hand, that D thereby committed the actus reus of the offence of administering a noxious thing contrary to s. 23 of the Offences Against the Person Act 1861 by participating in the ‘injection process’ (see further 10.1.4 post). If D was the principal, then the issue of an intervening act by V could be avoided as the s. 23 offence would amount to an unlawful and dangerous act. Of course, the Court chose to ignore the fact that however much D might tighten the tourniquet, there would be no administration until V injected the syringe. As Smith and Hogan observed (Criminal Law, 10th edn, p. 142), ‘where there are several participants in a crime the principal is the one whose act is the most immediate cause of the actus reus’. The most immediate cause remains that of self-injection and that is performed by a person whose act is ‘free, deliberate and informed’ and thus appears, at least to ivory tower academics,
if not to Court of Appeal judges, to be an intervening act between the act of supply, or of raising a vein, and death resulting from the injection. The conjuror’s trick may distract and deceive, but the reality remains unchanged.

The Court of Appeal, however, are impressed with their own magic and, indeed, sometimes appear to believe that their tricks represent the reality. Following the decisions in Dias and Richards, the Criminal Cases Review Commission referred the case of Kennedy back to the Court of Appeal. It appeared that the conviction could not stand following the doubts expressed in Dias and the quashing of a conviction in similar circumstances in Richards. The sleight of hand of Rogers did not appear to apply as Kennedy had performed no act beyond supplying the heroin-filled syringe. The Court of Appeal, however, upheld the conviction in Kennedy while, at the same time, expressing no doubts about the decisions in Dias and Richards. Some higher order magic was involved here! Magic, of course, is a matter of faith and not something subject to rational explanation. The Court of Appeal’s second decision in Kennedy [2005] EWCA Crim 685, all but defies rational explanation.

The Court did declare that Lord Hoffmann’s dicta in Empress were very much confined to their context. Thus, it appears, Empress does not present an authority of general application and is to be confined to its own context of a strict liability, regulatory pollution offence. When the Court of Appeal in Finlay [2003] EWCA Crim 3868 applied Empress to another heroin self-injection manslaughter case, they were engaging in ‘unnecessary sophistication’. That, however, was the end of the good news. The Court found a new spell in a dictum of Lord Steyn’s in Latif [1996] 1 WLR 104, at 115 where he stated:

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

Prior to the latest decision in Kennedy, Lord Steyn’s dictum had been regarded as a statement of conventional doctrine. If a person is acting in concert there is a joint enterprise and those involved are either principals or accessories. The act of the principal in bringing about the prohibited result cannot amount to an intervening act negating the liability of another party who has aided and abetted the principal in performing that act. The Court of Appeal, however, perceive ‘acting in concert’ to be some separate means of participation in an offence such that if it can be proved that D and V acted in concert, resulting in the s. 23 offence being committed, D could be guilty of this offence and of manslaughter (if death ensued) notwithstanding the fact that V does not commit any offence by self-injecting. In Finlay the Court of Appeal took Rogers to have been based on the concept of joint principalship. Buxton LJ stated at para. 14:

Rogers is thus clear authority for saying that if a ‘helper’ is in fact a joint principal with the deceased, then he can be guilty of an offence under section 23 even though the deceased is not guilty of an offence by self-administration. That follows from the classic understanding of what is meant by joint principalship, as set out in the 10th Edition of Smith and Hogan at page 161. That work of authority says:

‘A and B are joint principals where each does an act which is a cause of the actus reus, eg, each stabs P who dies from the combined effect of the wounds; or A and B
together plant a bomb which goes off and kills P; but then each is liable for his own act, not because he has “participated” in the act of another, and each is liable to the extent of his own mens rea.’

The learned authors finish the paragraph by saying: ‘there are two principals and two offences’. The test therefore is whether each of the parties has done an act which is a cause of the actus reus and it was that test that was applied by this court in Rogers. In paragraph 7 the court said this:

‘. . . by applying the tourniquet, the appellant was playing a part in the mechanics of the injection which caused the death. It is therefore, as it seems to us, immaterial whether the deceased was committing a criminal offence.’

Powerful magic indeed—the magic of self-deception. Just a moment’s analysis would have revealed several flaws in the reasoning. It was not immaterial to Smith and Hogan that one of the parties was not committing a criminal offence; joint principalship could only apply where (1) each party does an act which is a cause of the actus reus, (2) does so with the necessary mens rea for the offence, and (3) is liable (which in context means to conviction of a criminal offence) for his own act and not because he has participated in the act of another. In Rogers the Court created liability out of D’s assistance in V’s act of self-injection which looks remarkably like participation in the act of another. The act of V, of course, is one which V does without mens rea as the mens rea of the s. 23 offence is an intention to administer a noxious thing to another person or recklessness thereto. V, of course, is intending to administer to himself and is not acting unlawfully in doing so. Finally, joint principalship requires that each party’s act be a cause of the actus reus of the offence. In the example of the stabbing A and B each stab P; each wound is a more than minimal cause of P’s death. In the syringe cases, absent V’s self-injection and there will be no administration and no death. None of the three criteria which Smith and Hogan specified for liability as a joint principal are met. To further emphasise this point a further quotation from Smith and Hogan immediately following the passage quoted above may have assisted the Court of Appeal:

Suppose that in the bomb case, B intends (and believes that A intends) that ample warning will be given to allow the area to be cleared, whereas A intends that no warning shall be given. The bomb goes off prematurely and kills P. A is prima facie guilty of murder, B of manslaughter. Similarly where they jointly release a gas canister which B believes to contain tear gas and A knows to contain a deadly gas. There are two principals and two offences.

This passage, and the one preceding it, must be seen in the context of a further qualifying statement made by the learned authors at p. 161 that ‘where there are several participants in a crime the principal is the one whose act is the most immediate cause of the actus reus.’ In the syringe examples there are not two offences as V commits no offence; nor is D’s act the most immediate cause of the actus reus. The conclusion, which eluded the Court of Appeal, is that D and V cannot be joint principals. The Court of Appeal in Kennedy were made aware of these difficulties with the concept of joint principalship by the Criminal Cases Review Commission in their reference. Their Lordships’ faith in the power of magic was not to be shaken as
they stated, with sincere conviction, at para. 42:

If Kennedy either caused the deceased to administer the drug or was acting jointly with the deceased in administering the drug, Kennedy would be acting in concert with the deceased and there would be no breach in the chain of causation.

The criminal law, prior to this decision, did not recognise ‘acting in concert’ as a separate mode of participation; it talks only of principals and accessories (or secondary parties) and joint enterprises. There is no joint enterprise where one of the two participants cannot be convicted of an offence. In such a situation D may be liable to conviction as the principal if he is acting through V who is an innocent agent. Where V, however, is of the age of criminal responsibility, is not mentally incompetent, and acts voluntarily (his act being free, deliberate, and informed), he is not an innocent agent. Their Lordships clearly believe that ‘acting in concert’ covers both joint principalship and the situation of principal and innocent agent. But we know that V was not an innocent agent as his act was free, deliberate, and informed—he was not duped. We also know that he cannot be a joint principal. Nonetheless the Court of Appeal appear to consider that where D hands the heroin-filled syringe to V for V to self-inject, D and V are acting in concert in committing the s. 23 offence (even though V could not be convicted of this) and that that offence amounts to the unlawful and dangerous act which provides the basis for a conviction of D of manslaughter. To talk of D and V being jointly engaged in administering the heroin where it is V who administers it, is both linguistically and legally inaccurate. To describe D’s and V’s actions as a “combined operation” for which they are jointly responsible’ is similarly so. To suggest that it is really a question of fact for juries to determine whether or not D and V were acting in concert, neither cures nor excuses this error.

Joint responsibility refers to two or more actors being jointly liable to conviction in respect of the commission by them of an offence. In Kennedy (and all the other cases) V is not, and cannot be, liable to conviction for the s. 23 offence. He may be guilty of possession of a Class A drug; but the offence of possession is not causative of his death. No matter how much the Court of Appeal may incant new spells, it cannot change that reality. Unfortunately, the Court of Appeal believes it has changed the reality; unless the House of Lords has opportunity to intervene, the sad prospect for others in Mr Kennedy’s position is that this version of reality will result in their conviction of offences which they have not caused. The final word on this should go to Professor Glanville Williams, Textbook of Criminal Law (2nd edn) 1983, p. 392:

The novus actus rule is of fundamental importance at common law, because it underlies the doctrine of accessorship. If D2 incites D1 to kill V, and D1 complies, D2 has prompted (in ordinary speech, caused) D1 to perpetrate the crime, and is himself an accessory to the crime, but he has not in law caused V’s death. Fletcher states the principle as follows:

‘Aiding the crime of a responsible, self-actuating perpetrator does not “cause”, “control” or “determine” the latter’s conduct. The accessory contributes to the crime, but the execution is not his doing.’

[Rethinking Criminal Law (Boston 1978), 582]

As we have seen, there are certain important differences between the liability of the accessory and that of the perpetrator. If it were not for the novus actus rule the successful
inciter would be liable as a perpetrator, which would require the law of complicity to be rewritten.

The point just made also shows that the novus actus principle is distinct from the requirement of reasonable foreseeability. If D2 pays an assassin D1 to kill V, of course he foresees that D1 will do the killing, so that the requirement of foreseeability is satisfied; but still D2 is not a perpetrator of the crime.

The true reality now is that the Court of Appeal’s sleight of hand, used to uphold the conviction of Mr Kennedy for manslaughter, while appearing to resolve some problems relating to causation leaves the law on complicity in a state of utter confusion. Nice trick!

2.7 Coincidence of actus reus and mens rea

Where an offence requires mens rea the prosecution must prove that the accused had mens rea at the time he did the act which caused the actus reus (Jakeman (1982) 76 Cr App R 223). In this case D had booked two cases containing cannabis on a flight from Accra to Rome and from there to London. The flight was diverted from Rome to Paris. D had repented of her intention to import the cannabis into England and did not claim her cases in Paris. Officials in Paris, however, sent the cases to London where the cannabis was discovered. D was charged with being knowingly concerned in the importation of cannabis. The court rejected her defence that she had repented of her criminal intent at the time the cannabis entered England. They stated that what mattered was her ‘state of mind at the time the relevant acts are done’. In this case the relevant act was booking her luggage to London, at which time she intended it to arrive in London, and it was immaterial that innocent agents at a Paris airport subsequently became instrumental in it being sent to London.

Where an actus reus may be brought about by a continuing act, it is sufficient that the accused had mens rea during its continuance albeit that he did not have mens rea at its inception (Fagan v Metropolitan Police Commissioner [1969] 1 QB 439). In Fagan D accidentally drove his car onto a policeman’s foot. The officer asked him to move but he delayed doing so. D was convicted of assaulting the constable in the execution of his duty. It was clear that at the time of driving on to the officer’s foot D did not have the necessary mens rea for the offence. The Divisional Court, however, held that the assault involved a battery (unlawful application of force to another person) and that this battery continued after the car came to rest, and thus there was a continuing act of assault for which D had the necessary mens rea at some time during its continuance. The court also stated that if an act is complete, even though results continue to flow from it, the subsequent inception of mens rea cannot convert it into an offence. For example, if D accidentally runs over V in his car and V sustains injuries from which he dies some time later, D’s desire that V die, formed after the accident, will not convert V’s death into murder. The act which caused death was complete prior to the formation of D’s desire, even though the results of the act continued to flow up to the point of V’s death.

If the facts of Fagan were to recur the accused could now be convicted under the ‘duty’ principle in Miller (2.5.2.2.4 ante). The ‘continuing act’ principle remained
relevant in some circumstances. In Kaitamaki [1985] AC 147 (see further Cooper and Schaub [1994] Crim LR 531), the Privy Council affirmed the decision of the New Zealand Court of Appeal that, for the purposes of rape, sexual intercourse is a continuing act. Thus, if D penetrated V with consent (or believing he had consent), and then declined to withdraw on consent being revoked (or on realising that V did not consent), he was guilty of rape as he had formed the mens rea for the offence during the continuance of the actus reus. The Sexual Offences Act 2003 has affirmed this approach providing in s. 79(2): ‘Penetration is a continuing act from entry to withdrawal’.

The cases examined so far have involved one act to which mens rea may be linked. In several cases the problem has arisen of a consequence ensuing from a combination of several acts but mens rea did not exist for the commission of each act. Is it sufficient that the accused had mens rea at some stage during the course of events?

In Thabo Meli [1954] 1 WLR 228, the appellants struck V over the head with intent to kill him. V's body was rolled over a cliff to make his death appear to be an accident. In fact V died from exposure and not from the initial blow to the head. The appellants had mens rea when they struck V, but V died from the act of disposal when they did not have mens rea as they believed they were disposing of a corpse. The appellants were undoubtedly guilty of attempted murder but the Privy Council upheld the convictions for murder because, as they stated (at p. 230) it was:

impossible to divide up what was really one series of acts in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan and as parts of their plan; and it is too refined a ground of judgment to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before in fact it was achieved, therefore they are to escape the penalties of the law.

In framing the decision in this way the Privy Council appear to have delivered a policy decision as there was no mens rea when the act immediately causing the death was performed. The fact that all the acts were performed in pursuance of an antecedent plan, and death ensued from the execution of that plan, appeared to be crucial to the decision of the Privy Council. In Church [1966] 1 QB 59, the Court of Appeal extended the Thabo Meli ‘series of acts’ doctrine to a case of manslaughter where there was no antecedent plan. In the course of a fight with V, D struck and attempted to strangle her. She fell unconscious and D, believing her to be dead, threw her into a river where she drowned. The Court of Criminal Appeal were of opinion that it was sufficient for a conviction if the conduct constituted ‘a series of acts which culminated in her death’. The Court stated obiter that the jury could have convicted of murder ‘if they regarded the appellant’s behaviour from the moment he first struck her to the moment when he threw her into the river as a series of acts designed to cause death or grievous bodily harm’. As the act of disposal is for the purpose of disposing of a body, it being the accused’s belief that death had occurred already, it is difficult to see how the series of acts could be described as being ‘designed to cause death’. The act which caused death was designed to dispose of a corpse! The principle the Court was endeavouring to state has been clarified by another case.
In *Le Brun* [1991] 4 All ER 673, there was neither an antecedent plan nor did D believe that he was dealing with a corpse as he attempted to drag the unconscious body of his wife away from the place where he had assaulted her following an argument in the course of which she had refused to go home. In moving his wife she slipped from his grasp and hit her head on the pavement causing a fractured skull from which she died. D was convicted of manslaughter following a direction to the jury by the trial judge that they could convict of murder or manslaughter, depending on the intention with which the original blow was struck, if D had ‘accidently dropped the victim causing her death whilst either: (a) attempting to move her to her home against her wishes . . ., and/or (b) attempting to dispose of her body or otherwise cover up the previous assault’. The Court of Appeal upheld D’s conviction of manslaughter applying *Church*, Lord Lane CJ stated (at pp. 678, 679):

> It seems to us that where the unlawful application of force and the eventual act causing death are parts of the same sequence of events, the same transaction, the fact that there is an appreciable interval of time between the two does not serve to exonerate the defendant from liability. That is certainly so where the appellant’s subsequent actions which caused death, after the initial unlawful blow, are designed to conceal his commission of the original unlawful assault . . . In short, in circumstances such as the present . . . the act which causes death and the necessary mental state to constitute manslaughter need not coincide in point of time.

Accordingly, the ‘transaction’ principle applies not only where D is disposing of what he believes to be a corpse but also when he is attempting to move V to a place contrary to her will or where D is attempting to cover up his original crime. The Court of Appeal did not expressly declare that the ‘transaction’ principle is equally applicable to murder, but presumably it is.

An alternative approach to this problem is to express it as an issue of causation. If, for example, D by an assault (for which he has *mens rea*) renders V unconscious leaving him on a beach with an incoming tide and V drowns, D will be guilty at least of manslaughter as V’s death was reasonably foreseeable. Why should it make any difference if D, believing V to be dead as a result of his assault on him, throws V into the water where he drowns? It is equally foreseeable by the reasonable person that V might not be dead and thus may die from drowning. D’s second culpable act cannot be regarded as a *novus actus interveniens* as it is all part of the same transaction or series of acts (see Smith and Hogan, *Criminal Law* (9th edn) at p. 341). The Court of Appeal in *Le Brun* accepted that the problem could also be expressed as one of causation. However, the Court continued to focus on the later act which immediately caused death rather than regarding the original act, which was done with *mens rea*, as a cause of death. If the original act, performed with *mens rea*, is seen as a cause of death, with everything subsequent being regarded as an unbroken chain of causation, there is no problem of a lack of coincidence between *actus reus* and *mens rea*; there is no need to rely on a ‘transaction principle’. It is arguable that the transaction principle has arisen because the courts have failed to recognise that the *actus reus* of an offence comprises conduct, circumstances, and consequences. They have treated the act which immediately led to death as the *actus reus* when it could equally be seen as the consequence flowing from the original conduct. In the South African case of *S v Masilela* 1968 (2) SA 558, Ogilvie Thompson JA came closest to this position when he described the accused’s earlier acts of
strangulation as ‘a direct and contributory cause’ of the victim’s later death which resulted from carbon monoxide poisoning when the accused set fire to his house believing him to be dead; had the victim not been unconscious he could have escaped from the house.

In *Thabo Meli, Church* and *Le Brun* it was clear that death ensued from the second act. Where it is not possible to determine which of the two acts caused death, the accused may be convicted only if the prosecution prove that he acted with *mens rea* on both occasions (*A-G’s Reference* (No. 4 of 1980) [1981] 1 WLR 705). The facts of the *A-G’s Reference* were that D had slapped V on the face causing her to fall down a flight of stairs and bang her head. D dragged her upstairs by a rope tied around her neck, placed her in the bath and drained off her blood before cutting up her body and disposing of the pieces. It was impossible to determine the cause of death. The Court of Appeal held that it is not necessary to prove which act caused death but the jury could only convict of manslaughter if they were satisfied both (i) that the fall downstairs was the result of an intentional act by the accused which was unlawful and dangerous (i.e. ‘unlawful act’ manslaughter), and (ii) that the act of cutting the victim’s throat was an act of gross criminal negligence (i.e. gross negligence manslaughter). The same principle would apply on a charge of murder provided the accused had the requisite *mens rea* when he performed each act. For example, D hits V over the head intending to kill him but believing that V is not dead he slits his throat to complete the job before disposing of the body in an incinerator. In this example D has the necessary *mens rea* for murder when he hits V and when he slits his throat. The problem, however, with the principle in *A-G’s Reference* is that it is too favourable to the accused as the jury must acquit if they are not satisfied that each act was performed with *mens rea*. It is submitted that if it is proved that the accused had the relevant *mens rea* when he performed the first act, he should be guilty of homicide as either this act caused death and thus there is no problem or, if the second act caused death, a conviction can be supported on the basis of the transaction principle or on the basis of causation, as the first act was a contributory cause of death.

**FURTHER READING**


G. Williams, ‘Criminal Omissions—the Conventional View’ (1991) 107 LQR 86.