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NUT**CASES**

CRIMINAL LAW

Penny Childs

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ACTS AND OMISSIONS

Key Principle

The definition of some offences is restricted to liability for acts. In such cases, an omission is insufficient unless it can be construed as an act.

Fagan v Metropolitan Police Commissioner 1969

The defendant drove his car onto a policeman's foot. This may have been accidental but he then deliberately refused to move. He claimed that the original act was not assault because he lacked mens rea and the rest of his conduct was an omission which could not amount to assault.

Held

❖ (DC) Defendant's appeal dismissed. Assault cannot be committed by omission. However, the assault was not complete on mounting the foot but continued until the car was removed. Therefore, failing to remove the car was not a mere omission but was part of a continuing act. [1969] 1 Q.B. 439.

Commentary

According to this case, assault is one offence that cannot be committed by pure omission; others include burglary, robbery, attempt and constructive manslaughter. Therefore Fagan would have been acquitted if his conduct could only have been described as an omission. For an alternative way of dealing with assault in this context, see *R. v Santana Bermudez* (2003) (see p.37). For other examples of the consequences and difficulties involved in categorising conduct, see *R. v Miller* (1983) (see p.4) and *Airedale NHS Trust v Bland* (1993) (see p.4).

Key Principle

Where an actus reus can be committed by omission, a defendant who fails to act is only liable if under a duty to act.

Key Principle

A duty to act may arise through contract.

R. v Instan 1893

The defendant lived with her aged aunt who died after the defendant failed to feed her or get medical help when she became unable to care for herself.

Held

❖ (CCCR) Conviction for manslaughter upheld. The defendant was under a duty because food was paid for by the aunt, who relied on the niece as her only source of maintenance. [1893] 1 Q.B. 450.

Commentary

A common law duty can arise from a familial relationship, but it is doubtful whether such a duty arises where the parties are of full age and capacity. It could also arise because the aunt depended on the niece, who had voluntarily assumed a duty (see, for example, *R. v Stone & Dobinson* (1977) at p.3). Moreover, the court felt that the duty could arise from a contract, implied from the circumstances of the case.

R. v Pittwood 1902

A railway gate-keeper, whose duties involved shutting a gate when trains passed, forgot to shut the gate. A person crossing the track was killed by an oncoming train.

Held

❖ (Assize Ct) The defendant was guilty of manslaughter due to the duty imposed by his contract of employment. It did not matter that the contract was between him and a third party (his employers). (1902) 19 T.L.R. 37.

Key Principle

A duty to act may arise from the close relationship between defendant and victim.

R. v Gibbins & Proctor 1918

A father and his common law wife failed to feed his child who died as a result. They were convicted of murder.

Held

❖ (CA) Defendant's appeal dismissed. The father was guilty of murder, having breached the duty owed by parents to their children. (1918) 13 Cr. App. R. 134.

Commentary

How far this type of duty extends is uncertain. Duties can also be imposed by statute and the duty in this case could today also arise as a statutory duty under the Children and Young Persons Act 1933.

Key Principle

A common law duty to act may arise through the voluntary assumption of care.

R. v Stone & Dobinson 1977

An aged woman lived with her brother (Stone) and his common law wife (Dobinson). She refused to eat and became seriously ill and bedridden. For a number of reasons, the defendants failed to summon medical help and the sister eventually died.

Held

❖ (CA) Appeal against conviction for manslaughter dismissed. The jury was entitled to decide that the defendants owed a duty to get help or to care for the deceased once she became helplessly infirm. The assumption of a duty could be inferred from the facts that both defendants were aware of her condition; she was a blood relation of Stone, living in his house; and Dobinson had undertaken the duty of trying to wash and feed her. [1977] Q.B. 354.

Commentary

(1) Reference to Stone's relationship with the deceased suggests a common law duty based on special relationship, but it is unlikely that a duty would have been owed if she had not been living in his home. There was no such relationship with Dobinson but she had apparently assumed a duty by trying to care for the deceased. Does this mean that Dobinson would have been under no duty if she had not acted at all? What about Stone?

(2) Other cases falling within this category are *Instan* and the common law wife's duty in *Gibbins & Proctor*.

Key Principle

A common law duty to act may arise from creating a dangerous situation.

R. v MILLER 1983

The defendant accidentally set fire to a mattress by falling asleep with a lighted cigarette. When he awoke, he failed to take any steps to extinguish the fire or prevent further damage.

Held

❖ (HL) Appeal against conviction for arson dismissed. Arson can be committed by act or omission. Where defendants create a dangerous situation and it is within their power to counteract that danger, a responsibility arises to do so. Since the defendant could, without danger or difficulty, have minimised the risk he had created, his failure to do so amounted to arson. [1983] 2 A.C. 161.

Commentary

(1) The duty is simply to take reasonable steps (safely open to the defendant) and only arose because the defendant created the danger in the first place. Lord Diplock contrasted the case of a passive bystander who sees a fire but is under no duty to act.

(2) The case deals with the Criminal Damage Act 1971 but is of more general application (although it may be restricted to result crimes). For example, in a case on manslaughter, *R. v Evans* (2009) the Court of Appeal held that the defendant who had supplied her half-sister with heroin owed a duty to take reasonable steps by, for example, getting medical help, when she became aware that her sister was exhibiting signs of a heroin overdose. There is a further example of an application of the *Miller* principle in a case of battery in *R. v Santana Bermudez* (2003) (see p.37).

Key Principle

A person may be discharged from their duty to act, incurring no liability for an omission thereafter.

AIREDALE NHS TRUST v BLAND 1993

A patient had been in a persistent vegetative state for over three years. The doctors and family wanted to withdraw treatment and artificial feeding and the health authority successfully applied for a court order to do so. The Official Solicitor appealed on the basis that withdrawal breached the doctor's duty to the patient.

Held

❖ (HL) Appeal dismissed. In light of the patient's condition and views of the medical personnel, the declaration was granted. Whilst a doctor was under a duty to act in the best interests of a patient, continuation of treatment was not always in those best interests. In this case, since there was no chance of recovery, withdrawing treatment would not breach the doctor's duty. [1993] A.C. 789.

Commentary

The case further illustrates the difficulties involved in classifying conduct as an act or omission. The court stated that it was always unlawful to take positive steps to end a patient's life. It was only where the case was one of omission that it might be lawful because no duty was breached. This means that liability turns on how the conduct is classified: is withdrawing treatment an act or an omission?

STATES OF AFFAIRS

Key Principle

Conduct must generally be voluntary. However, voluntariness may not be required where the actus reus consists of a state of affairs (or event) rather than conduct.

R. v LARSONNEUR 1933

A Frenchwoman, required to leave the UK, did so by going to Eire. She was deported from Eire and handed to the police in the UK. She was convicted of "being an alien ... found in the UK" (without leave) and appealed on the basis that her return was caused by circumstances over which she had no control.

Held

❖ (CA) Appeal dismissed. The defendant was found in the UK after expiration of permission to be there and so had violated the conditions of her passport. (1933) 24 Cr. App. R. 74.

Commentary

The case has been criticised since the defendant's presence was involuntary. However, the cause of the prohibited state of affairs was apparently

irrelevant. A similar decision was reached in *Winzar* (1983), where the defendant was guilty of "being found drunk ... on a highway", having been placed there by the police.

UNLAWFULNESS

Key Principle

The word "unlawful" may be included as part of the actus reus of a crime.

R. v WILLIAMS (GLADSTONE) 1984

The defendant punched the victim mistakenly believing that the victim was unlawfully assaulting another. He was convicted of assault occasioning actual bodily harm and appealed against the direction that his honest belief that he was acting lawfully was only relevant if based on reasonable grounds. Whether this was a misdirection depended on whether the word "unlawful" was a matter of defence or part of the actus reus of the offence (see Ch.2).

Held

❖ (CA) Appeal allowed for reasons explained in Ch.2. The word "unlawful" was part of the actus reus of assault, with the prosecution bearing the burden of proving that the actions were unlawful. Therefore the defendant had made a mistake about an element appearing in the actus reus of the crime charged. (1984) 78 Cr. App. R. 276.

Commentary

This decision was further approved by the Privy Council in *Beckford v R.* (1988) (see Ch.14 p.172).

CAUSATION—IN FACT

Key Principle

Causation in fact requires that the defendant's conduct be a sine qua non ("but-for" cause) of a result.

R. v WHITE 1910

The defendant was charged with murder having put cyanide into his mother's drink with the intention to kill her. Medical evidence established that her death was due to heart failure and not the poison.

Held

❖ (CA) The defendant was not guilty of murder, but he was, on the evidence, guilty of attempted murder. [1910] 2 K.B. 124.

Commentary

Whilst the decision (concerned with attempted murder) does not deal directly with the point, it is a good illustration of lack of factual causation. But for his act, the defendant's mother would still have died and so he was not the sine qua non (cause) of her death.

CAUSATION—IN LAW

Key Principle

The defendant's conduct does not have to be the sole (or main) cause of a result but it must more than minimally contribute to it.

R. v PAGETT 1983

The defendant held a woman in front of him as he fired at armed police. The police returned fire, killing the woman. The defendant appealed against conviction on two grounds:

(1) the immediate cause of the death was the act of the police and not attributable to the defendant.

(2) the judge had misdirected the jury in saying that causation was matter of law rather than fact.

Held

❖ (CA) Appeal dismissed.

(1) The defendant had caused the death despite the actions of the police. A defendant "need not be the sole cause or even the main cause ... it being enough that his act contributed significantly".

(2) Causation is a question for the jury to decide on the facts but must be decided in accordance with legal principles. (1983) 76 Cr. App. R. 279.

Key Principle

If an event intervenes between the defendant's conduct and the result, it may be a novus actus interveniens (a new operative cause), breaking the chain of causation.

R. v JORDAN 1956

The defendant stabbed the victim who died a few days later following treatment for the wound. The wound had almost healed and the immediate cause of death was the medical treatment, described as "palpably wrong". The defendant appealed against conviction for murder.

Held

❖ (CA) Conviction quashed. The direct and immediate cause of death was a separate and independent feature (the treatment) and not the stab wound. (1956) 40 Cr. App. R. 152.

Commentary

It was suggested that where death arose from normal treatment for an injury, the injury could be said to be a cause of death. However, this treatment was not normal and so broke the chain. A further example of the key principle can be found in *R. v Rafferty* (2007) where the defendant was involved with two other defendants in assaulting the victim. When the defendant left, the remaining two defendants drowned the victim in the sea. This amounted to a novus actus interveniens preventing the defendant from being a cause of the victim's death.

Key Principle

An intervening event will not break the chain of causation if the defendant's conduct is still an operative and substantial cause of the result.

R. v SMITH 1959

The defendant stabbed the victim, causing internal injury. A medical officer, not realising the nature of the injury, gave "thoroughly bad" treatment. The victim died within two hours of being stabbed but might not have died if given different treatment. The defendant appealed against conviction for murder on the basis that the treatment broke the chain.

Held

❖ (CMAC) Appeal dismissed. Death resulted from the original wound which was still an operating and substantial cause of the death despite other operative causes. [1959] 2 Q.B. 35.

Commentary

The court distinguished *Jordan* as "a very particular case, depending on its exact facts". *Jordan* was also said to be "very exceptional" (and *Smith* was preferred) in *Malcherek & Steel* (1981) (CA) where life support for two injured victims was disconnected by doctors. Since the treatment was "normal and conventional" and the original injuries were still operative, the court held that discontinuing treatment did not break the chain of causation. Also, note the view in *Airedale* that allowing a patient to die of a pre-existing condition does not, in law, amount to causing the death which is still treated as caused by the pre-existing condition. Overall, the distinction between *Smith* and *Jordan* seems to be that in *Jordan* the wound, having practically healed, ceased to operate. Any attempt to distinguish the cases on the degree of fault involved in the treatment should now be avoided according to *R. v Cheshire* (1991) (see below).

Key Principle

To operate as a novus actus interveniens, the intervening event must be so potent and independent of the defendant's actions as to render those actions "insignificant".

R. v CHESHIRE 1991

The defendant shot the victim in the abdomen and thigh. The victim developed breathing difficulties, necessitating a tracheotomy. Two months after the shooting, the wounds had practically healed but the victim died from complications caused by the tracheotomy. The defendant was convicted of murder and appealed against the direction that only grossly negligent or reckless treatment broke the chain of causation.

Held

❖ (CA) Appeal dismissed. It was a misdirection to focus on the degree of fault involved in the medical treatment but no miscarriage of justice had occurred. The complication from which the victim died was a direct consequence of the defendant's conduct which was still a significant cause of the death. This was not an extraordinary or unusual case where treatment was so independent of the defendant's conduct and so potent in causing death as to exonerate the defendant. [1991] 3 All E.R. 670.

Commentary

(1) Factually, the case is similar to *Jordan* since the original wound had ceased to operate. However, only treatment that is so extraordinary as to be independent of the defendant's conduct breaks the chain and obiter in *Cheshire* suggests that incompetence does not of itself render treatment "abnormal in the sense of extraordinary".

(2) Consider whether this principle (and those below relating to intervening acts of the victim) might assist the prosecution in proving causation where the victim commits suicide as a result of the defendants actions. See, for example, the comments made obiter in *R. v Dhaliwal* (2006) where a woman committed suicide whilst suffering from psychological damage caused by prolonged spousal abuse.

Key Principle

A free, deliberate and informed intervention will break the chain of causation.

R V KENNEDY 2007

The defendant prepared a syringe of heroin and presented it ready for use to the deceased, who, acting freely and voluntarily, used it to inject himself and died as a result. The defendant appealed against his conviction for manslaughter.

Held

❖ (HL) Defendant's conviction quashed. The deceased's act of self-injection, being informed, deliberate and voluntary, broke the chain of causation. [2007] UKHL 38.

Commentary

In *Environment Agency v Empress Car Co (Abertillery) Ltd* (1999) (HL) a company was found guilty of causing pollution when a tap on their oil tank was opened by an unknown third party and so discharged oil into a river. It was held that this act did not break the chain because it was foreseeable. In *Kennedy* the House of Lords approved but distinguished this earlier decision, stressing that the principles of causation may differ according to the context.

Key Principle

An intervening act will not break the chain of causation if it is dependent on the defendant's conduct and not a free (voluntary) act.

R. V PAGETT 1983

(see p.7).

Held

❖ (CA) In dismissing the defendant's appeal, the court stated that an intervention must be independent and voluntary ("free, deliberate and informed") to break the chain. A reasonable act of self-defence or self-preservation (such as the police returning fire) did not break the chain because it was an involuntary response, dependent on the defendant's actions. For the same reason, an act carried out in the execution of a legal duty (such as preventing a crime or effecting an arrest) would not operate as a novus actus. (1983) 76 Cr. App. R. 279.

Key Principle

An attempt by the victim to escape from the defendant's conduct will not break the chain of causation if it is reasonably foreseeable.

R. V WILLIAMS & DAVIS 1992

A hitch-hiker jumped from a moving car and died from the injuries sustained. The victim had, according to the prosecution, jumped to escape violence from the defendants who intended to rob him.

Held

❖ (CA) Appeal against conviction for manslaughter allowed. An attempt to escape from a threat does not break the chain if it is within the range of responses which could be foreseen by the reasonable person. However, in this case, there was insufficient evidence about the nature of the threat to determine whether or not the hitch-hiker's response was reasonable. [1992] 2 All E.R. 183.

Commentary

The case confirms the conditions applying to escape attempts: the defendant caused the victim immediate fear of being hurt; the fear was well-founded and caused the escape attempt in the course of which the injury was sustained; the response was a natural consequence of the defendant's action (i.e. reasonably foreseeable as likely to happen, bearing in mind the agony of the moment and any particular characteristics of the victim). Compare the decision with *R. v Roberts* (1971) (see Ch.4 p.44) where there was sufficient evidence to suggest that the victim's response was reasonably foreseeable rather than "daft" or unexpected.

Key Principle

An "abnormality" in the victim will not break the chain of causation, even if it is not reasonably foreseeable.

R. v BLAUE 1975

The defendant stabbed the victim who died after refusing a blood transfusion because she was a Jehovah's witness. The defendant appealed against conviction for manslaughter on the basis that the victim's refusal broke the chain.

Held

❖ (CA) Appeal dismissed. The operative cause of the victim's death was the stab wound and not her refusal of treatment. The chain was not broken by the refusal because "people must take their victims as they find them". [1975] 3 All E.R. 446.

Commentary

The rule, stated obiter, that victims be taken as found (which covers physical and other attributes) prevents a break in the chain even though it may be an unforeseeable "abnormality". However this principle will not mean that a defendant is always liable where the prohibited result is caused by an "abnormality" in the victim because the other elements of the offence charged must also be proved. See, for example, *R. v Carey, Coyle, Foster* (2006) where an undiagnosed heart disease contributed to the death of a 15-year-old victim and *R. v Dawson* (1985) at p.67.

Key Principle

If the defendant commits a number of different acts and the prosecution cannot prove which one caused the specified result, the defendant must be acquitted unless mens rea accompanied each of the acts that may have caused the result.

ATTORNEY-GENERAL'S REFERENCE (NO.4 OF 1980) 1981

The defendant slapped the victim, causing her to fall downstairs and bang her head. He dragged her upstairs by a piece of rope tied around her neck, cut her throat, dismembered her body and disposed of the pieces. The prosecution could not prove which act caused her death and the judge directed an acquittal.

Held

❖ (CA) It was not necessary to prove which act caused death as long as the jury was satisfied that each possible cause was accompanied by the relevant mens rea. However, if the jury felt that any one of the relevant acts was not accompanied by mens rea, they must acquit even where satisfied that the remaining acts were so accompanied. [1981] 2 All E.R. 617.

Commentary

A conviction for manslaughter was possible because evidence suggested that all of the acts were accompanied by the mens rea of manslaughter. Contrast *Fisher* (1987) (CA), where the prosecution could not prove whether death was caused by hitting the victim or by dragging him downstairs. The defendant was acquitted because whilst the dragging was accompanied by mens rea, the blow may have been in self-defence.

CONTEMPORANEITY

Key Principle

The actus reus and mens rea of a crime must be contemporaneous (coincide in time). Where an actus reus initially occurs without mens rea, contemporaneity may be achieved if the actus reus is construed as a continuing act and mens rea occurs during its continuance.

FAGAN v METROPOLITAN POLICE COMMISSIONER 1969

(see p.1).

Held

❖ (DC) Appeal dismissed. The court confirmed that "... both ... actus reus and mens rea must be present at the same time". However, lack of contemporaneity was avoided by construing the actus reus as continuing from its inception (when there was no mens rea) until the car was removed (when there was mens rea). [1969] 1 Q.B. 439.

Commentary

For another illustration of this principle, see *Kaitamaki v R.* (1985) (Ch.5 p.49). A similar problem arose in *Miller* (1983) where the act of starting the fire was not accompanied by mens rea. Mens rea was formed later when the defendant failed to act. The Court of Appeal adopted the approach in *Fagan*, treating the conduct as a continuing act so that mens rea was formed during its continuance. The House of Lords rejected this approach, deciding that the conduct was an omission and not a continuing act. They achieved the same

result by holding that the failure to act (accompanied by mens rea) was the actus reus. This approach is only possible where the offence can be committed by omission and there is a duty to act.

Key Principle

Where a series of acts culminates in the actus reus, and mens rea existed before but not at the time of the actus reus, contemporaneity is achieved if the series of acts is a continuous transaction connecting actus reus and mens rea.

THABO MELI V R. 1954

In pursuance of a pre-conceived plan to kill and evade detection, the defendants assaulted the victim. Believing him to be dead, they "staged" an accident by dropping the body over a cliff where the victim ultimately died from exposure.

Held

❖ (PC) Defendant's appeal against conviction for murder dismissed. The first act(s), done with mens rea, did not cause death and the act(s) which did cause death were not accompanied by mens rea. However, the acts were not separate. They were all part of the plan and therefore represented one series of acts during which actus reus and mens rea were present. [1954] 1 All E.R. 373.

R. V CHURCH 1966

The defendant was convicted of manslaughter, having assaulted the victim with intent. Apparently believing the victim to be dead, he threw her body in a river where she died from drowning.

Held

❖ (CA) Defendant's appeal dismissed. The jury was entitled to treat the series of acts as one course of conduct. Therefore, because the first act would establish (at least) manslaughter if the victim had died, the defendant was guilty even though he lacked mens rea at the time of doing the act that caused death. [1966] 1 Q.B. 59.

Commentary

(1) The court also felt that murder was possible if the series of acts was designed to cause death or grievous bodily harm.

(2) There was no pre-conceived plan as in *Thabo Meli* (1954) nor did the court explain why, in the absence of such, this could still be viewed as one transaction. Explanation comes in the next case.

R. V LE BRUN 1992

In the course of an argument, the defendant hit his wife, causing her to become unconscious. In dragging her away thereafter, he caused her death by accidentally dropping her body. He was convicted of manslaughter.

Held

❖ (CA) Defendant's appeal dismissed. Where there is a time interval between the act done with mens rea (the original assault) and the act that causes death, there may still be a conviction if all the acts are part of the same sequence of events (the same transaction). This is easily established where the subsequent actions are designed to conceal the original act done with mens rea. [1992] Q.B. 61.

Commentary

(1) The court distinguished *Thabo Meli* (1954) because there was no pre-conceived plan. Moreover, unlike *Thabo Meli* or *Church*, the defendant did not believe he was disposing of a corpse.

(2) The continuous transaction principle dealt with lack of contemporaneity. Even if the second act was the sole cause of the death, liability arose because it was part of the same transaction as the act accompanied by mens rea. The court approved a distinction between subsequent acts by which the defendant was trying to assist the victim (such as trying to get the body to hospital) and acts not so designed (such as disposal or trying to conceal the original act). The latter established the continuous transaction whilst the former might not.

(3) The case also raises an issue of causation. If the first act is a contributory cause of the death and accompanied by mens rea, there is no difficulty with contemporaneity and the defendant is guilty because his subsequent acts do not operate as a novus actus interveniens. Acts designed to evade liability do not break the chain linking the original act to the death, but acts designed to assist the victim might.