Kennedy and Unlawful Act Manslaughter: An Unorthodox Application of the Doctrine of Causation

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Abstract The decision of the House of Lords in *R* v *Kennedy (No. 2)*[1] was welcomed by many academics as a return to the traditional application of causation. The victim in *Kennedy* was found to have broken the chain of causation between himself and his drug supplier when he self-injected with an already prepared syringe and produced his own death. However, on a careful examination of the law, can the rationale behind *Kennedy* be supported? This article explores *Kennedy*'s unconventional relationship with the doctrine of causation and casts a critical eye over the application of the doctrine in 'fright and flight' and 'victim' cases. There appears to be no correlation between the judgment in *Kennedy* and the well-established causal principles of foreseeability and *novus actus interveniens* in the criminal law. Will *Kennedy* end up being another *Environment Agency* v *Empress Car Co. Ltd?*[2]

Keywords Causation; Self-injection; *Novus actus interveniens*; Supply of drugs; Unlawful act manslaughter

Unlawful act manslaughter is renowned for criminalising consequences which were never intended or even foreseen by the defendant,[3] but the doctrine of causation has not been applied consistently in recent times. The approach to causation may depend on the particular unlawful act used at trial,[4] and there appears to be a particularly inconsistent application of causation in *R* v *Kennedy (No. 2)*, *R* v *Carey*[5] and *R* v *Dhaliwal*,[6] all of which involved an unlawful act so trivial in nature[7] that the principles of causation and foreseeability were almost impossible to apply in a way that would be analogous to well-established cases. Where did the courts

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1 [2007] UKHL 38, [2007] 3 WLR 612.

2 [1999] 2 AC 22.

3 A view shared by D. Ormerod, comment on *R* v *Carey* [2006] Crim LR 842 at 846.

4 As seen particularly in *R* v *Kennedy (No. 2)* [2007] UKHL 38, [2007] 3 WLR 612. A supply of prepared heroin led to the death of a user, but it was unlikely that the House of Lords would deviate from previous drug-abuse cases and hold the appellant responsible for the victim's decision to inject. Other cases of a similar nature include: *R* v *Kennedy (No. 1)* [1999] Crim LR 65, *R* v *Richards* [2002] EWCA Crim 3175, *R* v *Dias* [2002] 2 Cr App R 96, *R* v *Rogers* [2003] 2 Cr App R 160, *R* v *Finlay* [2004] EWCA Crim 3868, historically, *R* v *Cato* (1976) 62 Cr App R 41, and *R* v *Dalby* [1982] 1 WLR 425.

5 [2006] EWCA Crim 17.

6 [2006] 2 Cr App R 24.

7 Or, to put it more fairly, small in significance and culpability compared to the end result.

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in these cases go wrong and what should the courts have applied? More importantly, what is the outcome of these inconsistent authorities?

General principles of causation should be explored. Factual causation is easily met and merely acts as a filter, narrowing down the possible legal causes of death. *R* v *Dalloway*[8] held that it must be shown that had the defendant acted lawfully, the harm would not have occurred.[9] Legal causation is much stricter, requiring an operating and substantial cause of death arising from several different factors.[10] A 'substantial cause' may contribute to the end result to a 'significant extent'[11] and must be 'more than insubstantial or insignificant' contribution.[12] Goff LJ in *R* v *Pagett*[13] stated that it is usually enough to direct a 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 contributed significantly to that result. An 'operating cause' requires much tighter proof that the victim's injuries flow directly from the defendants' act. The popular way to disprove that one's actions are not an operating cause of the harm suffered is to claim that a *novus actus interveniens* broke the chain of causation.[14] *R* v *Smith*[15] provides good authority that only if the second cause is so overwhelming as to make the original wound merely a part of the history can it be said that the death does not flow from the wound.[16] Thus, a second act or injury must overtake the first as the main and independent cause of death and there is an underlying assumption that the defendant has no clue that the second cause is forthcoming. To add to this a few years later, Lord Steyn in *R* v *Latif*[17] said:

> The general principle is that 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.[18]

It can be taken from *Latif* at this point that only when a second cause is free from the first cause and a deliberate intervention of another person can it be said to break the chain of causation. This significant quote from Lord Steyn will be returned to later. Taking these general causation principles forward, *Rafferty* (in detail below) applied them clearly and correctly, but other recent cases have not been so consistent.

8 (1847) 2 Cox CC 273.
9 Also see *R* v *White* [1910] 2 KB 124 where 'but for' the defendant's actions the victim would still have died.
10 See *R* v *Mellor (Gavin Thomas)* [1996] 2 Cr App R 245.
11 See Beldam LJ in *R* v *Cheshire* [1991] 3 All ER 670. This does not include a 'slight or trifling link' as in *R* v *Kimsey* [1996] Crim LR 35.
12 *R* v *Cato* [1976] 1 All ER 260, *per* Lord Widgery CJ.
13 (1983) 76 Cr App R 279.
14 The Latin term '*novus actus interveniens*' was explained by Goff LJ in *R* v *Pagett* (1983) 76 Cr App R 279 at 291: '. . . there has not merely been an intervening act of another person, but an act that was so independent of the act of the accused that it should be regarded in law as the cause of the victim's death'.
15 [1959] 2 QB 35.
16 Ibid. at 42–3, *per* Lord Parker.
17 [1996] 1 All ER 353.
18 Ibid. at 364.

Sticking to the rules: *R* v *Rafferty*

R v *Rafferty (Andrew Paul)*[19] was an unusual case. There appeared to be a joint enterprise[20] and withdrawal from that enterprise by the defendant, but the trial judge introduced to the jury an alternative route to conviction in the form of causation. Rafferty and his co-defendants, Taylor and Thomas, were all tried for the murder of Ben Bellamy, a 17-year-old boy who was subjected to a violent attack on a beach before being dragged into the sea and drowned. During the attack, which according to two witnesses was predominantly carried out by the co-defendants by kicking, punching and stamping on the victim, Rafferty supposedly elbowed the victim in the back to keep him down and stole his debit card. On walking away to obtain the victim's cash, Rafferty called out to his co-defendants 'come on boys, leave it' before exiting the scene. When the defendant disappeared, his co-defendants continued their violent attack on the victim until he was unconscious and then dragged him into the sea. Drowning was the cause of death. The defendant returned to the beach a short time later as planned without any money, but his co-defendants had already left the scene and the victim had died. According to Rafferty's defence counsel, his co-defendants' act of drowning the victim was a new and fundamentally different event in the joint enterprise that broke any connection between the defendants' actions and the victim's death. The prosecution took a stricter approach, arguing that after his departure, the defendant remained a party to the joint enterprise, which encompassed the continuing use of violence by the co-defendants on the victim, and that he had contemplated that they might leave the victim to drown in the sea. The trial judge warned the jury that by using the latter route to convict, the defendant would either have the *mens rea* required for a secondary party to murder or he would be acquitted. The judge probably recognised the unlikelihood of the jury finding that the defendant foresaw that his co-defendants might intend to cause serious harm to the victim, leading him to elaborate on the causation argument as put forward by the defence counsel as an alternative route to a manslaughter conviction.[21] The causation approach—also known as the 'transaction principle'—was introduced by Lord Lane CJ in *R* v *Le Brun*.[22] In that case the appellant punched the victim in the jaw before trying to carry her unconscious body home. After a segment of time had passed, he dropped the victim on to the pavement and as a result she suffered a fractured skull and died. The *mens rea* as to the harm caused occurred when the appellant punched the victim's jaw. This did not cause the death. It was only at a later point did the *actus reus* and the cause of death occur, which was the act of accidentally dropping the

19 [2007] EWCA Crim 1846.

20 A joint enterprise occurs when two or more parties embark on the commission of a criminal offence together, i.e. a burglary. Each defendant is required to foresee that their partner will commit the planned offence. See Lord Hutton in *R* v *Powell and English* [1999] 1 AC 1 and see *R* v *Rahman* [2007] 3 All ER 396.

21 For further criticism on this point, see in *R* v *Rafferty* [2008] Crim LR 218 at 220, comment by D. Ormerod.

22 [1992] QB 61.

victim on to the pavement. The issue on appeal was whether the earlier *mens rea* and the later *actus reus* could be combined as one whole transaction. Lord Lane CJ held that a defendant could not break his own chain of causation by covering the tracks of his earlier unlawful act:

> 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.[23]

The trial judge in *Rafferty* directed the jury that in order to use causation as a route to conviction they must be satisfied that: (1) the blunt force injuries sustained by the victim which the defendant was responsible for before his departure made a significant contribution to the death of the victim; (2) those injuries contributed to the drowning of the victim by either rendering him unconscious or reducing his ability to resist drowning; and (3) the drowning of the victim was not such a new and intervening act in the chain of events that it destroyed any causal connection between the defendants' contribution and the victim's death. The jury applied the causation test, and Rafferty was convicted of manslaughter. He appealed, and the issue for the Court of Appeal was whether the causation test as defined by the trial judge was a sufficient basis to establish the appellants' conviction for manslaughter.

The Court of Appeal addressed two issues. First, they found that the appellant was a secondary party who had withdrawn from a joint enterprise, thus applying the principles from *R* v *Powell and English*[24] and *R* v *Rahman*.[25] Overturning the jury's decision that the drowning did not break the chain of causation, Hooper LJ stated that no jury could properly conclude that the drowning was other than of a fundamentally different nature to the other harm inflicted upon the deceased.[26] Even though the Court of Appeal preferred joint enterprise in *Rafferty*, interesting points were made in its judgment about causation. The trial judge's directions relating to the causation test illustrate why the jury picked the causation route to conviction:

> If you are sure that the prosecution have proved the causal link between any blunt force injuries for which Rafferty bears responsibility and the death of Ben Bellamy and that Rafferty intended when those blunt force injuries were inflicted that Bellamy would be caused really serious harm, Rafferty would be guilty of murder. If you are not sure that he possessed that intent, but you are sure that the causal link has been established, Rafferty would be guilty of manslaughter.[27]

This test is easy to apply to any defendant. The jury clearly believed that the appellant's small action of elbowing the victim in the back did not

23 Ibid. at 68.
24 [1999] 1 AC 1.
25 [2007] 3 All ER 396.
26 [2007] EWCA Crim 1846 at [50].
27 Ibid. at [27].

show any intention of serious harm, but it was easy to conclude that Rafferty's act set up a 'causal link' to the victim's death. It may not have been a good idea in this case to base an unlawful act manslaughter conviction on such a minor causal link, because if the appellant had not inflicted any force at all the victim would probably still have died. Perhaps the jury recognised that Rafferty possessed some fault, but did not wish him to get away without punishment.

The Court of Appeal secondly mulled over whether the causation principles were appropriate for this particular case. If causation was appropriate, how was the chain broken? Hooper LJ reached the conclusion that no jury could properly conclude that the drowning of Ben Bellamy by Taylor and Thomas was other than a new and intervening act in the chain of events by asking himself what would have been the proper result if the appellant had been found not to have withdrawn when he left to go to the bank.[28] In other words, assuming that the appellant had stayed at the beach, the act of drowning the victim was outside of the scope of the planned events and broke all causal connections between the appellant and the outcome. The Court of Appeal recited well-known work by Professor Glanville Williams[29] to illustrate how the co-defendants could in fact break a chain of causation with their act of drowning the victim (even when acting as part of a joint enterprise):

> If D murderously attacks a victim and leaves him for dead, when in fact he is not dead or even fatally injured, and if X then comes along and, acting quite independently from D, dispatches the victim, the killing will be X's act, not D's, and D would be completely innocent of it. The analysis is not changed if D was aware of the possibility or even probability of X's intervention, provided that he was not acting in complicity with X.

What can be taken from *Rafferty* is that a new act *not contemplated* by the defendant will break the chain of causation. Ormerod argues that the idea of introducing causation as a route to conviction in *Rafferty* was 'illogical' because once a defendant has withdrawn from a joint enterprise he cannot be linked to the cause of death.[30] This appears to be correct—it seems plain from the facts that the defendant's contribution was minimal, and once his co-defendants undertook a joint act which was unexpected and extraordinary, the defendant carried no further liability for the victim's death.

Lord Bingham of Cornhill in the slightly later case of *R* v *Kennedy (No.2)*[31] described the principles discussed in *Rafferty* as 'fundamental'[32] when confirming in *Kennedy* that a free, informed and deliberate act breaks the chain of causation. The inconsistency, however, occurs in the foreseeability element of the intervening act. In *Kennedy* the victim's 'foreseeable' act broke the chain of causation, directly contrasting with the 'unforeseeable' approach in *Rafferty*.

28 Ibid. at [44]–[47].
29 Glanville Williams, 'Finis for Novus Actus?' [1989] CLJ 391 at 396–8.
30 *R* v *Rafferty* [2008] Crim LR 218 at 221.
31 [2007] 3 WLR 612.
32 Ibid. at 616.

Breaking the rules: *Kennedy*

Simon Kennedy's third appeal put to rest a very difficult issue in criminal law regarding participation, assisted drug-abuse injection and causation. It provided some clarification for the test of unlawful act manslaughter, which is as follows: (1) the defendant committed an unlawful act; (2) that unlawful act was a crime;[33] and (3) the defendant's unlawful act was a 'significant cause' of the death of the deceased.[34] Kennedy handed a prepared syringe of heroin over to his friend Bosque and Bosque injected himself, but later died. Kennedy was convicted of unlawful act manslaughter on the premise that by handing over a prepared syringe he was acting in concert with the victim in administering a noxious thing contrary to s. 23 of the Offences against the Person Act 1861. Apart from the obvious bone of contention that it was not generally accepted that a victim could unlawfully self-inject,[35] the point of law of general public importance in the House of Lords was whether it was appropriate to find a person guilty of manslaughter when that person was involved in the supply of a drug which was then freely and voluntarily self-administered by the victim and this administration then caused the victim's death. The House of Lords analysed s. 23 very carefully, which contains the following provisions:

> Whosoever shall unlawfully and maliciously administer to or cause to be administered to or taken by any other person any poison or other destructive or noxious thing, so as thereby to endanger the life of such a person shall be guilty [of an offence].

The House of Lords proceeded to break the provision down into three sub-offences and went on to illustrate how the appellant could not possibly be guilty of any of the following: (1) administering a noxious thing to any other person (i.e. K injects V directly); (2) causing a noxious thing to be administered to any other person (i.e. K causes an innocent third party to administer the noxious thing to V); and (3) causing a noxious thing to be taken by any other person (i.e. K causes V to take the noxious thing directly). The House of Lords rejected Kennedy's culpability under sub-offences 2 and 3 of causing a noxious thing to be administered and of causing a noxious thing to be taken respectively, by deducing that informed adults of sound mind should be treated as autonomous beings able to make their own decisions on how they will act. Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another.[36] Lord Bingham of Cornhill observed work by Professor Glanville Williams to support this principle:

> I may suggest reasons to you for doing something; I may urge you to do it, tell you I will pay you to do it, tell you it is your duty to do it. My efforts

33 See *R* v *Franklin* (1883) 15 Cox CC 163, *R* v *Lamb* [1967] 2 QB 981 at 988, and *R* v *Dias* [2002] 2 Cr App R 96 at [9].
34 *R* v *Cato* [1976] 1 WLR 110 at 116–17.
35 *R* v *Dias* [2002] 2 Cr App R 96 at 100, *per* Keene LJ.
36 [2007] 3 WLR 612 at 616, *per* Lord Bingham of Cornhill.

> may perhaps make it very much more likely that you will do it. But they do not cause you to do it.[37]

The House of Lords concluded on causation that the deceased freely and voluntarily administered the injection to himself, knowing what it was, and this was fatal to any contention that the appellant caused the heroin to be administered to the deceased or taken by him. The appellant supplied the heroin and prepared the syringe, but the deceased had a choice whether to inject himself or not. He chose to do so, knowing what he was doing. It was therefore the victim's act.[38] The key phrase which leaps from the *Kennedy* judgment is 'freely, voluntarily self-administered'. Thus, if the victim has his own independent, autonomous mind, then the defendant is in no way legally responsible for the victim's self-injection and has merely provided a 'backdrop' for the victim's act.[39] *Kennedy* eventually fell in line with similar authorities such as *R* v *Dalby*[40] and *R* v *Dias*[41] in which defendants who supplied drugs to their victims were absolved from liability for unlawful act manslaughter because the victims were found to have freely decided to inject themselves with the noxious substance. The *Kennedy* decision is no doubt correct and it would be futile to argue that Kennedy was the operating cause of the victim's death. However, the stricter application of causation as seen in *Rafferty*, i.e. the foreseeability of the intervening act is pivotal to the outcome, has not been considered in *Kennedy*. Significantly, no correlation can be drawn between this case and 'escape'[42] cases and 'taking your victim as found'[43] cases.

Foreseeability in causation

There are several problems surrounding the House of Lords judgment in *Kennedy* in relation to foreseeability. Previous case law has not been followed, leading to a similarity with the most controversial causation case of all—*Environment Agency* v *Empress Car Co. Ltd*.[44] Additionally,

37 Glanville Williams, above n. 29 at 392.
38 [2007] 3 WLR 612 at 618, *per* Lord Bingham.
39 A. Reed, 'Causation and Assisting Drug-abuse Injection' (2005) 69 JCL 386.
40 [1982] 1 WLR 425.
41 [2002] 2 Cr App R 96.
42 The escape (or 'fright and flight') doctrine allows the chain of causation to remain intact when the victim completes the *actus reus* of violent offence by reacting foreseeably to an attacker. See *R* v *Roberts* (1971) 56 Cr App R 95 and *R* v *Williams and Davis* (1992) 95 Cr App R 1, in which hitchhikers in both cases jumped out of their attackers' cars after being unlawfully propositioned. In *Roberts* the victim's reaction was held to be foreseeable, but in *Williams* the victim's reaction was held to be unexpected and over-the-top, and the attackers in *Williams* were acquitted of the victim's death.
43 This doctrine was confirmed explicitly in *R* v *Blaue* (1975) 61 Cr App R 271, in which the victim of an assault refused a blood transfusion to save her life because of her religious beliefs. Lawton LJ made it clear that an attacker must accept his victim—and all his physical and mental ailments—as he finds them and not use them as an excuse to diminish his own liability: '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'.
44 *Environment Agency (formerly National Rivers Authority)* v *Empress Car Co. (Abertillery) Ltd* [1999] 2 AC 22.

Kennedy may have been working with his victim, thus making the 'independent act' from the victim very unlikely.

Lord Bingham of Cornhill stated in *Kennedy*[45] that Lord Hoffmann's comments on causation in *Empress Car Co.* cannot be compared to cases under s. 23 of the Offences against the Person Act 1861 (causing a noxious thing to be administered) because they are of a wholly different context to strict liability pollution offences.[46] In *Empress Car Co.*, the appellant had been convicted of the strict liability offence of 'causing' a river to be polluted under the Water Resources Act 1991, s. 85(1). An unknown trespasser had entered the appellants' premises and drained a tank of diesel directly into a river. The House of Lords held that it had to be proved that the defendant caused the pollution, but where the defendant had created 'a situation in which the polluting matter could escape (but a necessary condition of the actual escape which happened was the act of a third party or a natural event), the question was whether that act or event should be regarded as a normal fact of life or something extraordinary'.[47] It is submitted that although Lord Hoffmann's suggestion that only an unforeseeable and extraordinary act should break the chain of causation is correct, his error was holding that an unforeseeable and malicious intrusion of a stranger was a foreseeable and ordinary act. Although *Empress Car Co.* involved an offence of causing pollution to controlled waters, *Empress Car Co.* and *Kennedy* are actually quite similar in that they have taken reverse causal approaches. In *Empress Car Co.* there was an independent, intervening act which was unforeseeable. It should have broken the chain of causation. It did not. In *Kennedy* there was also an independent act which this time *was* foreseeable and expected. It should have therefore not have broken the chain of causation, but it did. Why have both *Empress Car Co.* and *Kennedy* ignored the foreseeability element of the *novus actus interveniens* doctrine?[48] In *Empress Car Co.*, the unforeseen and independent intervening act did not break the chain of causation because the issue at hand was who caused the pollution to the river. The answer was the company who installed the waste pipe, not the third party. This has been quoted as incorrect many times because the company who installed the waste

45 [2007] 3 WLR 612 at 617.

46 Lord Hoffmann in *Empress Car Co.* submitted that: (1) common-sense answers to questions of causation will differ according to the purpose for which the question is asked; (2) one cannot give a common-sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule; (3) strict liability was imposed in the interests of protecting controlled waters; and (4) in the situation under consideration the act of the defendant could properly be held to have caused the pollution even though an ordinary act of a third party was the immediate cause of the diesel oil flowing into the river: [1999] 2 AC 22 at 29, 31–2 and 36.

47 [1999] 2 AC 22 at 36.

48 Lacey believes that foreseeability is irrelevant to issues of causation and should be confined to considerations of *mens rea*. See N. Lacey, 'Clean Water and Muddy Causation: Is Causation a Question of Law or Fact, or Just a Way of Allocating Blame?' [1995] Crim LR 683 at 685.

pipe did not know that an independent act would occur,[49] but Lord Hoffmann was clearly looking for the source of the pollution as opposed to other elements which merely hurried the source along. This rationale is interesting as it ensures that the fault of the facilitator is taken into account as opposed to the independent party who merely took advantage of the facilitator's thoughtlessness. If *Kennedy* was to follow in the same unorthodox lines as *Empress*, an interesting question occurs: should the cause of death be the heroin itself (akin to the pollution in *Empress Car Co.*), or the act of injection (akin to the turning of the tap)? Perhaps Lord Bingham in *Kennedy* should have applied Lord Hoffmann's rationale in *Empress Car Co.* and considered the cause of death (i.e. the substance) as opposed to how it got into the victim? It has to be said, applying the *Empress Car Co.* rationale to *Kennedy* reaches a much more logical outcome: the victim with his independent act injected the noxious substance into himself, but the source of the substance was Kennedy. Kennedy foresaw and expected this act, and therefore he bore some responsibility for the outcome. Some writers are inevitably torn on this matter. Hart and Honoré argue that although there may be a relationship between the two acts (supply and use), it would be inconsistent with the doctrine of free will or individual autonomy to describe this in terms of cause and effect.[50] However, Fortson and Ormerod recognise how attractive the *Empress Car Co.* rationale is to drug-abuse injection cases:

> The taking of heroin would be 'a matter of ordinary occurrence'. Any supplier of heroin to those who were regular users would be liable in manslaughter for their deaths. Such a result is undesirable in principle, but we anticipate that such policy considerations might cause a court to adopt the *Empress* approach to causation in the drug administration cases.[51]

These suggestions are no doubt controversial, and would provoke a critical response if introduced back into the law. *Kennedy* is a good illustration of one of those 'grey area' cases which will never sit right with the tried principles of causation.

49 The decision was heavily criticised by a raft of academics, including Sir John Smith (see commentary on *R* v *Dias* [2002] Crim LR 492), Professor Ashworth (described it as 'aberrant' in *Principles of Criminal Law*, 4th edn (Oxford University Press: Oxford, 2003) 129), and by Simester and Sullivan as involving 'bad principle, bad law, bad reasoning' (*Criminal Law: Theory and Doctrine*, 2nd edn (Hart Publishing: Oxford, 2003) 101). Also see the note by R. Heaton in 'Principals? No Principles!' [2004] Crim LR 463 and *R* v *Kennedy* [2008] Crim LR 222, comment by D. Ormerod.

50 H. L. A. Hart and T. Honoré, *Responsibility and Fault* (Hart Publishing: Oxford, 1999) 2, commented on by T. H. Jones, 'Causation, Homicide and the Supply of Drugs' (2006) 26(2) LS 139 at 141.

51 R. Fortson and D. Ormerod, 'Drug Suppliers as Manslaughterers (Again)' [2005] Crim LR 819 at 826. See also Glanville Williams above n. 29 at 391. Jones, above n. 50, points out that an interesting correlation can be drawn to smokers. It has been observed in several recent cases that the common law requires people to live with the legal consequences of their own choices (see *McTear* v *Imperial Tobacco The Times* (14 June 2005) and *Tomlinson* v *Congleton Borough Council* [2003] UKHL 47, [2004] 1 AC 46).Those who continue to smoke in the knowledge that by doing so they are damaging their health have to accept responsibility for their actions (*Badger* v *Ministry of Defence* [2005] EWHC 2941.)

Was Kennedy working with his victim thus making an 'independent act' unlikely? A quote from Hart and Honoré was presented in the *Rafferty* judgment[52] to illustrate that the free, deliberate and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.[53] This view suggests that Kennedy and his victim would have had to produce two acts completely separate of each other in time and purpose in order for the second act to be considered an 'intervention'. In the *Kennedy* judgment itself, Lord Bingham rejected the notion that Kennedy was guilty of causing a noxious thing to be taken by any other person (i.e. K causes V to take the noxious thing directly) because the victim did an autonomous act,[54] but it can easily be argued that Kennedy and his victim were working together. Although it has been correctly decided that there was no joint enterprise in this case[55] and that self-injection is not a criminal offence,[56] on a more basic level Kennedy and his victim were sharing a drug habit as acquaintances and they were working together as partners or friends for a very short time to ensure that the victim attained his heroin. As recalled above, Lord Steyn in *R* v *Latif*[57] supported the ideas of Hart and Honoré that if the victim in *Kennedy* exploited the situation created by the appellant, then the chain would not be broken because they may be seen to be acting in concert together. It is hard to argue that the victim's act of self-injection was completely 'independent' of Kennedy's preparation and supply of the drug he injected. It was not a joint enterprise in the legal sense, but a shared activity: one drug user helping out another. Because the victim's actions were foreseeable, it is more logical that his and Kennedy's acts could be *combined* as causes rather than played off against one another to compete for the 'main cause'. In *R* v *Cheshire*[58] Beldam LJ supports this idea by stating that it is not the function of the jury to evaluate competing causes or to choose which is dominant provided they are satisfied that the accused's acts can fairly be said to have made a significant contribution to the victim's death.[59]

A correlation can be found here with the case of *R* v *Finlay*.[60] The Court of Appeal in *Kennedy* overruled *Finlay*, in which the defendant was convicted of manslaughter on the basis that he prepared a syringe and handed it to the victim, who took it and died. The trial judge ruled that *Finlay* had produced a situation in which: (a) the victim could inject herself, (b) in which her self-injection was entirely foreseeable, and

52 [2007] EWCA Crim 1846 at [40], *per* Hooper LJ.
53 H. L. A. Hart and T. Honoré, *Causation in the Law*, 2nd edn (Oxford University Press: Oxford, 1985) ch. 12, 326.
54 [2007] 3 WLR 612 at 616, *per* Lord Bingham.
55 Ibid. at 619–20.
56 On this point, see *R* v *Dias* [2002] 2 Cr App R 5.
57 [1996] 1 All ER 353.
58 [1991] 3 All ER 670.
59 Ibid. at 678.
60 [2003] EWCA Crim 3868.

(c) in which self-injection could not be regarded as something extraordinary. The House of Lords in *Kennedy* argued that the principles in *Finlay* conflicted with the rules on personal autonomy and the Court of Appeal were right to overrule it,[61] but the analysis in *Finlay* is consistent with the doctrine of causation, particularly the well-established rules on *novus actus interveniens*. The problem, of course, would be finding an appropriate offence to pin upon Kennedy for his more-than-minimal contribution.[62] If supply was used as the unlawful act to establish a conviction for unlawful act manslaughter (based on the theory that Kennedy was working with the victim thus diminishing the 'independent act'), the test could logically be applied quite easily. The test is whether there was an unlawful act, whether that act was dangerous, and whether that act was a significant cause of death. Supply of heroin is an unlawful act under s. 4(1) of the Misuse of Drugs Act 1971.[63] 'Dangerousness' was explained in *R* v *Church*[64] as an 'unlawful act which must be such as all sober and reasonable people would inevitably recognise subject the other person to, at least, the risk of some harm resulting therefrom, albeit not serious harm'.[65] Can it be argued that Kennedy's unlawful supply of ready-to-inject heroin to a drug user would have subjected the user to some harm? A sober and reasonable man would probably recognise that the victim would inject the prepared syringe which contains a dangerous substance. However, the House of Lords in *Kennedy* rejected the idea that an offence such as possession or supply is applicable in assisting drug-abuse injection cases, because as the Court of Appeal observed in *R* v *Dalby*:[66] 'the supply of drugs would itself have caused no harm unless the deceased had subsequently used the drugs in a form and quantity which was dangerous'.[67]

Applying the correct tests of causation and unlawful act manslaughter, with caution it is submitted that the deceased in *Kennedy* used a drug which was dangerous in not only its form but in its quantity. This act of

61 See *R* v *Kennedy* [2007] 3 WLR 612 at [16], *per* Lord Bingham of Cornhill.

62 'The connection between fault and death is too tenuous': C. M. V. Clarkson, 'Context and Culpability in Involuntary Manslaughter' in A. Ashworth and B. Mitchell (eds), *Rethinking English Homicide Law* (Oxford University Press: Oxford, 2000) 160.

63 The facts in *R* v *Dias* [2002] 2 Cr App R 5 are identical to those in *Kennedy*. Dias was charged with manslaughter on the premise that self-injection was an unlawful act which he had aided and abetted, making him liable as a secondary party for the unlawful act which caused the victim's death. It was established on appeal that under the Misuse of Drugs Act 1971 there was no such offence of 'self-injection' and the conviction was quashed, but Keene LJ noted that to rely on the supply of heroin as an alternative unlawful act would raise difficulties on causation (at [8]): '[The victim] was an adult and able to decide for himself whether or not to inject the heroin. His own action in injecting himself might well have been seen as an intervening act between the supply of the drug by the defendant and the death of [the victim]'.

64 [1966] 1 QB 59.

65 Ibid. at 70, *per* Edmund Davies J.

66 [1982] 1 WLR 425.

67 Ibid. at 429, *per* Waller LJ.

supply must be a significant cause of death in order to secure a conviction.[68] It has been discussed that the independent act of the victim was not in fact 'wholly independent' enough to break the chain, so this leaves us with the question: was the supply a significant cause of the victim's death? Keene LJ in *Dias* gave some future guidance which points towards a more generous application of the doctrine of causation:

> The trial judge in a case such as this after identifying the unlawful act on the part of the defendant relied upon, must direct the jury to ask whether they are sure that that act was at least a substantive cause of the victim's death, as well as being dangerous.[69]

As already discussed, a substantial cause may contribute to the end result to a 'significant extent'[70] and must be 'more than insubstantial or insignificant' contribution.[71] Goff LJ in *Pagett*[72] also stated 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 contributed significantly to that result.[73] This is difficult to apply to the facts of *Kennedy*, because even though factual causation is clearly met, the victim did inject *himself* in the end, and it would be unfair to say that Kennedy was the operating cause of the victim's death as a result of this fact.[74] The main thought to be taken from this discussion is that the victim may not have acted as 'independently' as has been claimed, and *Kennedy* did not follow the lucid guidance in *Rafferty* that an act of a 'fundamentally different nature' should break the chain of causation.

Escape cases (in more detail below) and *Rafferty* apply the doctrine of causation in a more traditional way which sees the element of foreseeability as pivotal when establishing a *novus actus interveniens*.

Ignoring well-established principles: *R* v *Carey*

In *R* v *Carey*[75] three appellants appealed against their unlawful act manslaughter convictions which were based on affray. Aimee Wellock, aged 15, and her two friends were assaulted by another gang of youths. Aimee was punched in the face by Sinead Coyle and Aimee ran away—a distance of approximately 109 metres. Aimee said she felt faint and

68 Additionally, *R* v *Goodfellow* (1986) 83 Cr App R 23 clarified that the unlawful act does not have to be aimed at the victim, confirmed by *Attorney-General's Reference (No. 3 of 1994)* [1998] AC 245.
69 [2002] 2 Cr App R 5 at [26].
70 See Beldam LJ in *R* v *Cheshire* [1991] 3 All ER 670. This does not include a 'slight or trifling link' as in *R* v *Kimsey* [1996] Crim LR 35.
71 *R* v *Cato* [1976] 1 All ER 260, *per* Lord Widgery CJ.
72 (1983) 76 Cr App R 279.
73 Ibid. at 291.
74 It is submitted—applying some of the rationale in *Empress Car Co.*—that it was not the act of self-injection that killed the victim, because needles and injections do not kill people. It was the heroin that killed the victim, and the heroin came from Kennedy. Since heroin was the operating cause of death, this would logically allow Kennedy to be a significant cause of death. Besides, is not the victim's voluntary decision to inject the heroin simply a foreseeable continuation of the supply of a ready-to-inject syringe?
75 [2006] EWCA Crim 17.

collapsed and died shortly after. The medical evidence in the case concluded that the immediate cause of death was ventricular fibrillation, where the heart stops pumping blood to the vital organs. It was also important to note that Aimee's actual injuries from the assault were relatively small—a reddening under her right eye, a bruise on the bridge of her nose and a bruise on the back of her right ear. Aimee did have a severely diseased heart, but both Aimee's doctors and her family were unaware of this. The prosecution simply argued that the appellants (Carey, Coyle and Foster) were guilty of affray under s. 3 of the Public Order Act 1986 and that the affray was the unlawful and dangerous act which caused Aimee's death. Section 3 of the 1986 Act states:

> (1) A person is guilty of affray if he uses or threatens unlawful violence towards another and his conduct is such as would cause a person of reasonable firmness present at the scene to fear for his personal safety . . .
>
> (2) Where 2 or more persons use or threaten the unlawful violence, it is the conduct of them taken together that must be considered for the purposes of sub-section (1).

The unlawful act manslaughter test was put by Dyson LJ as follows: (i) there must be an unlawful act, (ii) that act must have been dangerous in the sense that it subjected Aimee to the risk of physical harm, and (iii) the unlawful act caused her death.[76] Under the first criteria, it was quickly confirmed that the unlawful act in this case was the affray as opposed to Coyle's single assault on Aimee. It was thought that by using affray as the unlawful act, it was reflecting 'the fact that this was a group offence'.[77] Ormerod agrees with this approach, believing that the totality of the threats and violence from all present defendants against all present victims should be aggregated 'to represent the sufficient dangerous act for the manslaughter charge'.[78] For the purposes of applying unlawful act manslaughter, it may be more wise to take account only of the individual harm inflicted upon the victim who died rather than the general harm inflicted upon the several victims present. This way, only the individual who has a causal link to the outcome is convicted.

The unlawful act must also be dangerous. *R* v *Church*[79] developed this part of the test and Edmund Davies J said:

> . . . an unlawful act causing death of another cannot render a manslaughter verdict inevitable . . . the unlawful act must be such as all sober and reasonable people would inevitably recognise must subject the other person to, at least, the risk of some harm resulting there from, albeit not serious harm.[80]

A sober and reasonable bystander must have recognised a risk of some harm to Aimee. The House of Lords in *Carey* gave a lot of consideration to this part of the unlawful act manslaughter test because the assault upon Aimee was so trivial that it potentially could not have been foreseen as dangerous. This aspect of the unlawful act manslaughter test

76 Ibid. at [26].
77 Ibid. at [28], *per* Dyson LJ.
78 *R* v *Carey* [2006] Crim LR 842 at 847, comment by D. Ormerod.
79 [1966] 1 QB 59.
80 Ibid. at 70.

was discussed at length in *R* v *Dawson*.[81] Two masked men demanded money from a 60-year-old petrol station attendant who suffered from heart disease. Shortly after the men fled, the attendant died from a heart attack. Expert evidence said that the heart attack had been induced from the shock at the armed robbery and the men were charged with manslaughter. Although the court admitted that injury to a person 'through the operation of shock emanating from fright' could count towards 'some harm' under the unlawful act manslaughter test,[82] the reasonable bystander must have the same knowledge as the defendant and no more. Since the accused in *Dawson* did not know that the victim had a heart complaint, it could not be said that a reasonable bystander would have recognised that the attempt to rob the victim in *Dawson* would have subjected an apparently healthy 60-year-old man to a risk of shock leading to a heart attack. It seems strange that the doctrine of 'take your victim as you find them' from *Blaue*[83] was not applied to the facts in *Dawson*. It is submitted that the facts of *Dawson* are no different from the facts of *Blaue*, in which the victim died as a result of a savage attack because her religious beliefs prevented her from accepting a life-saving blood transfusion. It was argued by the appellant in *Blaue* that the victim broke the chain of causation, but Lawton LJ held that the appellant chose his victim's beliefs when he chose his victim and he could not escape liability for her death. A few years after *Dawson*, the case of *R* v *Watson*[84] produced a more logical verdict, where an 87-year-old man who suffered from a serious heart condition was the victim of a burglary. Two men threw a brick through the victim's window and shouted verbal abuse at him before leaving empty-handed. The victim died later of a heart attack. The trial judge directed the jury in *Watson* that since the unlawful act encompassed the whole duration of the burglary, they were entitled to ascribe to the reasonable bystander (the appellants) all the knowledge that the appellants had gained during their entire stay in the victim's house. This included the fact that they had disturbed a frail, elderly man who would likely suffer some harm through the operation of shock emanating from fright. When highlighting this case in the *Carey* judgment, Dyson LJ stated that when considering the dangerousness of the unlawful act, it is sensible to consider the attributes of the victim.[85] He confirmed that in *Dawson* it was unforeseeable that the 60-year-old victim would have a heart attack, but it was foreseeable that the victim in *Watson* would suffer the same fate. Aimee's 'shock' leading to her heart attack was eventually retracted from the jury's consideration by the trial judge because the difference between emotional upset and shock was described as 'a grey area' by the trial judge and it would not have been recognised by a sober and reasonable bystander that an

81 (1985) 81 Cr App R 150.
82 Ibid. at 156, *per* Watkins LJ.
83 Lawton LJ stated in *R* v *Blaue* (1975) 61 Cr App R 271: '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'.
84 [1989] 1 WLR 684.
85 [2006] EWCA Crim 17 at [35].

apparently healthy 15-year-old was at risk of suffering shock as a result of this particular affray. Dyson LJ compared Aimee's circumstances with the *Dawson* case and supported the trial judges' decision in the following terms:

> The reason why the death resulting from the attempted robbery of the 60 year old petrol station attendant was not manslaughter was that the attempted robbery was not dangerous in the relevant sense. It was not foreseeable that an apparently healthy 60 year old man would suffer shock and a heart attack as a result of such an attempted robbery . . .even if the affray had caused Aimee to suffer shock as opposed to emotional upset, the affray lacked the quality of dangerousness . . . it would not have been recognised by a sober and reasonable bystander that an apparently healthy 15 year old was at risk of suffering shock as a result of this affray.[86]

It is hard to argue against this rationale. How could any person have known that Aimee was about to suffer from a fatal heart attack as a result of a single punch? It is submitted that if consideration is to be given to the victim's attributes, then it should include other personal characteristics so as to keep in line with *Blaue*. To ascribe only obvious ailments to the sober and reasonable bystander is unfair in the sense that it does not recognise the likes of Aimee as a potential candidate for a cardiovascular complaint, and ideally the doctrine of 'take your victim as you find him' should apply in cases such as *Dawson* and *Carey*.

The trial judge in *Carey* also mistakenly aggregated the infliction of violence on Aimee and both of her friends to satisfy the test of dangerousness. This was incorrect and it became a difficulty under the third unlawful act manslaughter test, which requires the unlawful and dangerous act to have caused the death of the victim. The trial judge directed the jury that the prosecution must prove that the affray was a substantial—that is to say more than an insignificant—cause of Aimee's death. By taking into account the violence inflicted on all three victims as opposed to the single assault inflicted on Aimee by Coyle, the jury were not entirely sure that the assault on Aimee was a cause of her death when they convicted.[87] The Court of Appeal conceded that because the only unlawful act against Aimee which led to physical harm (the single punch by Coyle) did not cause her death, and because the affray was not 'dangerous' in the relevant sense, none of the appellants were guilty of manslaughter. This may have been a wasted opportunity to apply a well-established causal doctrine. The trial judge's directions on causation (below)—apart from the aggregation component—were not criticised by the House of Lords, and so it can be assumed that the following directions are sufficient in unlawful act manslaughter:

> The blows inflicted on Aimee were *not the direct cause* of her death. The medical experts base their opinion on Aimee's *history* and *what happened during the incident* and the *closeness in time* between the incident and Aimee's

86 Ibid. at [37].

87 Section 3(2) of the Public Order Act 1986 requires an aggregation of violence if two or more offenders commit an affray, but the aggregation permitted by s. 3(2) is not for the purpose of making an individual participant liable for the acts and threats of other participants.

> collapse. In their opinion it is a matter of *probability* Aimee did not die spontaneously but because she had been the victim of the incident. Professor Miloy remained of the view that it was the *incident overall* that caused Aimee's death.[88] (emphasis added)

The trial judge's guidance seems to take a general and cumulative approach to causation, implying that the whole incident—not just the punch to Aimee's face—could potentially be the cause of her death, controversially taking into account such factors as the victim's history and proximity of time between the act and the death. This approach in *Kennedy* would have led to a completely different outcome; any previous drug abuse between both Kennedy and the victim—and Kennedy's supply of heroin—would be taken much more seriously as causes of death.

If the single assault on Aimee had been accepted as the unlawful act rather than the general affray (and it is submitted that this should have been the case), then the causal issue in *Carey* would become identical to that in the controversial case discussed below: when a strike to the victim did not cause the victim's death, could a cumulative or 'fright and flight' approach to the events surrounding her death overcome the strict causal difficulties and establish liability for manslaughter?[89]

Cumulative causation? *R* v *Dhaliwal*

A writer once wrote:

> It is criminal homicide to cause a normal adult to commit suicide by creating a situation so cruel and revolting that death is preferred to unavoidable continued submission.[90]

In circumstances where a person may be guilty of manslaughter by driving another person to suicide, an unlawful and dangerous act is difficult to find, but what is more tricky is that the unlawful 'act' must *cause* the suicide. In the sad case of *R* v *Dhaliwal*,[91] the defendant was accused of causing the suicide of his wife through psychological injury, which, it was argued, was sufficient to amount to 'bodily harm' under ss 18, 20 and 47 of the Offences against the Person Act 1861. The defendant had struck his wife on her forehead on the night of her suicide, but she was mainly subject to psychological abuse over a number of years. The trial judge decided that since there was no recognised psychiatric illness such as clinical depression or post-traumatic stress disorder exposed by the medical experts, there could be no bodily harm.

88 [2006] EWCA Crim 17 at [39], *per* Dyson LJ.

89 Incidentally, because Aimee was running away from the appellants the Court of Appeal did make a passing comment about escape cases. It was noted that there may be circumstances where the *actus reus* of a crime is completed by the act of the victim rather than the offender. However, escape was not considered in *Carey* simply because Aimee's run was to be considered as 'a part of the whole picture'.

90 J. Hall, *General Principles of Criminal Law* (Indianapolis, 1960) 274, cited by W. Wilson, *Central Issues in Criminal Theory* (Oxford University Press: Oxford, 2002) 183.

91 [2006] 2 Cr App R 24.

The Court of Appeal in *Dhaliwal* gave significant thought to the difference between psychological injury and psychiatric illness in criminal law, because they did not want to be responsible for blurring the boundaries of 'bodily harm'. A line was drawn between diagnosed injuries and emotional characteristics to keep in line with the well-established authority of *R* v *Chan-Fook (Mike)*[92] and the defendant was acquitted, but what was interesting about the *Dhaliwal* judgment was the lack of discussion on causation considering the vague nature of the unlawful 'act'. After all, if there are merely psychological taunts directed at V over a number of years by D, it is more difficult for the purposes of unlawful act manslaughter to establish that an unlawful and dangerous act has caused the death of V. The trial judge in *Dhaliwal* believed that the victim's decision to commit suicide was 'triggered' by a physical assault which represented a 'culmination of a course of abusive conduct', and he bravely submitted that it would be possible for the Crown to argue that the final assault played a significant part in causing the victim's death:

> I do not see any reason in principle why the final assault which triggered the suicide should be looked at in isolation. If a defendant by his previous conduct has reduced the victim to a psychological state in which the 'last straw which broke the camel's back' is liable to tip her over the edge, I would have thought there was some force in the argument that the 'last straw' played a significant part in causing the death.[93]

In other words, where there has been a history of physical or emotional abuse, and a final assault from D was the 'last straw' triggering V's suicide, the final assault was a legal cause of the victim's suicide. Remarkably, the Court of Appeal simply stated that they would not comment on the trial judge's direction, but went on to approve his underlying principle by submitting that it seemed likely that the assault operated as the immediate trigger which precipitated the victim's suicide. Psychiatric evidence at trial suggested that the 'overwhelming primary cause' of the victim's suicide was the experience of being physically abused by her husband in the context of experiencing many such episodes over a very prolonged time. Subject to evidence and argument on the critical issue of causation, unlawful violence on an individual with a fragile and vulnerable personality, which is proved to be *a* material cause of death, could at least, arguably, be capable of amounting to manslaughter.[94]

The Court of Appeal gives support to the idea that an unlawful act such as a strike to the head, which did not directly cause the death, may be enough to found a conviction for manslaughter where the victim has a 'fragile and vulnerable personality' on the premise that a culmination of previous abuse is to be combined with the final unlawful act to establish a cause. The blow to the head in *Dhaliwal* was an unlawful and

92 [1994] 1 WLR 689.
93 *R* v *Dhaliwal* [2006] 2 Cr App R 24—the words of the trial judge—described by Sir Igor Judge P at [7] of the Court of Appeal judgment.
94 Surprisingly, this is the view of Sir Igor Judge P (*R* v *Dhaliwal* [2006] 2 Cr App R 24 at [6] and [8].

dangerous act, but establishing a causal link between that remote assault and the victim's decision to commit suicide (and to run away as in *Carey*, above) presents difficulties. The Court of Appeal is suggesting that the causal element for unlawful act manslaughter can be met in these circumstances if the final assault which did not cause the victim's death was taken into context with a history of abuse (possibly legal and therefore not dangerous) which may have led to the victim's decision to die (or run away). Is the Court of Appeal suggesting under their 'cumulative and vulnerable' approach that if C emotionally abuses V for five years before striking her—thus causing her to commit suicide that night—the one strike by C can be combined with a history of lawful psychological abuse to establish a significant cause of V's death? Surely this defies the very nature of 'unlawful act' manslaughter? Cases most similar to this suggestion are those in which a defendant must take his victim as he finds them. In *R* v *Blaue*[95] the victim made an independent decision to refuse a blood transfusion from which she then died, and in *R* v *Dear*[96] the victim chose to reopen his stab wounds from which he also died. One could argue that these are suicide cases like *Dhaliwal* in which the defendants are still liable for the deaths of the victims despite their victims' free and informed decisions to die. On the other hand, the operating causes of death in these two cases (both when the victim in *Blaue* refused her transfusion and when the victim in *Dear* reopened his wounds) were clearly the injuries inflicted by the defendant during a violent and unlawful act. We would not have such a clear causal connection in *Dhaliwal* (or *Kennedy* and *Carey*) because the strike upon Mrs Dhaliwal's head (or the supply of heroin in *Kennedy* or the single punch in *Carey*) was not the operating cause of death. Perhaps the causal principle in *Blaue* could be expanded to cover abuse victims? Lawton LJ stated in *Blaue* that it had long been the policy of the law that those who use violence on other people must take their victims as they find them. That meant the whole man, not just the physical man. It does not lie in the mouth of the assailant to say that his victim's religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable.[97] Perhaps Mr Dhaliwal should have taken his wife as he found her; in a suicidal state prone to attempt to take her own life. It transpired during the trial that in August 2004 Mrs Dhaliwal was admitted to hospital after consuming a large quantity of alcohol and slitting her wrists. This is evidence of her suicidal state of mind. The victim's own act of suicide will then be incidental, as the defendant assaulted and tormented her knowing that she was extremely vulnerable. If, however, legal causation will not allow strong psychological influences to play a part in its application, there is another option in *Dhaliwal* and *Carey* to consider when the operating cause of death is unavoidably the victim's own act: fright and flight (or 'escape') cases. These provide a more logical approach to causation because only an *unforeseeable* act by the

95 (1975) 61 Cr App R 271.
96 [1996] Crim LR 595.
97 (1975) 61 Cr App R 271 at 274.

victim breaks the chain of causation between the defendant's act and the victim's injury, and even though the victim completes the *actus reus* of the offence, the defendant will be liable for the victim's actions because they were simply an obvious response to the defendant's behaviour.[98] In the leading case of *R* v *Roberts*,[99] the appellant made advances towards a girl in his car. When he tried to take her coat off it was the 'last straw' and she jumped from the vehicle despite it travelling at some speed. The Court of Appeal said:

> Was [the victim's reaction] the natural result of what the alleged assailant said or did, in the sense that it was something that could reasonably have been foreseen as the consequence of what he was saying or doing? If the victim does something so 'daft' or so unexpected that no reasonable man could be expected to foresee it, then it is only in a very remote and unreal sense a consequence of his assault.[100]

Similarly, in *R* v *Williams and Davis*,[101] the defendants picked up a hitch-hiker who jumped from their car and sustained fatal injuries when the defendants demanded money from him. The Court of Appeal added to *Roberts* that not only should the victim's reaction be reasonably foreseeable, but reasonable in nature depending on his or her characteristics and circumstances:

> The jury should consider whether the deceased's reaction in jumping from the moving car was within the range of responses which might be expected from a victim placed in the situation which he was. The jury should bear in mind any particular characteristic of the victim and the fact that in the agony of the moment he may act without thought and deliberation.[102]

To put *Roberts* and *Williams* into context with the facts of *Dhaliwal*, consider that C and V are a Muslim couple who have been married for several years, and that C has physically and emotionally abused V for the best part of the marriage. One night C threatens V that he will burn her with an iron if she fails to provide him with the money for the electric bill the next day. Fearful of sustaining more injuries and shaming her family through a divorce and depressed over the prospect of a lifetime of violence, V runs in front of a truck the next day, killing herself. Taking the 'reasonably foreseen' criteria from *Roberts* and the 'particular characteristics' element from *Williams*, could a combination of V's emotional state of mind, her religious beliefs and her history of violence at the hands of C bring V's act of suicide into the range of 'reasonable responses' to C's behaviour? Could this be regarded as a 'quasi-causal link' between C's acts over a number of years and V's death, which could only be strengthened as a result of V's religion, making her believe that suicide is the 'only way out'?[103]

98 See *R* v *Dhaliwal* [2006] Crim LR 923 at 926, comment by D. Ormerod, for further discussion on the application of this doctrine to the *Dhaliwal* case.
99 (1971) 56 Cr App R 95.
100 Ibid. at 102, *per* Stephenson LJ.
101 (1992) 95 Cr App R 1.
102 Ibid. at 8, *per* Stuart-Smith LJ.
103 For further discussion on *Dhaliwal* and the victim's state of mind, see J. Horder, and L. McGowan, 'Manslaughter by Causing Another's Suicide' [2006] Crim LR 1035 at 1041.

The escape cases illustrate the correct use of the doctrine of causation and sharply contrast to the narrow approach taken by the House of Lords in *Kennedy*. According to escape cases, a break in the chain in causation only happens when the victim's free and deliberate act is *unforeseeable* and *outside the range of reasonable responses* to the defendants act. Although these cases are based on different facts, this basic causal principle was neglected in *Kennedy*. Kennedy foresaw that the victim would inject the heroin. The victim's injection was also a reasonable response to being handed a pre-prepared syringe. Thus, the causal approach in escape cases conveys that the chain of causation should not have been broken by the victim's act.

There are striking resemblances to be made between *Carey* and *Dhaliwal*. Assuming (as the medical experts did) that Aimee's running away caused her heart to stop, according to Lawton LJ in *Blaue*, the victim should be taken as found. It should not have mattered if Aimee had a serious heart condition, the same as it did not matter that the victim in *Blaue* was a Jehovah's witness. Thus, Coyle's unlawful act upon Aimee could be said to have led to her death.[104] Additionally, applying the 'reasonably foreseen' criteria from *Roberts* and the 'particular characteristics' element from *Williams*, could a combination of (a) Aimee's frightened state of mind, (b) the fact that she was only 15 years old, (c) the fact that she was only yards from her home, and (d) the assault she suffered on her face, bring her act of running away into the range of reasonable responses to the defendant's behaviour? It seems very likely. The recent case of *R* v *Johnstone*[105] illustrates how difficult it can be to prove a causal link between the alleged criminal act and the death of the deceased. In this case, a gang of youths caused the death of a 67-year-old man who died of a heart attack shortly after they had thrown sticks and stones at him and struck him on the head with at least one stone. There was some doubt as to whether the victim's arrhythmia (irregular heart rhythm) that led to the heart attack was triggered by the unlawful and dangerous assaults or whether it had already been triggered by earlier behaviour from the defendants such as spitting and verbal abuse, which may have been criminal but may not have been regarded as dangerous. Although the combination of events was likely to have caused the fatal bout of arrhythmia, it was impossible for the jury to conclude that the earlier and less dangerous verbal abuse had not been the sole cause of the heart attack.

The trial judge in *Carey* spoke of 'probability' and 'proximity' and an 'overall' cause. These terms are an example of a more generous application of legal causation but they will produce a fairer outcome. According to *R* v *Smith*[106] a final cause is still a cause in law, even if it is only one of

104 Additionally, in *R* v *Hayward* (1908) 21 Cox CC 692, the defendant remained liable for manslaughter where he caused his victim to die by triggering a previously undiagnosed medical condition. This is an observation by D. Ormerod in his comment on *R* v *Carey* [2006] Crim LR 842 at 848, who supports the notion that in *Carey* the option to use 'victim' cases was missed.

105 [2007] EWCA Crim 3133.

106 [1959] 2 QB 35.

a number of operating causes.[107] The fact that Dhaliwal's final assault and Kennedy's supply of drugs and Coyle's assault on Aimee could only be understood to play a minor role in the victim's death does not mean that they did not contribute to the cause the death.

Conclusion

This article is not a rejection of the tried-and-tested principles of causation, but a criticism of the confused application of such principles to the notoriously difficult area of unlawful act manslaughter. Why does the victim's act of injection in *Kennedy*[108] break the chain of causation? In *Kennedy* it cannot be disputed that the victim made an independent choice to 'administer' the heroin himself, but this does not mean that the defendant as facilitator played no part in the victim 'taking' the drug or that any link between them had been broken. The Court of Appeal in *Dias* admitted that even though the act of injection was not part of the unlawful act, the injection was made possible by the unlawful possession and supply. The court also admitted that manslaughter cases could be established in facts such as those in *Kennedy* as long as the jury are satisfied that the chain of causation is not broken.[109] Keene LJ's further guidance on the application of causation suggested that a jury must ask themselves whether they are sure that the unlawful act was at least a substantive cause of the victim's death, as well as being dangerous.[110] The House of Lords decision in *Kennedy* seems to ignore this advice and focuses only on the victim's act of administration as opposed to the source of the fatal drug and the significant contribution from the facilitator, but if their Lordships argue that the victim's act breaks the chain of causation, are they at least admitting that there *is* a causal link?

As revealed above, according to escape cases and *Rafferty,*[111] a break in the chain in causation only happens when the victim's free and deliberate act is *unforeseeable* and *outside the range of reasonable responses* or *planned enterprise* to the defendant's act. Only when a defendant has no idea what the end result of his act will be would it be unfair to place blame on him. This was the rationale in *Rafferty* and it appears to be logical, and it is certainly foreseeable in the facts of *Kennedy* that the victim would inject himself with the prepared syringe. The Law Commission in 2006[112] suggested that unlawful act manslaughter should take the form of 'manslaughter' on the third rung of their three-tier homicide structure, proposing that where death was caused by a criminal act intended to cause injury—or where the offender was aware that the criminal act involved a serious risk of causing injury—he will be

107 Ibid. at 42–3, *per* Lord Parker CJ.
108 [2007] UKHL 38, [2007] 3 WLR 612.
109 [2002] 2 Cr App R 96 at [22] and [25], *per* Keene LJ.
110 Ibid. at [26].
111 [2007] EWCA Crim 1846.
112 Law Commission, *Murder, Manslaughter and Infanticide*, Law Com. Report No. 304 (2006), available at *http://www.lawcom.gov.uk/lc_reports.htm#2006*, accessed 4 August 2008.

guilty of manslaughter.[113] At first glance it can be seen how this provision could improve the law. A defendant would only be guilty of 'criminal act' manslaughter if when committing the criminal act he intends to cause injury. However, the causation issue remains. If Kennedy intended to cause his victim injury (or, at least thought that injury was a virtually certain consequence) of his action, the same dilemma would arise—did his unlawful act cause the death?

113 Ibid. at para. 1.38. Following on directly from the proposals in Law Commission, *Legislating the Criminal Code: Involuntary Manslaughter*, Law Com Report No. 237 (1996), available at *http://www.lawcom.gov.uk/lc_reports.htm#2006*, accessed 4 August 2008; and Home Office, *Reforming the Law on Involuntary Manslaughter: The Government's Proposals* (2000), available at *http://www.homeoffice.gov.uk/documents/cons-2005-corporate-manslaughter/2000-cons-invol-manslaughter.pdf?view=Binary*, accessed 4 August 2008.