**Causation in homicide - Practice and principle in difficult cases**

***Nathan Rasiah[[1]](#footnote-1)\****

**1. Introduction.**

1. In *Broughton* [2020], the Court of Appeal quashed the conviction of Ceon Broughton for gross negligence manslaughter of his girlfriend Louella Mitchie, who died having consumed illegal drugs that he had supplied to her, on the basis that the medical evidence, that she would have had a 90% chance of surviving if medical attention had been provided, was not enough to prove that his grossly negligent failure to seek such attention was a significant cause of her death.
2. Does the decision reflect the fact that the prosecution, the trial judge, and the jury that convicted Ceon Broughton were all simply fundamentally wrong in their analysis of what the evidence proved? Or does the decision reflect divergent conceptions of the nature of causation in criminal law, and the extent to which it should be an issue for evaluation by a jury?
3. This paper argues that issues of causation involve evaluation of the remoteness and significance of the contribution made by the culpable act or omission in question, an evaluation that will inevitably involve considerations of policy and value judgments or moral judgments. Those appellate decisions that seek to leave "difficult" cases to juries to decide provide a framework for juries to make those judgments. By contrast, the approach adopted in *Broughton* renders it very difficult to prosecute at all in cases involving a failure to render assistance or medical treatment to someone at risk of death, bearing in mind the limitations of expert opinion regarding the ex post facto assessment of the survivability of an individual’s condition. Thus - although ostensibly a ruling on evidence, not the principle - it may have an effect analogous to the decision of the House of Lords in *Kennedy (No 2),* regarding prosecutions for unlawful act manslaughter in connection with supply of illegal drugs. The paper concludes by exploring alternatives to an offence of manslaughter requiring proof of causation.

**2. How helpful is the concept of "factual" causation, as distinct from "legal" causation?**

1. Criminal law orthodoxy: Factual and legal causation. Buthow useful is the concept of "factual causation" for excluding cases in which causation is not made out? Does it add anything to "legal causation"? Eg. *White* [1910] 2 KB 124.
2. Does it prompt questions to witnesses that invite speculation? The counter-factual? Glanville Williams' observation in his comment on Hart and Honore's, *Causation in the law* (1959):

"Pascal said that if Cleopatra's nose had been shorter, the whole face of the earth would have been changed. This is a speculation that cannot be proved, because we cannot put the clock back to 69 B.C, give Cleopatra a shorter nose, and see whether Antony would still have fallen for her so disastrously. Nevertheless, the statement that Cleopatra's Egyptian or Grecian beauty was the cause of Antony's downfall seems to us to be probably true, because we know that men often are infatuated by female beauty."[[2]](#footnote-2)

1. *Wilson* [2019] 1 WLR 3916.[[3]](#footnote-3) Causing death by driving whilst uninsured, contrary to section 3ZB of the Road Traffic Act 1988. A pedestrian who ran into the road, was struck and killed by a vehicle driven by the defendant, uninsured, under influence of cannabis and driving at 40mph in a 30mph zone. At trial it was agreed that the risk of death occurring after a collision at 40 mph was at least four times greater than the risk of death occurring after a collision at 30 mph, but that at 30 mph death could still have occurred. Appeal against conviction on the basis that a submission of no case should have been upheld, since the Crown had not established that a collision at 30 mph would not have been fatal.

**29** We do not consider that the analysis is taken forward by the decision of Earl J in *R v Dalloway* (1847) 2 Cox CC 273 mentioned by the judge which did not turn on the problematic wording of section 3ZB of the Road Traffic Act 1988. On the facts of *R v Dalloway*, which involved a fatal collision between a horse and cart and a three-year old child, the driver had the reins on his knees. On Earl J’s narrow assessment of the driver’s culpability, the jury had to be sure that, but for this specific culpability, the victim would not have died.

**30** We have taken account of more recent Court of Appeal authority. In *R v Warburton* [2006] EWCA Crim 627 and *R v L* [2011] RTR 19, the “material contribution” test was endorsed. In the second case, Toulson LJ said at para 16:

“In short, it is ultimately for the jury to decide whether, considering all the evidence, they are sure that the defendant should fairly be regarded as having brought about the death of the victim by careless driving. That is a question of fact for them. As in so many areas, this part of the criminal law depends on the collective good sense and fairness of the jury.”

**38** Does section 3ZB place a legal burden on the Crown to prove that, but for the culpability that has been identified, the death would not have occurred? If it does, such proof would have to be to the criminal standard. [...] The question has to be addressed head on.

**39** In our judgment, adherence to the approach underpinning the submission of Mr Fisher would impose too onerous a requirement on the Crown, and one which is not mandated by the policy and objects of the statute. [...]

**40** In our view, the issue of causation built into section 3ZB, including the concept of more than minimal contribution, requires an evaluative assessment taking on board all the circumstances of the case. This is what Lords Hughes and Toulson JJSC meant by: “when there is some additional feature of his driving which is causative on a common sense view” (para 32). It is also borne out by the specific examples the Supreme Court proffered for consideration. The facts of the present case are far worse than in those examples. A fair reading of Mr Power’s evidence was that the risk of death would have been significantly or materially lower had the appellant been driving at the speed limit. This would be so even if one ignores the further question of whether the appellant’s reaction time being diminished on account of his cannabis use could or might have been causative. Beyond this, it is not possible to draw any further statistical or legal inferences from Mr Power’s evidence.

**41** The common sense approach which has guided previous decisions of this court and the Supreme Court creates no affront to justice. Indeed, the contrary would be the case, because Mr Fisher’s submission, if upheld, would exculpate an uninsured driver travelling at 100 mph. On those hypothetical facts, the 31% statistic would rise to 100% but the 7% statistic would remain constant.

**42** We have not embarked on a reasoning process which entails envisaging exactly where the appellant’s vehicle would have been on the highway had he been travelling at the speed limit. On one analysis, it could be said that he would have been further back in the road. However, such reasoning would be close to engaging in an exercise in metaphysics.

**43** In our judgment, section 3ZB is satisfied and the second limb of the test in *R v Hughes (Michael)* is made out—“contributes in some more than minimal way to the death”—if the driving at the critical time was such as significantly or materially to increase the risk of death resulting from the appellant’s culpable acts or omissions. Further than this, the purpose of the provision is not advanced by requiring a close comparative analysis of what would have happened with what did happen.

1. Observations confined to the statutory context (policy and objects) of the s.3ZB, RTA 1988 offence? Or could the critique of the counter-factual approach in favour of "an evaluative assessment" apply to other situations?
2. In passing, how helpful is statistical evidence in evaluating causation in such situations? (Eg the likelihood of death following a collision at a given speed.)

**3. What are the limits to the assistance expert evidence can provide on questions of causation?**

1. The issue for the expert may not be the issue for the jury. *Maybin* and *Maybin* (2012) SCC 24 (Supreme Court of Canada). Two brothers attack victim and knock him unconscious. A bar "bouncer" arrives within seconds and strikes the unconscious victim in the head. Medical evidence inconclusive about which blows caused death. Trial judge acquits of manslaughter. Court of Appeal reverse the acquittal, and order a re-trial; upheld by the Supreme Court. Held that appellants’ assaults were factually a contributing cause of death: “but for” their actions, the victim would not have died.

21. As Arbour J. noted in *Nette* (para. 77):

The difficulty in establishing a single, conclusive medical cause of death does not lead to the legal conclusion that there were multiple operative causes of death. In a homicide trial, the question is not what caused the death or who caused the death of the victim but rather did the accused cause the victim’s death. The fact that other persons or factors may have contributed to the result may or may not be legally significant in the trial of the one accused charged with the offence.

1. An expert's opinion is admissible to furnish the court with scientific information, regarding matters relevant to the case, which is likely to be outside the experience and knowledge of a judge or jury: *Turner* [1975] Q.B. 834, p. 841.
2. Dangers of witnesses exceeding their expertise. *Wangige* [2020] EWCA Crim 1319. Pedestrian struck by a car. Forensic Collision Investigator initially miscalculated speed, hence D not initially prosecuted for causing death by dangerous driving, but prosecuted for other summary driving matters. Subsequent prosecution for causing death by dangerous driving should have been stayed as abuse of process. In addition to being flawed regarding speed, the initial FCI report contained the following conclusion:

In conclusion, it is possible that the driver and pedestrian *were on a true collision course* where neither was in a position  to avoid the inevitable impact once the pedestrian had left the pavement. (Emphasis added)

1. Outside the proper scope of his expert opinion? Is there a role for the ultimate issue rule, in ensuring experts stick to the issues within their expertise and outside that of the jury? Blackstones Criminal Practice (2021) notes at F11.35:

In its Eleventh Report: Evidence (General) (1972), Cmnd 4991, para. 268, the Criminal Law Revision Committee was of the opinion that the old common-law rule that a witness should not express an opinion on an ultimate issue, i.e. one of the very issues to be determined by the court, probably no longer existed. In practice the rule is largely ignored, or treated as being of only semantic effect, so that an expert is allowed to express an opinion on an ultimate issue, provided that the actual words he employs are not noticeably the same as those which will be used when the issue falls to be considered by the court.

1. An argument for its resurrection?

**4. Should experts give evidence by reference to the standard of proof?**

1. The medical evidence of causation in Broughton:

62. Only Professor Deakin dealt with causation. He said in his statement:

“In view of the lack of previously documented deaths from 2CP, the combined effect of three stimulant drugs and the unknown mechanism that resulted in Louella’s death, it is not possible to state beyond reasonable doubt that earlier medical intervention would have been able to save Louella’s life once she had ingested the 2CP.”

 In his first report he had put it in similar terms but added “I do believe however that on the balance of probabilities, medical intervention at any time prior to 21.10 is likely to have saved Louella’s life.”  He maintained that position in cross examination but added various descriptions on the chances in answer to questions. He said:  “I say in that report that before 21.10 she had a very good chance of survival, but I wasn’t saying that after that time there wasn’t. I say that there was still a good chance of survival after that time, I confirmed that that was my opinion. At 21.10 she was still making noises, she was not unresponsive at that point. In my second report I sought to clarify this. In my opinion whilst she was still breathing there was a good chance of survival with treatment.”

63. He had clarified his view in his second report. The clarification was prompted by a reminder from a police officer of what he had said in a discussion. He put the chance of survival at 21.10 at 90% and “certainly on the balance of probabilities”. He said variously that “had the deceased received appropriate care earlier that evening ... she would have recovered”; that “so long as she was breathing her chances of survival are very high or very good”; but stated that “it is not possible to be certain beyond reasonable doubt as to whether medical intervention could have reversed [Louella’s] demise”.

1. Compelling?

96. Like the jury, we are left with the Professor’s evidence which, echoing Lord Coleridge’s language in Morby, he gave “under a high sense of duty and responsibility”. He was careful not to overstate his position. It is striking that in his original report the Professor expressly addressed himself to the criminal standard of proof, rather than scientific certainty, but found the evidence wanting. He was happy with the civil standard of proof, the balance of probabilities. The furthest he would go when pressed further was in suggesting that there was a 90% chance of survival at 21.10 if medical attention had then been provided. He used various epithets to describe the position then and thereafter, but it is abundantly clear that was the high-water mark for survival and that the chances diminished as time went by, albeit remaining good. The diminishing chances of survival were expressly referred to in the opening of the prosecution to the jury.

1. Or objectionable? The Inns of Court College of Advocacy’s *Guidance on the preparation, admission and examination of expert evidence* (3rd Edition: 2020)[[4]](#footnote-4) at paragraphs 5.9 to 5.12:

“Decisions are made in the context of, and at times turn upon, the burden and relevant standard of proof. Experts may not deal in the same currency. An expert analysing the cause of a past event such as an illness or the collapse of a building will express an opinion on the cause, but may not give it in terms of ‘beyond reasonable doubt’ or ‘on the balance of probabilities’. If a valuer gives an opinion of the value of a piece of real property or an article such as an Old Master picture they may not be able to go further than stating what price they think it is ‘likely’ to fetch in the open market, based on the information they have and their personal knowledge and experience. A medical expert predicting the likelihood of a patient’s future recovery from injury, and the likely degree of recovery, may be in no different position. Experts provide evidence to inform a decision by the court, they do not provide the decision itself, and should not try, or be seen to try, to usurp the decision making role of the court. Experts can be asked about the degree of certainty with which their opinion is expressed but it is for the court to connect that evidence with the requirements of legal proof ...”

1. Forensic pathologists and the burden of proof. An anonymised example taken from the transcript of an inquest:

HM CORONER: Can I ask you to read your conclusions and then the cause of death?

PATHOLOGIST: ... The formal cause of death was given as multiple organ failure, so thats a failure of two or more major organs due to intravascular sickling and organ ischaemia. I'm sorry about the technical aspects so I'll break it down so it means the red blood cells have changed from round to sickle shaped within the blood vessels resulting in lack of oxygen to the brain and that was due to sickle cell trait in an individual engaged in assault.

[...]

HM CORONER: If I was to ask you whether the fight caused the death, what would you say?

PATHOLOGIST: Well as I understand matters, unless I'm corrected on that he was previously fit and well prior to this incident. He was going about his business not complaining of any symptoms, there seems to me to be a temporal link between the incident and his deterioration. It was only after the fight, well shortly thereafter the fight that his level of consciousness started to drop. Therefore in my view that assault is a factor involved in this young man's death and that is the reason why I placed in an individual engaged in an assault as part of the cause of death. Because I think it is relevant.

HM CORONER: How sure are you about that?

PATHOLOGIST: Well, er when we consider a cause of death, er we go through erm a system of excluding various conditions. Erm so we need to, if an individual has been involved in an assault, we need to think has there been sufficient blood loss to explain the death, the answet's no here. While we know he was hit around the head, is there a brain injury arising from that, the answer is no. No other traumatic injuries explinae the death. No other critical natural diseases other than the Sickle which could have caused the death. Are there any drugs that could have cuased the death? The answer in my opinion is no so having gone through that and importantly taking into account the pathology with the circumstances, and that's most important in my view that there is a direct link on that basis, so yes I would be certain on that basis.

HM CORONER: Would you say beyond reasonable doubt?

PATHOLOGIST: Er without doubt on the balance of probabilities. I cannot think of any other tests that could have been undertaken that could identified an alternative Cause of death. ... So I am as certain as I can be that this is the correct diagnosis.

1. Contrast "being sure" with scientific certainty. *Dawson* [1985] 81 Cr App R 150.  Robbery of a petrol station. Attendant suffered heart disease, collapsed and died of a heart attack. At their trial medical experts were of opinion that the attempted robbery was responsible for the attendant's death; but they could not rule out the possibility of a heart attack having occurred before the attempted robbery. Appeal based on failure to withdraw the offence of manslaughter on the basis that the medical evidence amounted to no more than a high probability that the attempted robbery started the heart attack which caused death, rejected, citing *Bracewell* (1979) 68 Cr App R 44 (though appealed allowed on the basis of misdirection.)[[5]](#footnote-5)

"You must remember this, that a doctor, and you may have thought that Dr. Green was a splendid example of fairness is speaking from a scientific point of view. He was saying, "I cannot as a scientific certainty rule out that which you postulate. namely partial asphyxia, recovery and then a heart attack," but, he said, "I incline strongly against that view". You will remember ladies and gentlemen that your duty is not to judge scientifically or with scientific certainty. You judge so that as sensible people you feel sure and even say that what might not satisfy Dr Green as a scientific certainty, might, with propriety, satisfy you so that you felt sure. Do not be misled. There is no such thing as certainty in this life, absolute certainty.

You ask yourselves the simple question upon the whole of the evidence do I feel sure? Take account of course of the doctor's evidence. It IS the most important evidence on this aspect. He is really the only one qualified to speak here. Take account of his reservation fully.

That direction, in our judgment, correctly draws the distinction between what might be described as scientific proof on the one hand and legal proof on the other. It is, with respect an admirably lucid and succinct way of dealing with a problem which often arises in connection with scientific evidence. It is, of course, part of cross-examining counsel's duty to invite expert witnesses to consider alternative hypotheses and, after examining them in detail, to conclude by asking, 'Can you exclude the possibility?' The available data may be inadequate to prove scientifically that the alternative hypothesis is false, so the scientific witness will answer. 'No, I cannot exclude it,' though the effect of his evidence as a whole can be expressed in terms such as, 'But for all practical purposes (including the jury's) it is so unlikely that It can safely be ignored.' This is in substance what Dr. Green said."

**5. How gross negligence cases prior to Broughton have been left to juries.**

1. *Misra* [2004] EWCA Crim 2375. Routine operation, patient develops infection and dies of Toxic Shock Syndrome. Junior doctors involved in post-operative care prosecuted for gross negligence manslaughter.
2. The evidence:

He believed that if the deceased had been prescribed aggressive fluids and a broad spectrum antibiotic, he stood a very high chance of survival.

When cross−examined he indicated that he was not sure that the deceased would have survived with proper medical treatment, but he believed on the balance of probability that he would have done.

In re−examination he said that if appropriate treatment had been given at 12 o'clock on the Saturday, he was as certain as one could be that he would have survived.

1. Court of Appeal on whether the case should have been withdrawn:

22. [...] A distinct feature of the submission, however, was that the case should be withdrawn from the jury on the basis that the Crown's case had failed on causation. The judge rejected the submission. His decision is criticised, essentially on the basis that the deceased may have died from TSST1 in any event, or from the developing consequences of the condition before negligence could be established against either appellant. In our judgment the submission that there was no case to answer on the causation issue was untenable. We have narrated a brief summary of the evidence, including the expert medical evidence. The causation issue was entirely for the jury. If the submission had been upheld, the judge would have usurped its function. His decision was right. We refuse the application for leave to appeal on this ground.

1. *Sellu* [2016] EWCA Crim 1716. Patient underwent knee replacement. Prescribed painkillers and developed abdominal pain from perforated bowel / stomach. Died as a result of: “1(a) multiple organ failure; (b) faecal peritonitis; (c) perforation of the diverticulum”.  Sellu was Consultant Colorectal surgeon, prosecuted for gross negligence manslaughter for failing to take immediate urgent action.
2. Evidence:

50. Dr Bell also used the P-POSSUM statistical tool and assessed the mortality risk at 2.6% on the morning of 11 February, around 9% in the early hours of 12 February, and rising to 15% by later that morning. Dr Bell took the view that the tipping point (i.e. when the chances of survival dipped below 50%) occurred at about 3:00 pm on 12 February although expeditious action even as late as 8:00 pm may have saved his life.

1. Part of the summing up:

118. [...] “Mr Sellu will be guilty of the offence ...only if his gross negligence caused or significantly contributed to Mr Hughes’ death. ...Mr Hughes died of diverticulitis, where the pouch or diverticulum perforated and which then caused infection to spread throughout his body and that led to multiple organ failure. Here though, the prosecution contend that Mr Sellu did significantly contribute to Mr Hughes’ death in the sense that he failed to take various steps which could have led to an earlier operation, which in turn, would have had a significant chance of saving Mr Hughes’ life. No operation under general anaesthetic is completely safe. But you may decide that, even if an earlier operation would not have been bound to succeed, the effect of Mr Sellu’s negligence was to deprive Mr Hughes of a significant chance of survival and it that sense was a significant cause of Mr Hughes death.”

119. As for the tipping point, the judge said:  “Beyond about 15.00 in Dr Bell’s view the chance of Mr Hughes surviving the operation had started to enter the tipping point – that is it was starting to be less than 50%. His chances of survival continued to deteriorate. But in Dr Bell’s opinion, expeditious action even as late as 8.00pm may have saved Mr Hughes’ life....by the time Mr Hughes went into the operation he had about 1% chance of survival....”

1. No ground of appeal on this ground.
2. The role of statistics again.

**6. Differing approaches to leaving issues of causation to the jury: a comparison with "intervening acts"**

1. Drug supply unlawful act manslaughter cases prior to *Kennedy (No 2). Rogers* [2003] EWCA Crim 945*, Finlay* [2003] EWCA Crim 3868*.* In *Finlay* issue left in this way, conviction upheld: [[6]](#footnote-6)

Whether or not the defendant caused heroin to be administered to or taken by the deceased is a question of fact and degree which you have to decide, and you should decide it by applying your common sense and knowledge of the world to the facts that you find to be proved by the evidence.

1. *Kennedy (No 2)* [2008] 1 AC 269: The finding that the deceased freely and voluntarily administered the injection to himself, knowing what it was, is fatal to any contention that the appellant caused the heroin to be administered to the deceased or taken by him.
2. Norrie's critique of causation: *Crime, Reason and History* (3rd Ed. CUP: 2014): it is the overall moral and political reading of the situation that leads the court to cast an act as voluntary or involuntary. Drug user cases often co-users or friends of the deceased, hence the imperative of dealing compassionately militates against finding causal connection:

"The fundamental principle is so malleable that the case could have gone either way, and one is left to reflect that the judges may be deploying the principle in order to achieve the moral and policy result that they approve, rather than for its own sake."

1. *Berlinah Wallace* [2018] EWCA Crim 690.
2. Ruling on submission of no case to answer, Ruling on No Case to Answer, 20 November 2017, per May J:

Nevertheless it seems to me that if one is to accord proper respect to the decisions and actions of persons with free will acting autonomously (whether as victim or third- party intervener) then the legal result of their free and voluntary choice and/or positive act to end their own or another’s life must, as I see it, be to break with what has gone before, disconnecting both the choice to die and the death itself from the circumstances generating the occasion for it. When MvD made the brave, desperate, profoundly sad decision that his life with such appalling disability was so burdensome that he preferred to leave it, and when the doctors opened the door for him to go and ushered him through, his choice and their actions each disconnected his death, in law, from the culpable activity which had caused his dreadful injuries. In my view, a jury properly directed could reach no other conclusion and for that reason I have decided that the case of murder must be withdrawn from them.

1. Ruling on prosecution appeal from "terminating" ruling [2018] EWCA Crim 690:

52. The resolution of the issues raised by this appeal is not easy for a number of reasons, which must be acknowledged. First, as has been said many times, causation is a complex area of the law where the search for a comprehensive test of causation or set of principles has proved to be elusive. The difficulty stems no doubt from the vast array of circumstances in which issues of causation can arise and from the fact, as Mason CJ pointed out in *March v E & MH Stramare Pty Ltd* (1991) 171 C.L.R. 506, that considerations of policy and value judgments necessarily enter into the assessment of causation. Secondly, there has been no case in this jurisdiction so far as we are aware, in which the issue of causation has been considered in the context of an act of euthanasia or “mercy killing”. Though the factual issues are relatively straightforward, the legal issues on causation that they give rise to are not. Thirdly, it is necessary to avoid an unduly theoretical approach to issues that in the context of a criminal trial will normally have to be resolved by a jury, with appropriate directions from the judge. [...]

63. As was said by Karakatsanis J giving the judgment of the court in *R. v Maybin* [2012] S.C.C. 24; [2012] 2 S.C.R. 30 at [29]: “Any assessment of legal causation should maintain focus on whether *the accused* [our emphasis] should be held legally responsible for the consequences of his actions, or whether holding the accused responsible for the death would amount to punishing a moral innocent.”

64. In that connection, though an assessment has to be made in the overall scheme of things of the causative significance of intervening acts or events, the all-important question on legal causation remains whether “the accused’s acts can fairly be said to have made *a* significant contribution to the victim’s death”. It would be idle to pretend there is complete consistency in the principles that have been applied by the courts to determine causation issues when they have arisen. Nevertheless it is plain that the key factual question when evaluating legal causation in homicide cases—whether more than one cause is said to operate or not—is, as we have said whether the accused’s acts can fairly be said to have made *a* significant contribution to the victim’s death.

1. Distinguishing *Kennedy (No 2):*

75. It is undoubtedly the case that, generally speaking, informed adults of sound mind are treated by the law as autonomous beings able to make their own decisions about how they would act, and that a defendant may not be held responsible for the deliberate act of such a person. [...]

76. [...] In the circumstances, in our view the fact that the Belgian doctors considered Mr van Dongen’s decision/request to be “voluntary” for the purposes of the Belgian law on euthanasia does not determine whether his decision was voluntary for the purposes of the different legal issues arising here. [...] there was nothing that could decently be described as voluntary either in the suffering or in the decision by Mr van Dongen to end his life, given the truly terrible situation he was in.

1. Route to verdict:

Causation

3. In order to convict the defendant on count 1 you must be sure that the defendant’s unlawful act of throwing acid over Mr van Dongen caused his death. This is a question of fact that you should answer using your collective common sense. It is common ground that but for the injuries caused by the acid attack, Mr van Dongen would not have undergone voluntary euthanasia. If you are sure this is the case, go on to ask yourself:

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

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

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

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

1. The jury's verdict?
2. For criticism of *Maybin* and *Wallace*: F Stark, *Driving Home Causation,* 9 Archbold Review (2020), 6:

"The doorman's attack on an unconscious person looks suspiciously like an unforeseeable (and free, deliberate and informed) intervention that should, in a system like English law's, havce relieved the accused persons of causal responsibility for the patron's death." ...

"The better view is that the doctor's decision in Wallace was free, deliberate and informed, and relieved the defendant of responsibility for the death, even if the deceased's suicide were reasonably foreseeable as a result of the defendant's acid attack."

1. See also Causation in diminished responsibility: *Golds* [2016] UKSC 61:

Whilst the effect of the changes in the law has certainly been to emphasise the importance of medical evidence, causation (question 4) is essentially a jury question.

**7. Alternatives - "Inchoate" liability for omissions without causation?**

1. A different standard for omissions? Eg.Law Commission Draft Criminal Code 1989 (Law Com. No. 177):

17 (1) Subject to subsections (2) and (3), a person causes a result which is an element of an offence when-

(a) he does an act which makes a more than negligible contribution to its occurrence; or

*(b) he omits to do an act which might prevent its occurrence and which he is under a duty to do according to the law relating to the offence.*

(2) A person does not cause a result where, after he does such an act or makes such an omission, an act or event occurs-

(a) which is the immediate and sufficient cause of the result;

(b) which he did not foresee, and

(c) which could not in the circumstances reasonably have been foreseen.

1. Inchoate liability? Eg Failure to perform a duty or negligent performance of a duty, s. 15, Armed Forces Act 2006.

1. \* Barrister, 23 ES Chambers; Supervisor in criminal law, procedure and evidence, University of Cambridge. [↑](#footnote-ref-1)
2. G. Williams, *Causation in the Law*, 19 C.L.J. 1961, p.62. For the continued relevance of Cleopatra's nose to issues of causation in criminal law see D. Perry QC and T. Williams, *Causation and Cleopatra's nose*, 5 December 2019: https://blog.6kbw.com/posts/causation-and-cleopatras-nose [↑](#footnote-ref-2)
3. Commentary at CLW/19/24/7. [↑](#footnote-ref-3)
4. To declare an interest, I was one of a number of contributors involved in drafting and revising the 3rd Edition. [↑](#footnote-ref-4)
5. See *Oliver* v. *DPP* [2016] EWHC 1771, paras. 50 - 52 for example of a charging decision, flawed approach to causation including failure to take on board principles in *Dawson*. [↑](#footnote-ref-5)
6. Strongly criticised: R. Williams, Policy and principle in drugs manslaughter cases, 64 CLJ 66 (2005) [↑](#footnote-ref-6)