

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

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### **1. Introduction.**

1. *Broughton* [2020] EWCA Crim 1093. Divergent conceptions of the nature of causation in criminal law?

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

2. For excluding cases in which causation is not made out? Eg. *White* [1910] 2 KB 124.
3. Does it invite speculation? The counter-factual? Pascal and Cleopatra's nose.<sup>1</sup>
4. *Wilson* [2019] 1 WLR 3916, [38] - [43]<sup>2</sup> Observations confined to the statutory context of the s.3ZB, RTA 1988 offence or of wider application?

### **3. Limits to the assistance expert evidence can provide on questions of causation?**

5. The issue for the expert may not be the issue for the jury. Eg. *Maybin and Maybin* (2012) SCC 24 (Supreme Court of Canada).
6. A role for the ultimate issue rule? Eleventh Report: Evidence (General) (1972), Cmnd 4991, para. 268. An argument for its resurrection?
7. *Wangige* [2020] EWCA Crim 1319. "It is possible that the driver and pedestrian were on a true collision course where neither was in a position <sup>[ ]</sup> <sub>[SEP]</sub> to avoid the inevitable impact once the pedestrian had left the pavement."

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

8. Scientific certainty vs being sure. *Dawson* [1985] 81 Cr App R 150.
9. *Broughton*: paras. 62 - 63: 90% and "certainly on the balance of probabilities". CACD: "striking".

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<sup>1</sup> 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>

<sup>2</sup> Commentary at CLW/19/24/7.

10. Or objectionable? The ICCA's *Guidance on the preparation, admission and examination of expert evidence* (3rd Edition: 2020)<sup>3</sup> at paras 5.9 to 5.12.

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

11. *Misra* [2004] EWCA Crim 2375; *Sellu* [2016] EWCA Crim 1716.

118. [...] But you may decide that, even if an earlier operation would not have been bound to succeed, the effect of [D's] negligence was to deprive [V] of a significant chance of survival and it that sense was a significant cause of [V's] death." <sup>[L]</sup><sub>[SEP]</sub>

### **6. A comparison with "intervening acts"**

12. Drug supply ULM cases pre-*Kennedy (No 2)*. *Rogers* [2003] EWCA Crim 945, *Finlay* [2003] EWCA Crim 3868: "Whether [D] caused heroin to be administered to or taken by the deceased is a question of fact and degree [...]you should decide by applying your common sense and knowledge of the world to the facts that you find to be proved by the evidence." <sup>4</sup>

13. *Kennedy (No 2)* [2008] 1 AC 269

14. Norrie's critique: *Crime, Reason and History* (3rd Ed. CUP: 2014): the overall moral and political reading of the situation that leads the court to cast an act as voluntary or involuntary; fundamental principle is malleable.

15. *Berlinah Wallace* [2018] EWCA Crim 690: Ruling on No Case to Answer, 20 November 2017, per May J vs. Ruling on appeal from "terminating" ruling [2018], citing *Maybin* [2012] S.C.C. 24: assessment of legal causation should focus on whether the accused 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. Distinguishing *Kennedy (No 2)*: [...] there was nothing that could decently be described as voluntary. cf Norrie?<sup>5</sup>

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

16. A different standard for omissions? Eg. Law Commission Draft Criminal Code 1989 (Law Com. No. 177), s.17.

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

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<sup>3</sup> To declare an interest, I was one of a number of contributors involved in drafting and revising the 3rd Edition.

<sup>4</sup> Strongly criticised: R. Williams, Policy and principle in drugs manslaughter cases, 64 CLJ 66 (2005)

<sup>5</sup> For criticism of *Maybin* and *Wallace*: F Stark, *Driving Home Causation*, 9 Archbold Review (2020), 6.