

SECTION A1: *ACTUS REUS*: THE EXTERNAL ELEMENTS OF AN OFFENCE

A

It is customary, for analytical purposes, to separate the essential elements of a crime into two main elements: (1) the prohibited act, omission, consequence or state-of-affairs (the *actus reus*); and (2) any fault element, such as intent or recklessness, required in respect of it (the *mens rea*). Smith & Hogan (*Criminal Law*, 10th ed., p.30) define the *actus reus* as including ‘all the elements in the definition of the crime except the accused’s mental element’. It represents the external manifestation of the offence. **A1.1**

THE NATURE OF AN *ACTUS REUS*

Conduct Crimes and Result Crimes

The classification of offences into ‘conduct crimes’ and ‘result crimes’ may sometimes seem awkward and unhelpful. Nevertheless, it is always necessary to identify the constituent elements of an offence, and use of this classification sometimes highlights key differences between offences. Thus, the offence of indecent exposure formerly contained within the Town Police Clauses Act 1847, s. 28, was a result crime, because it required proof that D’s conduct caused residents or ‘passengers’ to be ‘annoyed, obstructed or endangered’. In contrast, the offence of genital exposure created by the SOA 2003, s. 66, is a conduct crime, because it requires proof only that D exposed himself and intended this to cause alarm or distress. Nobody need actually have suffered alarm or distress. In theory, nobody need even have seen the offending act. **A1.2**

The classification of offences into ‘conduct crimes’ and ‘result crimes’ can be a relatively crude process, and may not always be particularly helpful. Rape, for example, does not really lend itself to analysis in such terms. Nevertheless, it is always necessary to identify the constituent elements of an offence, and the classification can sometimes highlight essential differences between two alternative charges. Thus, the Vagrancy Act 1824, s. 4, creates an offence of indecent exposure ‘with intent to insult a female’, but does not require that any female should either see the exposure or feel insulted by it. It accordingly creates a conduct crime, which may be contrasted with the offence created by the Town Police Clauses Act 1847, s. 28, under which the prosecution must prove that D’s indecent exposure caused someone to be ‘annoyed, obstructed or endangered’.

The distinction between conduct crimes and result crimes may also be important in determining jurisdiction over cross-frontier offences. The general rule is that jurisdiction over a conduct crime depends on proof that some part of the relevant conduct occurred within England or Wales, whereas jurisdiction over a result crime ordinarily depends on at least some part of the proscribed result taking place there (see *Secretary of State for Trade v Markus* [1976] AC 35, per Lord Diplock at p. 61 and *Harden* [1963] 1 QB 8, but contrast *Smith (Wallace Duncan) (No. 4)* [2004] QB 1418). Cases involving international fraud may now fall within part I of the CJA 1993 (see **A8.4**). If so, jurisdiction may arise where any element of the offence occurs within England or Wales.

RELATIONSHIP BETWEEN *ACTUS REUS* AND *MENS REA*

The general rule, expressed in the maxim, *actus non facit reum nisi mens sit rea*, is that an offence can be committed only where criminal conduct is accompanied by some element of fault, the precise fault element required depending upon the particular **A1.3**

offence involved. There are nevertheless many offences of strict liability, in which no fault element need be proved (see **A4**). In such cases, one can therefore have an *actus reus* without any corresponding *mens rea*.

In theory, there can be no criminal liability based on *mens rea* alone, but if the *actus reus* element of a crime is defined very widely (as is sometimes the case) a 'guilty mind' may turn an objectively innocent act into the *actus reus* of that offence. Thus, a witness who tells the court something that he believes to be untrue is guilty of perjury, even if his evidence turns out, to his surprise, to be true after all (see **B14.9**); and a shopper who openly selects goods in a self-service store, whilst secretly nursing a dishonest intention to avoid paying for them, is regarded as committing theft at the moment he first selects them, even though he may have done nothing objectively wrong at that stage. The *actus reus* of perjury involves nothing more than giving material evidence in court; and the concept of appropriation, which lies at the heart of the *actus reus* of theft, has been defined so widely in cases such as *Gomez* [1993] AC 442 as to strip it of any special significance. Almost any form of dealing with another person's property, legitimate or otherwise, must now be regarded as an appropriation of it: the *actus reus* of theft (see generally **B4.25 et seq.**).

A person can meanwhile be guilty of a criminal attempt by doing an entirely lawful thing in the mistaken belief that he is doing something different, which would indeed have been criminal. If, for example, D imports a harmless vegetable powder mistakenly believing it to be heroin, he may be guilty of attempting to import a controlled drug, contrary to s. 1 of the Criminal Attempts Act 1981. The objectively lawful importation of the powder becomes the *actus reus* of the criminal attempt (*Shivpuri* [1987] AC 1; see **A6.40**).

A Mental Element in the *Actus Reus*?

- A1.4** The usual distinction between the mental element and the external manifestation of a crime can be difficult to apply in cases where the crime is one of 'possessing', 'permitting', 'keeping', 'appropriating', etc, because these terms simultaneously import both mental and physical elements. A person may, for example, possess a controlled drug without realising what it is that he possesses, but he does not possess something which, unknown to him, has become stuck to the sole of his shoe or the blade of his penknife (*Warner v Metropolitan Police Commissioner* [1969] 2 AC 256; *Marriott* [1971] 1 WLR 187). It might therefore be argued that there is a mental element implicit in the *actus reus* of any offence of unlawful possession. From a strictly theoretical viewpoint, this cannot be correct. The correct analysis must be that the legal concept of possession involves both the *actus reus* element of physical possession and a state of mind, the *animus possidendi*, which can only be a part of the requisite *mens rea*. Nevertheless, it may be convenient in practice to treat the *animus possidendi* as if it were an *actus reus* element, because it must always be proved by the prosecution, even where, as in drug possession cases, the burden of proof in respect of other *mens rea* elements is placed on the defence (see **B20.10 et seq.**).

Contemporaneity of *Actus Reus* and *Mens Rea*

- A1.5** The general rule is that, to be guilty of a criminal offence requiring *mens rea*, an accused must possess that *mens rea* when performing the act or omission in question, and it must relate to that particular act or omission. If, for example, D accidentally kills his wife in a car crash on Monday, the fact that he was planning to cut her throat on Tuesday does not make him guilty of her murder, even if he was thinking about the planned murder at the time of the accident, and even if he is subsequently delighted to find that his wife has died. The general rule as to contemporaneity must nevertheless be qualified in certain respects.

First, D's *mens rea* need not last beyond the moment at which he causes the *actus reus* to occur. He will not be excused merely because he abandons it before that *actus reus* is complete. After inflicting a fatal injury on V with murderous intent, D may repent of his actions and may even do his utmost to save V's life; but if V dies he will be guilty of murder (*Jakeman* (1983) 76 Cr App R 223, per Wood J at p. 228). In *Jakeman*, J booked suitcases containing drugs onto a series of flights terminating in London. She abandoned them in Paris, allegedly because she no longer intended to import them, but the cases were sent on to London where the drugs were discovered. The Court of Appeal held that J's loss of *mens rea* came too late to prevent her being guilty of an importation offence.

Secondly, the *actus reus* of a crime may consist of an extended or ongoing course of conduct, rather than one that occurs at one instant in time. The *actus reus* of rape, for example, extends from the moment of initial non-consensual penetration to the moment at which the penis is withdrawn. If D has no *mens rea* at the moment of penetration, but later becomes aware of the absence of consent, he may commit rape by not withdrawing immediately thereafter (*Kaitamaki v The Queen* [1985] AC 147). Consent may even be withdrawn after initial penetration, and rape may therefore be committed if, for example, D pays no heed when V protests that he should stop because he is hurting her.

A controversial example of the 'continuous act' principle can be found in *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439, where F was directed by a police officer to park his vehicle by the kerb, and drove it right onto the officer's foot. There was no proof that he did so deliberately, but it was clear that he deliberately left it there after the officer told him what he had done. His conviction for assaulting the officer was upheld by the Divisional Court on the basis that there was an ongoing act, which became a criminal assault once F became aware of it. James J said:

It is not necessary that *mens rea* should be present at the inception of the *actus reus*; it can be superimposed on an existing act. On the other hand, the subsequent inception of *mens rea* cannot convert an act which has been completed without *mens rea* into an assault.

Thirdly, the courts may extend the above principle by treating a series of different actions culminating in the *actus reus* of a crime as if they were a single, extended or continuous course of conduct. It will then be sufficient if the accused possessed the requisite *mens rea* at any point during that course of conduct. If, for example, D attempts to murder V by beating him to death, and believes that he has done so, but actually kills V by burying or dismembering what he assumes to be his corpse, D will still be guilty of murder. As Lord Reid said in *Thabo Meli v The Queen* [1954] 1 WLR 228:

It is much too refined a ground of judgment to say that, because the appellants were under a misapprehension at one stage and thought that their guilty purpose had been achieved before, in fact, it was achieved, therefore they are to escape the penalties of the law.

This principle has subsequently been applied, not only in cases where there was a prearranged plan, of which disposal of the body was a part (as in *Moore* [1975] Crim LR 229), but also in cases where there was no such plan. In *Church* [1966] 1 QB 59, C struck a woman and panicked because he mistakenly thought he had killed her. He threw her into a river, where she drowned. Edmund-Davies J, giving the judgment of the Court of Criminal Appeal, held that, '... if a killing by the first act would have been manslaughter, a later destruction of the supposed corpse should also be manslaughter'. *Church* was followed and extended in *Le Brun* [1992] QB 61, where B struck his wife in the course of an argument outside their house, after she had refused to enter it with him. The blow left her unconscious. He then tried to drag her into the house. As he did so, her head struck the pavement, fracturing her skull and killing her. The case differed from *Church* in that the fatal impact was accidental, whereas *Church's* disposal of the 'body'

was deliberate, but the Court of Appeal nevertheless upheld a conviction for manslaughter by identifying a continuous course of unlawful conduct. In attempting to drag his unconscious wife indoors, B was either trying to conceal his initial assault on her, or forcing her to enter the house against her wishes (this being the original reason for the assault). The trial judge had directed the jury to acquit if they concluded that B had been trying to aid or assist his wife when he attempted to move her, and the Court of Appeal agreed that this would have broken the essential nexus between the two halves of the incident.

A further difficulty arose in *A-G's Ref (No. 4 of 1980)* [1981] 1 WLR 705 where, in the course of a struggle, D pushed his girlfriend V over a landing rail onto the floor below and then, believing her dead, cut her throat and dismembered her in the bath so as to dispose of her body. It was impossible to establish whether V died in the original fall or whether he killed her (as in *Church*) by his subsequent actions. The Court of Appeal held that a manslaughter conviction was possible, despite uncertainty as to the actual cause of death, but only if it could be proved that each of D's acts was performed with the requisite *mens rea* for that offence. Since the initial fall may well have killed V, it would not suffice to establish *mens rea* (such as gross negligence) only in the subsequent act of disposal: the prosecution also had to disprove D's claim that he had merely pushed her away in a 'reflex action' when she dug her nails into him in the struggle on the upstairs landing.

VOLUNTARY AND INVOLUNTARY CONDUCT

- A1.6** The vast majority of criminal offences require acts or omissions on the defendant's part, and these acts or omissions must ordinarily be willed or 'voluntary'. D does not therefore commit criminal damage if his enemies throw him from an upstairs window onto the roof of a car below. Nor is this merely because he lacks the requisite *mens rea* for that offence. It is because involuntary movements cannot ordinarily constitute the *actus reus* of any offence, not even one of strict liability. As Ashworth explains, 'It is not merely a denial of fault . . . It is more a denial of authorship . . . in these circumstances, it is fair to say that this was not D's act, but something which happened to D' (*Principles of Criminal Law*, 4th ed., pp. 99–100).

Physical compulsion is merely one possible cause of involuntary conduct. Such conduct may also be caused by uncontrollable reflex actions or by a physical collapse brought on by injury or illness. If, for example, D suffers a sudden and unforeseen stroke or blackout whilst driving his car, which then careers through a red traffic light and collides with another vehicle, no offence is committed by him. The same rule would apply if D loses control of his car when attacked by a swarm of bees (an example suggested by Devlin J in *Hill v Baxter* [1958] 1 QB 277).

'Involuntary' conduct in this context does not include acts done by reason of duress, necessity or coercion (as to which, see **A3.19 et seq.**) because such acts are still conscious, willed and rational; but it may include acts 'committed' by D when in a state of automatism: i.e. when not consciously in control of his own mind or body. A condition of automatism can arise where D is suffering from concussion, where he is a diabetic who suffers an attack of hypoglycaemia (very low blood sugar) after taking insulin (see *Quick* [1973] QB 910) or, arguably, where he commits the *actus reus* whilst in a somnambulistic trance induced by hypnotism.

Limitations on the Defence of Automatism

- A1.7** Although involuntariness or automatism is ordinarily a complete defence to any criminal charge, the use of that defence is limited by a number of considerations. These are more

fully explained at **A3.7 et seq.** It must suffice to note at this point that the defence may be rendered invalid where D was culpable for falling into such a condition, as for example by driving whilst suffering from exhaustion (*Kay v Butterworth* (1945) 173 LT 191) or by abusing alcohol or drugs (*Lipman* [1970] 1 QB 152). It is also unavailable where the cause of the condition is a 'defect of reason arising from a disease of the mind', because this amounts in law to insanity. The term 'disease of the mind' embraces both organic and functional disorders of the mind, but excludes external causes, such as drugs, hypnosis or concussion. Epilepsy is in this sense a disease of the mind (*Sullivan* [1984] AC 156) as is a brain tumour (*Kemp* [1957] 1 QB 399) or even hyperglycaemia (excessive blood sugar) which may occur naturally in a diabetic (*Hennessy* [1989] 1 WLR 287). Sleepwalking was regarded in *Bratty v A-G for Northern Ireland* [1963] AC 386 as a classic example of non-insane automatism, but sleep-associated automatism may be caused by functional disorders of the mind and in *Burgess* [1991] 1 QB 92 the Court of Appeal held that any such condition which manifests itself in violence must be treated as one of insanity. Finally, the defence of automatism appears to be unavailable where D has some, albeit impaired, control over his actions (*Broome v Perkins* [1987] Crim LR 272; *A-G's Ref (No. 2 of 1992)* [1994] QB 91).

The Burden of Proof

Where the defence raise a defence of non-insane automatism, this must be disproved by the prosecution (in contrast to a defence of insanity, which must be proved by the defence) but there is always an evidential burden on the defence, who must produce some evidence of automatism before the prosecution can be required to address it (*Hill v Baxter* [1958] 1 QB 277; *Bratty v A-G for Northern Ireland* [1963] AC 386). See further, **F3.11**.

Situational Liability

It may be that voluntary conduct need not always be proved in cases where D is charged with a strict liability offence in which the *actus reus* takes the form not of a prohibited act or omission but of a prohibited state of affairs. Authority for this proposition can be found in *Larsonneur* (1933) 24 Cr App R 74 and *Winzar v Chief Constable of Kent* (1983) *The Times*, 28 March 1983. In the former case, L, a French citizen, visited the United Kingdom for the purpose of entering into a marriage of convenience. The police prevented this marriage and an order was served on her requiring her to leave and not re-enter the country. Instead of returning to France, L travelled to Ireland, whence she was deported in the custody of the Irish police, and handed over to the British police in Holyhead. They arrested her under the Aliens Order 1920 for 'being found in the United Kingdom' in breach of the original order excluding her. It was argued on L's behalf that she had returned to the United Kingdom only involuntarily, under physical compulsion, but the Court of Criminal Appeal held that the circumstances under which she was returned were 'perfectly immaterial'. All that mattered was that she was found in the United Kingdom on the occasion in question. Whether this reasoning would be followed today is open to question, and it is likely that any prosecution based on such facts would now be stayed as an abuse of process (see **D7.5** and **D10.41**).

Somewhat different considerations arguably applied in *Winzar*, where the charge was one of being 'found drunk on a highway', contrary to the Licensing Act 1872, s. 12. W had originally been found drunk in a hospital and asked to leave. When he failed to do so, police officers removed him to their patrol car, which was parked on the highway outside, and then charged him with the offence in question. Upholding the conviction, Goff LJ pointed out that a distinction would otherwise have to be drawn between the drunk who leaves a restaurant when asked to do so and the drunk who is forcibly ejected after refusing to leave. If both are arrested in the street shortly afterwards, it would be



wrong for the courts to regard the former as guilty and the latter as not. It is submitted, however, that the position must be different if the police were to drag a person from his own bed and into the street before charging him with being found drunk on a highway; that would undoubtedly involve an abuse of process.

OMISSION TO ACT

- A1.10** Most criminal offences require the defendant to carry out some positive act before liability can be imposed. There can ordinarily be no liability for failure (or omission) to act, unless the law specifically imposes such a duty upon a particular person. The general rule is illustrated by this example from Stephen's *Digest of the Criminal Law* (3rd ed., 1887):

A sees B drowning and is able to save him by holding out his hand. A abstains from doing so in order that B may be drowned, and B is drowned. A has committed no offence.

Although A may have failed to save B, he did no positive act to cause B's death. In some jurisdictions, A would always be under a duty to act in such a situation, at least where he does not have to put his own life in danger. Under English law, however, such a duty arises only in certain specific situations, and there are several offences (such as assaults or battery) which can be committed only through positive acts (see **A1.20**).

Where Statute Imposes a Specific Duty to Act

- A1.11** There are many statutory provisions (mostly regulatory) which specifically impose duties on particular persons to act in particular ways and which impose criminal sanctions for failure or omission to act. A failure to keep proper accounts or business records, where these are required by law, may for example lead to criminal liability under the Companies Act 1985 or the Value Added Tax Act 1994. Road traffic law provides many further examples, including the offences of failing to stop after an accident and failing to provide a breath sample or a specimen for analysis.

Failure to Prevent or Report Criminal Conduct

- A1.12** Failure to prevent or report the criminal activities of other persons is not ordinarily an offence. The offence of misprision of felony was abolished in 1967, but failure to report a known act of treason still amounts to misprision of treason and it also remains an offence at common law to refuse to assist a constable who calls for assistance in dealing with a breach of the peace (*Brown* (1841) Car & M 314; *Waugh* (1976) *The Times*, 1 October 1976). Modern legislation has added new offences of failure to comply with a duty of disclosure in relation to terrorist acts or funding (see **B10.47 et seq.**) and failure to disclose knowledge or suspicion of money laundering (see **B22.17**). As to the position of police officers who fail to act in accordance with their duty, see **A1.15**.

Duty Arising from Special Relationships

- A1.13** *Care or Control of Children* If persons are in a close or special relationship to one another, the law may impose on one a duty to act on behalf of the other. Under the CYPA 1933, s. 1 (see **B2.97 et seq.**), a parent or any other person over the age of 16 years who has responsibility for a child under that age may incur liability for any wilful neglect of that child that was likely to cause unnecessary suffering or injury to health. This specifically includes failure by a parent etc. to provide or obtain adequate food, clothing or medical care but could also include other forms of neglect, such as failure to rescue from drowning in circumstances of the kind described at **A1.10**. Neglect leading to death may lead to liability for manslaughter by gross negligence (*Downes* (1875) 13 Cox CC 111; *Lowe* [1973] QB 702). The wilful neglect of a child contrary to s. 1 of the 1933 Act does not automatically give rise to liability for manslaughter merely because death results (*Lowe*), but it may sometimes do so if, for example, there is proof of an

intent to harm the child through such neglect. Indeed, a parent who deliberately starves a child to death may be guilty of murder (*Gibbins* (1918) 13 Cr App R 134).

Assumption of Care for Another The CYP A 1933, s. 1, has no statutory counterpart in cases where the person in need of care or assistance is over the age of 16. In *Shepherd* (1862) 9 Cox CC 123 it was held that the parents of an 18-year-old and 'entirely emancipated' daughter were under no special duty to care for her. The common law nevertheless recognises that such a duty may arise in the context of a family relationship, as for example where a couple live together as husband and wife, or where a child continues to live with (and be dependent upon) his parents even after becoming an adult (see *Chattaway* (1922) 17 Cr App R 7). A1.14

If a person voluntarily undertakes to care for another who is unable to care for himself as a result of age, illness or other infirmity, he may thereby incur a duty to discharge that undertaking, at least until such time as he hands it over to someone else. In *Instan* [1893] 1 QB 450, D lived with her aunt, who was suddenly taken ill with gangrene in her leg and became unable either to feed herself or to call for help. D did not give her any food, nor did she call for medical help, even though she remained in the house and continued to eat her aunt's food. She was convicted of manslaughter. The principle laid down in *Instan* was applied and extended in *Stone* [1977] QB 354. Stone's sister, Fanny, came to live with him and his mistress, Dobinson. Fanny was suffering from anorexia, but was initially able to look after herself. Gradually, however, her condition deteriorated, until she became bed-ridden. She needed medical help, but none was summoned and she eventually died in squalor, covered in bed sores and filth. Stone and Dobinson were each convicted of her manslaughter and the Court of Appeal upheld their convictions. Because they had taken Fanny into their home, they had assumed a duty of care for her and had been grossly negligent in the performance of that duty. The fact that Fanny was Stone's sister was merely incidental to this.

Official, Contractual or Public Duties A person may in some cases incur criminal liability through failure to discharge his official duties or contractual obligations. A typical example is provided by *Pittwood* (1902) 19 TLR 37, in which P was employed to operate a level-crossing on a railway but omitted to close the crossing gates when a train was signalled. A cart was crossing the railway through the open gates when the train struck it and killed one of the carters. P was convicted of gross negligence manslaughter. In one sense this was based on his breach of contractual duty, but the victim was not, of course, a party to the contract, and P's liability can more accurately be based on the breach of a duty of care to users of the crossing, which his employers paid him to discharge, and on which the users of the crossing relied. In the absence of such a duty, it is doubtful whether any criminal liability could have arisen, whatever his contractual position with his employers (cf. *Smith* (1869) 11 Cox CC 210). A1.15

Neglect of duty by a police officer was examined by the Court of Appeal in *Dytham* [1979] QB 722. D, whilst on duty, stood aside and watched as a man was beaten to death outside a nightclub. He then left the scene, without calling for assistance or summoning an ambulance. For this, he was convicted of the common-law offence of wilful misconduct in public office. Lord Widgery CJ said (at p. 727):

The allegation was not one of mere non-feasance, but of deliberate failure and wilful neglect. This involves an element of culpability which is not restricted to corruption or dishonesty, but which must be of such a degree that the misconduct impugned is calculated to injure the public interest so as to call for condemnation and punishment.

Although D was not charged with manslaughter, it is submitted that a conviction for manslaughter might be possible on such facts, if it were proved that the accused's

inaction was a factor contributing to the death of the deceased. It was not clear in *Dytham* that D could have saved the deceased even if he had tried to do so.

See also *A-G's Ref (No. 3 of 2003)* [2005] 1 QB 73.

Duty to Avert a Danger of One's Own Making

- A1.16** If a person creates a dangerous situation through his own fault, he may be under a duty to take reasonable steps to avert that danger, and may therefore incur criminal liability for failing to do so. In *Miller* [1983] 2 AC 161, M was 'sleeping rough' in a building, and fell asleep on his mattress while smoking a cigarette. When he awoke, he saw that his mattress was smouldering but, instead of calling for help, he simply moved into another room, thereby allowing the fire to flare up and spread. He was convicted of arson, not for starting the fire but for failing to do anything about it. Lord Diplock said (at p. 176):

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

In *Khan* [1998] Crim LR 830, the Court of Appeal considered the *Miller* principle in the context of manslaughter. The appellants had supplied a girl with heroin on which she accidentally overdosed, and then left her to die. It was held that the trial judge should first have ruled on whether there was evidence on which the jury could find that a duty of care (and thus a duty to act) had arisen. He should then have directed the jury to decide whether that duty had been breached.

Failure to Provide Medical Treatment

- A1.17 *Refusal of Consent to Treatment*** Doctors and hospital authorities have a duty to provide medical care for their patients, and an omission to discharge that duty may sometimes involve criminal liability (e.g., for manslaughter or, in the case of a patient under 16, for wilful neglect under the CYPA 1933, s. 1), although this duty may be terminated if the patient refuses to accept medical treatment. If, for example, an adult hospital patient refuses his consent to a life-saving amputation, the medical staff, far from being under a duty to provide that treatment, would ordinarily be acting unlawfully if they ignored his wishes (*Re C (Adult: Refusal of Treatment)* [1994] 1 WLR 290; *Re W (Adult: Refusal of Treatment)* [2002] All ER (D) 223 (April)).

Refusal of consent is not always decisive in such cases. Where minors are concerned, the High Court may exercise its wardship jurisdiction so as to override parental refusal of consent (*Re B (A Minor) (Wardship: Medical Treatment)* [1981] 1 WLR 1421) or refusal of consent by the minor himself (*Re W (A Minor) (Medical Treatment: Court's Jurisdiction)* [1993] Fam 64). Even in respect of adults, the court may sometimes hold that a refusal of consent to treatment is vitiated by lack of capacity or by undue influence (*Re T (Adult: Refusal of Treatment)* [1993] Fam 95) and doctors must then provide treatment, in accordance with that patient's best interests. In acute emergencies, where doctors have no time in which to appeal to the courts, they may sometimes need to act without consent. If, for example, Jehovah's Witnesses refuse to consent to the administration of an urgent blood transfusion to their child, doctors may need to act against their wishes, or risk prosecution (together with the parents) for manslaughter (cf. *Senior* [1899] 1 QB 283).

- A1.18 *Withholding Treatment in the Best Interests of the Patient*** If a patient is incapable of communicating his wishes, the doctor's normal duty is to do everything that he reasonably can to keep the patient alive. In certain circumstances, however, a doctor may be absolved of this duty, as the House of Lords recognised in *Airedale National Health Service Trust v Bland* [1993] AC 789. This case concerned a patient who had

survived for three years in a ‘persistent vegetative state’ after suffering irreversible brain damage in the Hillsborough disaster. He continued to breathe normally, but was kept alive only by being fed through tubes. The NHS Trust sought a declaration from the courts that it might lawfully discontinue this artificial feeding and allow him to die with dignity and minimum distress. The House of Lords held that treatment could properly be withdrawn in such circumstances, because the best interests of the patient did not involve him being kept alive at all costs. Lord Goff nevertheless drew a fundamental distinction between acts and omissions in this context (at p. 865):

. . . the law draws a crucial distinction between cases in which a doctor decides not to provide, or to continue to provide, for his patient treatment or care which could or might prolong his life, and those in which he decides, for example by administering a lethal drug, actively to bring his patient’s life to an end . . . the former may be lawful, either because the doctor is giving effect to his patient’s wishes . . . or even in certain circumstances in which . . . the patient is incapacitated from stating whether or not he gives his consent. But it is not lawful for a doctor to administer a drug to his patient to bring about his death, even though that course is prompted by a humanitarian desire to end his suffering, however great that suffering may be: see *Cox* (unreported) 18 September 1992 . . . So to act is to cross the Rubicon which runs between on the one hand the care of the living patient and on the other hand euthanasia.

See also *Frenchay Healthcare National Health Service Trust v S* [1994] 1 WLR 601. Similar issues can arise in respect of the very elderly or in respect of babies born with very severe mental or physical handicaps, especially where major (and possibly repeated) surgery would be needed to keep them alive (see *Re J* [1991] 2 WLR 140).

Practical and Financial Considerations Even apart from the question of whether treatment would be in the patient’s best interests, it is recognised that financial or manpower constraints on the health service must come into consideration. It is clearly not practicable for the NHS to provide intensive forms of medical care (such as major surgery) to every patient, of whatever age, whose life might possibly be prolonged by it. **A1.19**

Offences for which Omissions cannot be the Basis of Liability

Some offences appear to be capable of commission only by positive acts. The offence of acting with intent to prevent the apprehension of an offender, contrary to the Criminal Law Act 1967, s. 4, is an example (see **B14.38 et seq.**). Crimes of assault or battery arguably come into this category. This was at least the view of the Divisional Court in *Fagan v Metropolitan Police Commissioner* [1969] 1 QB 439 (see **A1.5**) although F’s conviction was upheld on the basis that his conduct amounted to a continuing act, rather than an innocent act followed by a deliberate omission to rectify it. See further **B2.5**. **A1.20**

It has also been held that omissions cannot be the basis of liability for ‘doing acts’ likely to interfere with the peace and comfort of a residential occupier, contrary to the Protection from Eviction Act 1977 (*Ahmad* (1987) 84 Cr App R 64; and see **B13.15**) but the courts have not been consistent in interpreting references to ‘acts’ as necessarily excluding omissions. In *Speck* [1977] 2 All ER 859, for example, it was held that an omission could amount to an ‘act’ of gross indecency with a child, contrary to the Indecency with Children Act 1960, s. 1 (now repealed). See also *Yuthiwattana* (1984) 80 Cr App R 55, in which it was held that a landlord’s omission to replace a lost key could be an ‘act’ of harassment against a tenant.

CAUSATION

Introduction

Causation issues appear to feature most frequently in homicide cases, but they can arise in respect of any ‘result crime’ (see, for example, **B5.10**, concerning causation issues in **A1.21**

the context of deception offences under the Theft Acts). In order to establish whether a defendant can be guilty of a given result crime, one must first establish a factual link between his conduct and the result he is alleged to have caused. Once this has been established, a second and more difficult question must be considered, namely whether that conduct was a sufficient cause in law. This is sometimes called the question of ‘imputability’ or ‘legal causation’. It involves issues of value-judgment and the allocation of responsibility for what has occurred.

Factual Causation

- A1.22** The importance of proving factual causation is illustrated by *White* [1910] 2 KB 124. W put potassium cyanide in his mother’s bedtime drink. When she was found dead the next morning, he was charged with her murder, but it was eventually established that his mother had consumed very little of the poison. She had died, coincidentally, of natural causes. W’s conduct had not in any sense contributed to this. He was therefore guilty only of attempting to murder her.

It may also be necessary to prove a link between the proscribed result and a particular aspect of the defendant’s conduct, such as his negligence. In *Dalloway* (1847) 2 Cox CC 273, D was charged with manslaughter after his cart had struck and killed a girl who ran out in front of him. D had not been holding the horse’s reins at the time, but Erle J directed the jury that they could convict D of manslaughter only if they were satisfied that D could have avoided the accident had he been holding the reins correctly.

Factual causation is sometimes referred to as ‘but for’ (or *sine qua non*) causation, because it can be established only where the alleged result would not have occurred, or would not have occurred at the time or in the way it did, ‘but for’ the defendant’s act or culpable omission. The only qualification to this basic rule involves cases of complicity or joint venture, under which a defendant may incur liability for encouraging or assisting the principal offender, even where it is proved that his conduct made no difference to the outcome. Procuring appears to be the only form of secondary participation that requires a causal link between the participation and the crime. See **A5.1**.

Legal or Imputable Causation

- A1.23** Legal causation is a narrower and more subjective concept than factual causation. Not every cause in fact is a cause in law. To be so, it must be adjudged an ‘operating and substantial’ cause of the consequence in issue (*Smith* [1959] 2 QB 35) albeit that it does not have to be the only or even the principal such cause. The isolation of a legal cause from amongst a possible multitude of factual causes is a process involving subjective common sense rather than objectively measurable criteria, but when seeking to apportion possible criminal responsibility in this way, one must in practice look for some kind of abnormal and culpable behaviour. The logic behind such reasoning is explained by Hart and Honore, *Causation in the Law* (2nd ed., 1985):

The notion that a cause is essentially something which interferes with or intervenes in the course of events which would normally take place, is central to our common-sense concept of cause . . .

In distinguishing between causes and conditions, two contrasts are of prime importance. These are the contrasts between what is abnormal and what is normal in relation to any given thing or subject-matter, and between a free deliberate human action and all other conditions . . .

In the case of a building destroyed by fire, ‘mere conditions’ will be factors such as the oxygen in the air, the presence of combustible material or the dryness of the building . . . which are present alike both . . . where such accidents occur and . . . where they do not . . . Such factors do not ‘make the difference’ between disaster and normal functioning, as . . . the dropping of a lighted cigarette does. . . .

Multiple Causes and Multiple Blame

A defendant may be guilty of causing something to happen even if his conduct was not the only legal cause of it. In *Hennigan* [1971] 3 All ER 133, H argued that he was not guilty of causing death by dangerous driving, because another driver was more to blame than him. The Court of Appeal replied that, as long as H's contribution was substantial, he could be held accountable. Without purporting to lay down any precise limits, the court suggested that, even if just 20 per cent of the blame could be attributed to H, that would suffice. *Hennigan* was followed in *Notman* [1994] Crim LR 518, where it was stated that anything more than a *de minimis* contribution could suffice. See also *Environment Agency v Empress Car Co. (Abertillery) Ltd* [1999] AC 22 (see **A1.28**). **A1.24**

Indirect Causation

Although legal causation must be 'operative and substantial', it need not necessarily be a direct cause of the proscribed result. In *McKechmie* (1992) 94 Cr App R 51, M inflicted serious head injuries on V. These were not in themselves fatal, but they prevented doctors from operating on V's duodenal ulcer, and V died when the ulcer burst. M was held to have caused his death. Not all indirect causes will be sufficiently proximate to the result; questions of fact and degree may be crucial, and it is therefore impossible to formulate any universal rule in such cases. Indirect causation may also be the basis of liability in cases involving crimes other than homicide. See for example *Roberts* (1971) 56 Cr App R 95 (see **A1.30**) and *Miller* (1992) 95 Cr App R 421 (see **B5.10**). **A1.25**

The 'Eggshell Skull' Rule

In criminal cases, as in tort, D must ordinarily take his victim as he finds him. If, for example, the victim of his assault is unusually vulnerable to physical injury as a result of an existing medical condition or old age, D must accept liability for any unusually serious consequences which result. In *Hayward* (1908) 21 Cox CC 692, H was seen to chase his wife into the road, threatening her with violence. She then collapsed and died as a result of a long-standing heart condition and H was held liable for her manslaughter. This principle was extended in *Blaue* [1975] 1 WLR 1411. B stabbed a woman. A blood transfusion would have saved her life, but she was a Jehovah's witness and refused to accept one. B was convicted of her manslaughter (on grounds of diminished responsibility) and this verdict was upheld by the Court of Appeal. Lawton LJ said at p. 1415): **A1.26**

It has long been the policy of the law that those who use violence on other people must take their victims as they find them. This in our judgment means the whole man, not just the physical man. It does not lie in the mouth of the assailant to say that the victim's religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable.

One possible qualification to this general rule may need to be noted. Where the victim of a crime dies of heart failure etc., resulting from stress or fright, the charge is likely to be one of manslaughter, and it would then have to be proved that D's unlawful conduct was obviously dangerous, in the sense of being likely to cause some kind of injury. Where blows are struck, this is unlikely to be a problem, but what of cases in which the victim proved unusually vulnerable to injury caused by fear or stress? In *Dawson* (1985) 81 Cr App R 150 the Court of Appeal quashed D's conviction for the manslaughter of V, a 60-year-old petrol station attendant, who had died of a heart attack after being threatened with a replica gun. The court held that the trial judge had misdirected the jury by (*inter alia*) inviting them to take account of V's heart condition when deciding whether D's conduct had been obviously dangerous. D could not in fact have known of V's heart condition at the time. At first sight, *Dawson* may seem inconsistent with the eggshell skull rule, but it is probably wrong to regard it as a causation case at all. It merely decides that it was unfair to judge the dangerousness of D's conduct as if V's heart defect was

already obvious to everyone concerned. It is submitted that the jury should instead have been directed to consider whether the act of threatening an elderly man (of unknown health) with a replica gun involved an obvious danger of shock-induced injury. The answer to that question would surely have been 'yes', and the eggshell skull rule could then have been applied. See also *Watson* [1989] 1 WLR 684 discussed at **B1.36**.

NOVUS ACTUS INTERVENIENS

Introduction

A1.27 A defendant will not be regarded as having caused the consequence for which it is sought to make him liable if there was a *novus actus interveniens* (or new intervening act) sufficient to break the chain of causation between his original action and the consequence in question. Although his original act may remain a factual cause, but for which the consequence would never have occurred, the intervening act may supplant it as the imputable or legal cause for the purpose of criminal liability. This intervening act may be the act of a third party, an act of the victim or an unforeseeable natural event, sometimes called an 'act of God'. These three variants will be considered in turn, but one general point may be made at the outset: no such intervening act can break the chain of causation if it merely complements or aggravates the ongoing effects of the defendant's initial conduct. Suppose, for example, that D attacks V, inflicting grave injuries, and that V later suffers further injuries, caused by his own foolishness, or by E's misconduct, or by some natural disaster. If V eventually dies of his *cumulative* injuries, there can be no question of the chain of causation being broken. The chain of causation can be broken only where the effect of the intervening act is so overwhelming that any initial injuries are relegated to the status of mere historical background. The detailed application of this principle will be explored in the specific contexts within which it may arise, but the basic principle is the same in each case.

If the aggravation of injuries cannot break the chain of causation, then *a fortiori* an omission to treat those initial injuries cannot do so, even if such neglect results in relatively minor injuries becoming fatal (*Holland* (1841) 2 Mood & R 351). As Lawton LJ said in *Blaue* [1975] 1 WLR 1411, where V refused a life-saving blood transfusion on religious grounds:

The question for decision is what caused [V's] death. The answer is the stab wound. The fact that [V] refused to stop this end coming about did not break the causal connection between the act and death.

It can make no difference whether the omission is that of the victim (as in *Blaue*) or of a third party, such as a doctor. It may even be the result of an unforeseen natural event, such as a flood which prevents medical assistance from reaching the victim.

Acts of Third Parties

A1.28 *Deliberate and Informed Interventions* The subsequent intervention of a third party, other than one acting in concert with the accused (see *Kennedy* (2005) *The Times*, 6 April 2005) will ordinarily break the chain of causation if, but only if, it is free, deliberate and informed, and provides the immediate cause of the event in question (*Pagett* (1983) 76 Cr App R 279; *Latif* [1996] 1 WLR 104). Another way of stating this principle is that, 'voluntary conduct acts as a barrier in any causal enquiry in criminal law; by and large, D's voluntary conduct will usually be regarded as the cause of an act or omission if it was the last human conduct before the result' (Ashworth, *Principles of Criminal Law*, 4th ed., p. 127).

In *Latif*, L and S were involved in a plan to smuggle heroin into Britain. The heroin was delivered by S to a supposed accomplice in Pakistan, who was in fact an undercover

operative of the U.S. Drug Enforcement Agency. It was then flown into Britain by a British customs officer, technically without lawful authority, whilst L and S were lured to a meeting in London, where they were arrested. It was held that the importation by the customs officer, whilst unlawful, was a deliberate third-party act for which S was not responsible, although S could still be convicted of being concerned in an *attempt* to import it, contrary to the Customs and Excise Management Act 1979, s. 170(2) (see **B17.15 et seq.**). In contrast, the actions of an innocent agent, who is unaware of the true facts, cannot break the chain of causation. Had the case containing the heroin been forwarded by airline officials as lost luggage (as in *Jakeman* (1983) 76 Cr App R 223: see **A1.5**), S would have been held responsible for their actions.

In *Pagett*, P forcibly used his pregnant girlfriend, V, as a ‘human shield’ in a shoot-out with police officers. V was killed by bullets from officers returning his fire. He was convicted of her manslaughter. The Court of Appeal reasoned that the officers had acted ‘involuntarily’ in taking reasonable measures for the purpose of self-preservation and in the performance of their legal duty to apprehend P, and there was of course no suggestion that they shot V deliberately. Whether the police indeed acted ‘reasonably’ may be open to question; but this would make no difference to the outcome. Even if the police officers were at fault, their conduct was not free, deliberate and informed. P created a situation in which V’s life was inevitably endangered, and what happened was a natural and foreseeable consequence of that behaviour.

In a controversial ruling that is difficult to reconcile with *Latif*, the House of Lords held in *Environment Agency v Empress Car Co. (Abertillery) Ltd* [1999] AC 22 that the operator of an installation from which diesel fuel escaped into a watercourse could be convicted of ‘causing’ that pollution, contrary to the Water Resources Act 1991, s. 85(1), even though the immediate cause of the disaster was an act of vandalism by an unknown third party, who had opened the tap on a fuel storage tank during the night. Significantly, the defendants had no measures in place to prevent such vandalism, or to restrict the subsequent escape of any fuel leaking from the tap. Lord Hoffmann reasoned that, ‘there may be different answers to questions about causation when attributing responsibility to different people under different rules’ or even ‘when attributing responsibility to different people under the same rule’. Looking at the policy behind the provision in question, he continued:

Strict liability is imposed in the interests of protecting controlled waters from pollution. . . . Clearly, therefore, the fact that a deliberate act of a third party, caused the pollution does not in itself mean that the defendants’ creation of a situation in which the third party could so act did not also cause the pollution for the purposes of section 85(1).

Lord Hoffmann added that it remained necessary to consider whether the third party’s act was a ‘normal fact of life or something extraordinary’:

If it was in the general run of things a matter of ordinary occurrence, it will not negative the causal effect of the defendant’s acts, even if it was not foreseeable that it would happen to that particular defendant or take that particular form. . . . The distinction between ordinary and extraordinary is one of fact and degree to which the [court] must apply common sense and knowledge of what happens in the area.

There is some authority to suggest that the *Empress* principle may be one of general application. In *Finlay* [2003] EWCA Crim 3868, it was applied by the Court of Appeal in the context of constructive manslaughter, when Buxton LJ held that a drug abuser who prepared a syringe of heroin for self-injection by a fellow abuser could be regarded as ‘causing’ the injection, which proved fatal. This, however, appears to have been doubted in *Kennedy* (see **A1.30**), in which Lord Woolf CJ preferred to view *Empress* as dependent on its own particular context. With respect, this may be the only way of reconciling *Empress* with *Latif*. The defendants in *Empress* had a duty to prevent



pollution of the kind that occurred, and this arguably included (if only by implication) a duty to adopt reasonable safeguards against commonplace acts of vandalism. See also *National Rivers Authority v Yorkshire Water Services Ltd* [1995] 1 AC 444.

A1.29 Medical Intervention It is foreseeable that the victim of an attack or accident may require medical treatment, but it is also foreseeable that his injuries may be misdiagnosed or that treatment may not be performed correctly. This is one reason why incorrect medical treatment is hardly ever categorised by the courts as amounting to a *novus actus interveniens*. An equally valid reason, in many cases, is that failure to provide proper treatment for an initial injury rarely amounts to an independent cause of death or injury: it is far more likely that such failure will merely aggravate the original injury, or that it will allow the original injury to take its natural course. In particular, the ‘switching off’ of a life support system, even if wrongful, will never break the chain of causation flowing from the original injury (see *Malcherek* [1981] 1 WLR 690). Even where incorrect treatment leads to death or more serious injury, it will only break the chain of causation if it is (a) unforeseeably bad, and (b) the sole significant cause of the death (or more serious injury) with which the accused is charged.

An exceptional case in which palpably wrong medical treatment was held to have broken the chain of causation was *Jordan* (1956) 40 Cr App R 152. J stabbed B, who was taken to hospital, where he died. J was initially convicted of his murder, but on appeal new evidence was admitted. This showed that at the time of B’s death his wound had almost totally healed and that he had died as a result of a mix-up in which he was given antibiotics to which he had already proved highly allergic. The Court of Criminal Appeal concluded that, if the jury had heard this new evidence, they would have concluded that it was the medical treatment which had caused death and not the stab wound.

Smith [1959] 2 QB 35 is clearly distinguishable from *Jordan*. S stabbed his fellow soldier, C, with a bayonet during a barrack brawl. Other soldiers carried C to the camp medical centre, dropping him twice on the way. An overworked army doctor failed to notice that one of C’s lungs had been pierced and the treatment given to him was described at the trial as ‘thoroughly bad . . . it might well have affected his chances of recovery’. This did not however break the chain of causation. According to the Courts-Martial Appeals Court:

If at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death did not result from the wound. Putting it another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.

C’s death was therefore a case of death by multiple causes, and the stab wound was one of those causes. In contrast, the wound inflicted on B in *Jordan* had largely healed, and so the hospital treatment was in effect the sole cause of B’s death. Furthermore, the mistreatment was so bizarre as to be unforeseeable. Had B died as a result of the first routine dose of antibiotics, J’s murder conviction would almost certainly have been upheld. This is apparent from the later case of *Cheshire* [1991] 1 WLR 844, in which C shot V, who later died as a result of unfortunate medical complications arising from an tracheotomy he had undergone as part of his emergency treatment. The gunshot wounds had actually healed at the time of death, but the Court of Appeal upheld C’s conviction on the grounds that the complications were still a natural consequence of his acts. After careful consideration of existing authorities, including *Jordan*, *Smith* and *Malcherek*, Beldam LJ concluded (at pp. 851–2):

. . . when the victim of a criminal act is treated for wounds or injuries by a doctor or other medical staff attempting to repair the harm done, it will only be in the most extraordinary and unusual case that such treatment can be said to be so independent of the acts of the defendant that it could be regarded in law as a cause of the victim's death to the exclusion of the defendant's acts . . .

Even though negligence in the treatment of the victim was the immediate cause of his death, the jury should not regard it as excluding the responsibility of the accused unless the negligent treatment was so independent of his acts, and in itself so potent in causing death, that they regard the contribution made by his acts as insignificant.

Cheshire was followed by the Court of Appeal in *Mellor* [1996] 2 Cr App R 245; see also *Gowans* [2003] All ER (D) 197 (Dec), [2003] EWCA Crim 3935.

Acts of the Victim

In many cases, the *actus reus* of a crime is completed, not by an act of the offender, but by **A1.30** an act of his victim. An obvious example is the victim of fraud, who is deceived into making a payment into the deceiver's account. Another is where V injures himself in a fall whilst attempting to escape from an attack by D: the latter may be regarded as having caused that injury. In *Roberts* (1971) 56 Cr App R 95, R was convicted of an assault causing actual bodily harm to a young woman who was injured jumping from his moving car after he had assaulted her in that car. See also *DPP v Daley* [1980] AC 237, *Mackie* (1973) 57 Cr App R 453 and *Corbett* [1996] Crim LR 594. A clear direction on causation is essential in such cases. In *Williams* [1992] 1 WLR 380, it was held that the question is whether V's reaction was 'within a range of responses which might be anticipated from a victim in his situation', or whether it was 'so daft as to make it his own voluntary act which amounted to a *novus actus interveniens*'. The jury should not, in this context, be invited to make any allowance for D's youth or inexperience (*Marjoram* [2000] Crim LR 372). D's inability to foresee V's reaction may be relevant to the question of *mens rea*, but as far as causation is concerned, the only subjective element relates to V. As Stuart-Smith LJ pointed out in *Williams*, the jury must be directed 'to bear in mind any particular characteristic of the victim and the fact that, in the agony of the moment, a victim may act without thought and deliberation'.

Conversely, D cannot ordinarily be held responsible for 'causing' the voluntary and deliberate acts of V, merely because they were foreseeable responses to his own actions. The supplier of a controlled drug does not ordinarily 'cause' his client to take or ingest that drug, even if such conduct is entirely foreseeable and expected (see *Dalby* [1982] 1 WLR 425 and *Armstrong* [1989] Crim LR 149). The distinction between such cases and cases such as *Roberts* is that the drug supplier does not force his customers to do anything. They exercise informed free will and harm themselves by their own voluntary acts.

This is not to suggest that a drug dealer can never be guilty of manslaughter if his customer dies after taking the drugs supplied. There are at least two ways in which such liability might arise. The first is where D supplies contaminated drugs, or supplies a drug such as heroin to a child, who is unable to make an informed decision concerning the dangers involved. *Khan* [1998] Crim LR 830 should not be seen as authority to the contrary, even though the appellants' convictions were quashed in that particular case (because of a misdirection as to the duty of care).

More controversially the Court of Appeal ruled in *Rogers* [2003] 1 WLR 1374 and later in *Kennedy* (2005) *The Times*, 6 April 2005 that D may be guilty of manslaughter on the basis of joint enterprise if he and the deceased were 'jointly engaged' in the preparation and administration of the drug in question. As Lord Woolf CJ explained in *Kennedy*:

To convict, the jury had to be satisfied that, when the heroin was handed to the deceased 'for immediate injection', he and the deceased were both engaged in the one activity of



administering the heroin. These were not necessarily to be regarded as two separate activities; and the question that remains is whether the jury were satisfied that this was the situation. If the jury were satisfied of this then the appellant was responsible for taking the action in concert with the deceased to enable the deceased to inject himself with the syringe of heroin which had been made ready for his immediate use.

In *Rogers* the appellant had not merely procured the drugs or prepared the syringe: he had actively assisted his friend to inject the drugs by applying a tourniquet to bring up the vein at the crucial moment. On that basis, the court held that he was 'jointly responsible' for the act of injection, which was a criminal and dangerous act by virtue of the OAPA 1861, s. 23 (see **B2.49**). *Kennedy* extends this reasoning even to cases in which D takes no direct role in the acts of injecting, but merely prepares the drug for immediate injection by his fellow user. With respect, this obscures still further the already blurred distinction between a principal offender (who commits the crime and causes any relevant consequence) and the secondary party, who may assist, encourage or procure the commission of the offence, but does not himself commit it.

If, however, one accepts the joint venture argument, it is then relatively easy to support the court's approach to causation. In *Kennedy*, Lord Woolf CJ said (at [44]):

The fact that a person who takes his own life does not commit an unlawful act by so doing, does not mean that a person who helps him to commit that act, if that helping act is contrary to section 23, does not commit an unlawful act. On the contrary, the helper does commit an unlawful act and could be charged under section 23 and convicted. He could also be convicted of manslaughter if the person he was helping dies in consequence. The requirement of an unlawful act is fulfilled. There should, in the appropriate case, be no difficulty in establishing foreseeability of risk. Nor should there be difficulty in establishing causation because the participants were acting in concert.

Acceptance of this joint venture argument does at least make it unnecessary in such cases to rely (as did the court in *Finlay* [2003] EWCA Crim 3868) on complex and unconvincing causation arguments derived from *Environment Agency v Empress Car Co. (Abertillery) Ltd* [1999] AC 22 (see **A1.28**).

As explained at **A1.27**, a victim's aggravation or neglect of his injuries is unlikely to affect the chain of causation. In *Wall* (1802) 28 St Tr 51, W was found guilty of murdering a soldier, S, whom he had subjected to an illegal flogging, notwithstanding that S aggravated his condition by drinking spirits to ease the pain. A victim's subsequent suicide is (or at least should be) another matter. In *Dear* [1996] Crim LR 595, D appealed against his conviction for murder, arguing that V, whom he had repeatedly slashed with a knife, subsequently caused his own wounds to re-open, so that he bled to death. D's conviction was nevertheless upheld. This could be justified if it was established that the original wounds remained a significant cause of V's death; but the decision would seem impossible to defend if V had voluntarily committed suicide by re-opening wounds that had otherwise started to heal. Unfortunately, the Court of Appeal does not seem to have distinguished between those two possibilities.

Exceptional Natural Events

- A1.31** An 'act of God' or other exceptional natural event may break the chain of causation leading from D's initial act, if it was the sole immediate cause of the consequence in question. Such an event must be 'of so powerful a nature that the conduct of the defendant was not a cause at all, but was merely a part of the surrounding circumstances' (*Southern Water Authority v Pegrum* [1989] Crim LR 442). If D attacks V and leaves him slowly dying of his injuries, the chain of causation may be broken if V is ultimately killed by a lightning bolt or a falling tree, rather than by the original injuries. In contrast, routine hazards, such as seasonal rain or cold winter nights, would not have such an effect (see *Alphacell Ltd v Woodward* [1972] AC 824). Such things are more

readily foreseeable, but as Lord Hoffmann said in *Environment Agency v Empress Car Co. (Abertillery) Ltd* [1999] AC 22 (see **A1.28**):

The true commonsense distinction is, in my view, between acts and events which, although not necessarily foreseeable in the particular case, are in the generality a normal and familiar fact of life, and acts or events which are abnormal and extraordinary. . . .

. . . In the context of natural events, this distinction between normal and extraordinary events emerges in the decision of this House in *Alphacell Ltd v Woodward*.

Causation Issues and Alternative Explanations

The court or jury must of course be satisfied that D caused the event which is the subject of the charge against him. If possible innocent explanations cannot be disproved D must be acquitted. Difficulties may arise where the evidence suggests that D might have caused the *actus reus* in one of two or more different ways. The court or jury must be able to agree, not just on their verdict but on the basis for it, and must be directed accordingly. As Otton LJ explained in *Boreman* [2000] 1 All ER 307, ‘where the two possible means by which the [offence] is effected comprise completely different acts, happening at different times . . . the jury ought to be unanimous on which act leads them to the decision to convict.’ See also *Brown* (1983) 79 Cr App R 115 at **D16.18**. This does not mean, however, that a court or jury must always be able to agree on how exactly D committed the crime. It will suffice if they can agree that he must, one way or another, have committed it. Thus, if six jurors believe that D committed murder by killing V himself (or, if not, by hiring an assassin to kill for him) and the other six believe that he committed that same murder by hiring an assassin (or, if not, by killing V himself) they may still be able to convict D of that offence, because they can all agree that he was implicated in one way or another (*Giannetto* [1997] 1 Cr App R 1). Alternatively, the jury may have no idea as to how or when D committed the offence, and yet be able to agree that he must have done so, in one way or another (*A-G’s Ref (No. 4 of 1980)* [1981] 1 WLR 705: see **A1.5**). In *Boreman*, however, V was beaten up by the appellants and later died in a fire at his home. There was some evidence that the beating had contributed to his death. There was also some evidence that the appellants had started the fire; but it did not follow that they must have killed V in one way or the other. It would not therefore suffice if some jurors thought they were guilty only on the first basis and some only on the second. **A1.32**

