Voluntary acts and the chain of causation in homicide cases: The need for 'free and unfettered volition'

R v Wallace [2018] EWCA Crim 690, Court of Appeal

Keywords – murder; causation; euthanasia; "voluntary" acts; *novus actus interveniens*

Berlinah Wallace (W) and Mark van Dongen (M) had been together for around five years, and lived in W's flat in Bristol. However, by August 2015 their relationship had broken down and M had moved out of the flat and started a new relationship. One night in September 2015, M went to W's flat at her request. They argued, and W said that she was going to stay in a hotel for a few days. M decided to stay the night in W's flat. During the night, W returned to the flat. At around 3am, M was asleep in bed, wearing only boxer shorts. He awoke to hear W laughing as she said 'If I can't have you, no-one else will', and then poured a glass of sulphuric acid over M's face. The acid splashed onto his upper body and then his lower body as he moved. M ran, screaming for help, into the street. Neighbours who had been awoken by M's screams provided assistance until the police and paramedics arrived to take M to Southmead hospital in Bristol.

M was kept in the hospital for 14 months. He had suffered burns to 25% of his body and, after skin grafts, some 40% of his body was affected. His face, chest, and arms were 'grotesquely' scarred. He lost the sight in his left eye and most of the sight in his right eye. His lower left leg was amputated. After he had regained consciousness, he was almost totally paralysed, unable to move anything other than his tongue. His physical condition improved a little and he regained his speech but he remained paralysed from the neck down, and in a 'permanent state of unbearable constant physical and psychological pain that could not be ameliorated by his doctors' (at [3]).

In November 2016, after an abortive attempt to transfer M to a care home, M's father hired a private ambulance and drove him to Belgium, where he lived, and admitted him to St. Maria Hospital in Overpelt. After being told that his condition (in particular the near-total paralysis) was permanent, in December 2016 M applied for euthanasia under Belgian law (the Belgian Act on Euthanasia of 28 May 2002). After waiting for the minimum 30 day period prescribed under the Belgian statute, a lethal injection was administered in January 2017.

After M's death, W was charged with two counts: (1) murder and (2) throwing a corrosive fluid with intent to burn, maim, disfigure, disable or to do grievous bodily harm, contrary to s 29 of the Offences against the Person Act 1861. She appeared before HHJ May and a jury at Bristol Crown Court in November 2017. However, at the close of the prosecution case, the trial judge accepted a defence plea of no case to answer in respect of the murder charge. HHJ May ruled that M's request for euthanasia, and the actions of the Belgian doctors in administering a lethal injection, broke the chain of causation, so that W was not guilty of

murder. The Crown exercised its right to appeal against that ruling, under s 58 of the Criminal Justice Act 2003.

Held, allowing the appeal and ordering a retrial, that the seeking of death as a response to horrific injuries did not preclude the jury finding that W's conduct made a significant contribution to M's death (at [85]).

Sharp LJ, giving the unanimous judgment of the Court of Appeal, said that factual causation was undisputed because, but for M's 'dreadful injuries' and the 'unbearable suffering' resulting from them, M 'would not have requested euthanasia nor would or could his doctors have (lawfully) carried it out' (at [58]). As far as legal causation was concerned, the jury would have to be satisfied that W's act was 'a cause of death; it need not be the sole or principal cause, as long it was a substantial cause, which meant a more than minimal cause' (at [25]). As a general rule, a 'voluntary, deliberate and informed' act on the part of the victim or of a third party was capable of breaking the chain of causation (a novus actus interveniens). However, M's request to the Belgian doctors, and the lethal injection administered by them, 'were not discrete acts or events independent of [W's] conduct, nor were they voluntary, if by this is meant they were the product of the sort of free and unfettered volition presupposed by the novus actus rule' (at [61]). The fact that the Belgian doctors considered M's 'decision/request to be "voluntary" for the purposes of the Belgian law on euthanasia [did] not determine whether his decision was voluntary for the purposes of the different legal issues arising here' (at [76]). A jury was entitled to conclude that there was 'nothing that could decently be described as voluntary either in the suffering or in the decision by [M] to end his life, given the truly terrible situation he was in' (at [76]).

Although the actions of the Belgian doctors would have been unlawful had they been carried out in England, where euthanasia is unlawful, the facts were that the lethal injection was administered in Belgium, where euthanasia is lawful. The question about whether the outcome would have been different had M requested and received a lethal injection in an English hospital did not need to be answered. 'This case must be determined on its own particular facts, and not on a hypothetical basis' (at [77]).

The question of foreseeability had not been raised before HHJ May, but the Court of Appeal held that it was pertinent to W's liability and would need to be decided at the retrial. The principle of law here was that acts, whether by the victim or a third party, which were 'not reasonably foreseeable' amounted to a break in the chain if causation. The jury at the retrial would need to be 'sure that at the time of the acid attack it was reasonably foreseeable that [M] would commit suicide as a result of his injuries'. In answering that question the jury would need to 'consider all the circumstances, including the nature of the attack, what [W] did and said at the time and whether or not [M's] decision to undergo voluntary euthanasia fell within the range of responses which might have been expected from a victim in his situation' (at [86]).

Postscript: W was retried on the same two counts before HHJ Davies and a jury at Bristol Crown Court in May 2018. There, W was acquitted of murder (and manslaughter) but convicted of throwing a corrosive fluid with intent. She was jailed for life.

Commentary

This is a landmark case on causation, although it should be noted that its precedent value may be limited. As Sharp LJ put it, the case was 'tragic and unusual' (at [7]), involving 'very special and particular facts' (at [59] and also at [76]).

Causation and 'Voluntary' acts

The leading English case on the question whether a 'voluntary' act on the part of the victim may break the chain of causation between the defendant's original unlawful act and the prohibited consequence is that of the House of Lords in *Kennedy* [2007] UKHL 38, [2008] 1 AC 269. The case involved an appeal against the manslaughter conviction of a drug dealer (D) who had supplied a heroin-and-water filled syringe to a drug addict (V), who self-injected, overdosed and died. The Court of Appeal had twice upheld the conviction but the House of Lords allowed the appeal on the basis that V's self-injection broke the causal chain. Lord Bingham, giving the decision of the whole House, said:

> The criminal law generally assumes the existence of free will... Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another... The finding that [V] freely and voluntarily administered the injection to himself, knowing what it was, is fatal to any contention that [D] caused the heroin to be administered to [V] or taken by him. (at [14] and [18])

In the present case, the defence had argued that M's decision to apply for euthanasia was a 'voluntary' act on his part which broke the chain of causation. That had been accepted by HHJ May in Bristol Crown Court but was rejected by the Court of Appeal. In the view of the appeal court, M's decision was not 'voluntary' because 'there was nothing that could decently be described as voluntary either in the suffering or in the decision by [M] to end his life, given the truly terrible situation he was in' (at [76]). Rather, this was 'a response by a victim to (extreme) circumstances created by [W's] unlawful act, which were persisting, and which had put [M] into a position where he made a "choice" that he would never otherwise have had to make or would have made' (at [76]).

In reaching that conclusion the Court provided a useful working definition of 'voluntary' acts in this context: 'free and unfettered volition' (at [61]). This is the main contribution made by the present case. It will be interesting to see whether prosecutors in future cases where causation is in issue – cases involving less extreme facts than in Wallace – will seek to argue that what appeared, ostensibly, to be a 'voluntary' act on the part of the victim was in fact lacking the requisite 'free and unfettered volition' to be truly 'voluntary'. It is noteworthy

that in very similar factual circumstances as in Kennedy, the High Court of Justiciary in Scotland declined to follow the House of Lords. In *MacAngus & Kane v HM Advocate* [2009] HCJAC 8; 2009 SLT 137, Lord Osborne said that 'a deliberate decision by the victim of the reckless conduct to ingest the drug will not necessarily break the chain of causation' (at [48]).

Causation and Suicide / Euthanasia

The present case is authority for the proposition that euthanasia of the victim does not necessarily (depending on the facts) break the chain of causation in a homicide case. In an earlier Court of Appeal case, *Dear* [1996] Crim LR 595, the Court of Appeal had already decided that the victim's suicide did not necessarily break the chain of causation in such cases. In the present case, the decision in *Dear* was relied on: '[In] the light of the decision in *Dear* the seeking of death (suicide in that case) as a response to horrific injuries does not preclude the jury finding that [W's] conduct made a significant contribution to [M's] death' (at [85]).

In *Dear*, D had seriously wounded V with a Stanley knife after being told that V had sexually interfered with D's 12-year-old daughter. V refused offers of assistance and was adamant that an ambulance should not be called. He died two days later as a result of the wounds. Medical evidence was given that V would have survived the attack had the injuries been properly treated. A "suicide note" was found by V's body. D was convicted of murder and appealed, arguing that the chain of causation had been broken, because of V's behaviour in committing suicide by reopening the wounds and/or by failing to take steps to staunch the flow of blood following the reopening of the wounds. However, the appeal court held that the jury was entitled to find that D's conduct was an 'operative and significant' cause of V's death.

Meanwhile, at the time of writing this note, Michelle Carter is appealing her conviction in June 2017 for the involuntary manslaughter of her 18-year-old boyfriend, Conrad Roy III, in the US state of Massachusetts. Back in July 2014, Carter sent numerous text messages to Roy, who had mental health problems and was suicidal, encouraging him to kill himself by carbon monoxide poisoning as he sat in his pickup truck. As he suffocated himself to death, Carter failed to alert the authorities or his family. In due course, Carter was prosecuted and convicted in a judge-only trial at Bristol County Juvenile Court in Taunton, Massachusetts. After she was convicted of manslaughter, the trial judge, Lawrence Moniz J, said that 'This court has found that Carter's actions and failure to act where it was her self-created duty to Roy since she put him in that toxic environment constituted reckless conduct. The court finds that the conduct caused the death of Mr. Roy' (emphasis added). In other words, Roy's suicide did not break the causal chain. Carter's appeal to the Massachusetts Supreme Judicial Court does not challenge this verdict on causation; rather her argument is that when she sent her texts she was 'engaged in protected speech' under the First Amendment to the US Constitution.

In the present case, M's near-total paralysis meant that suicide was not an option. The Court of Appeal was very clear that M's death at the hands of Belgian doctors, rather than by his

own hands, made no difference to the legal outcome: ‘It would seem an odd result, if a defendant who paralysed one victim but not another in identical circumstances (so the second could take their own life, but the first could only do so through the intervention of a third party) would be legally responsible for the death of the second victim but not the first’ (at [85]).

Causation and Criminal acts

Readers of this note will be acutely aware that, in English law, suicide is not proscribed whereas euthanasia most definitely is (*Airedale NHS Trust v Bland* [1993] AC 789, House of Lords; *Inglis* [2010] EWCA Crim 2637, [2011] 1 WLR 1110). In *Nicklinson & Others v Ministry of Justice* [2013] EWCA Civ 961, Lord Dyson MR and Elias J in a joint judgment (Lord Judge CJ agreeing) said that ‘Euthanasia involves not merely assisting another to commit suicide, but actually bringing about the death of that other… At common law euthanasia is the offence of murder’ (at [25], emphasis added). However, euthanasia in Belgian law is lawful, provided that the provisions of the Belgian Act on Euthanasia of 28 May 2002 are complied with, as they (apparently) were in the present case. Hence there was no unlawful act in *Wallace*.

However, what would the position have been had the lethal injection been performed – unlawfully – in England? What if – Instead of transporting his son in an ambulance to Belgium – M’s father, Kees van Dongen, had taken matters into his own hands and killed M while he slept in an English hospital bed with a fatal heroin overdose in order to end his suffering, in much the same way as Frances Inglis did to her son Thomas in *Inglis*? That would have made Kees van Dongen a murderer (‘mercy killing is murder’, per Lord Judge CJ in *Inglis* at [37]). But would it also have broken the chain of causation between Berlinah Wallace’s throwing of the acid and M’s death?

The Court of Appeal declined to address that question: ‘This case must be determined on its own particular facts, and not on a hypothetical basis’ (at [77]). One hopes that this scenario will forever remain hypothetical but, if or when it transpires, the door remains open to an argument that euthanasia, or mercy killing, carried out in this jurisdiction on a person who finds themselves in a situation like M would not necessarily break the chain of causation. Intriguingly, there is a footnote to the judgment in the present case thus: ‘It is by no means clear that the mere fact that an intervening act is unlawful is determinative as to its status as a *novus actus interveniens*’.