

Causation in the Criminal Law

It's an interesting question why the *actus reus* of some offences are defined in terms of D's action (or breach of duty, where D is only 'guilty' of an omission) causing an outcome to occur (for example, murder, s.20 OAPA, s. 18 OAPA), and the *actus reus* of other offences are simply defined in terms of D's performing a certain action (for example, rape or theft). But this essay is concerned with a different question, which is how we determine whether D's action (or breach of duty) caused a particular outcome to occur. The question we are concerned with is whether this is true:

$$a \longrightarrow O$$

where *a* describes D's action (or breach of duty), *O* describes the requisite outcome that *a* needs to have caused for D to have committed the *actus reus* of a particular offence, and the arrow between them indicates that *a* caused *O* to occur.

In order to establish that *a* caused *O* to occur, we need to establish three things, which are set out in the table below:

1. <i>O</i> would not have occurred but for <i>a</i>	✓
2. Nothing happened after <i>a</i> and before <i>O</i> to break the chain of causation between <i>a</i> and <i>O</i> , where only a deliberate, voluntary, informed and unreasonable act that contributed to <i>O</i> occurring will work to break the chain.	✓
3. There is a more than merely coincidental connection between <i>a</i> and <i>O</i> . That is, D's doing <i>a</i> materially increased the risk of <i>O</i> occurring.	✓

So *a* will only have caused *O* to occur if ✓✓✓ is true of the relationship between *a* and *O*. Having said that, we usually focus on whether conditions 1 and 2 are made out in determining whether *a* caused *O*. This is because it is rare for conditions 1 and 2 to be made out, and for condition 3 not be made out. In light of all this, let's now start working through some criminal cases on causation.

Cases where ✓✓✓ was true

Blaue (1975) – D stabs V and V dies of loss of blood, having refused a blood transfusion because of her religious beliefs. D is held to have caused V's death. V would not have died but for D's stabbing her, and V's omission in failing to save herself cannot break the chain of causation between D's stabbing her and V's dying.

Kirikiri (1982; New Zealand) – D seriously assaults V with the result that V needs extensive medical treatment, including a tracheotomy (inserting a tube into V's throat to allow her to breathe). The tracheal tube slipped and could not be replaced, with the result that V suffocated. D is held to have caused V's death. V would not have died but for D's assault. V's doctors did not act unreasonably in inserting the tracheal tube, and their failure to replace the tube could not break the chain of causation between D's assault and V's death.

Gowans and Hillman (2003) – D seriously injured V with the result that V went into a coma. While being treated in hospital V's wounds became infected and V died. D caused V's death. V would not have died but for D's attack and nothing happened between D's attack and V's death to break the chain of causation. (And it is obviously not a coincidence that V died from an infection as a result of D's attack as hospital patients are always vulnerable to infection.)

Smith (1959) – D stabbed V, puncturing V's lung and triggering a life threatening haemorrhage of blood into the lung. This was not appreciated by those treating V with the result that their efforts to assist V were completely ineffective. V died of the injury to his lung. It was held that D caused V's death. V would not have died but for D's stabbing him, and the completely ineffective efforts to assist V could not have the effect of breaking the chain of causation between the stabbing and V's death.

Cheshire (1991) – D shot V and V was admitted to hospital for treatment, where V was given a tracheotomy to allow him to breathe. V's treatment went well, and the tracheal tube was removed after four weeks, but V's doctors subsequently failed to spot that V's windpipe had started to narrow at the site of the tracheotomy and were unable to understand why V subsequently developed difficulties breathing. V eventually died of those breathing problems. It was held that D caused V's death. V would not have died but for D's shooting him, and nothing that happened subsequently in V's treatment broke the chain of causation between the shooting and the death. V's doctors acted reasonably in giving V a tracheotomy and their subsequent failure to spot the narrowing of V's windpipe was incapable of breaking the chain of causation between D's shooting V and V's death.

Roberts (1972) – D was found guilty of assault occasioning actual bodily harm, having made sexual advances on V while driving a car, with the result that V leapt from the car and was injured. V would not have been injured but for D's assault and V's leaping from the car did not break the chain of causation between the assault and the injury either because she was not acting voluntarily in so doing or because she acted reasonably in doing so.

Pagett (1983) – D was holed up in a building, under siege from the police. D emerged from the building, firing at the police, and holding V, a hostage, in front of him as a human shield. The police returned fire and V was killed. It was held that D caused V's death. She would not have died but for D's firing at the police, and the police did not act voluntarily (or unreasonably) in returning fire.

Michael (1840) – D wished to kill V, her illegitimate baby child. She gave V's foster-mother a bottle of poison, saying that it was medicine for the baby. V's foster-mother put the bottle on a mantelpiece and T, the foster-mother's five year old child later and unwittingly gave the 'medicine' to V, with the result that V died. D was held to have caused V's death. V would not have died but for D's supplying the bottle of poison, and T's actions did not break the chain of causation as T did not know what he was doing in giving the 'medicine' to V.

Martin (1881) – D blocked the exit to a theatre and turned off the lights on a staircase leading to the exit. A number of theatregoers were seriously injured in the ensuing panic. D was held to have committed an offence under s 20 of the OAPA 1861 (maliciously inflicting GBH). The injuries would not have occurred but for D's actions, and the theatre goers were not acting deliberately or voluntarily in the ensuing panic – and so the actions of the theatre goers could not have broken the chain of causation between D's actions and the subsequent injuries.

National Rivers Authority v Yorkshire Water Services (1994) – D regularly (and lawfully) discharged sewage from its plant into a nearby river. T, an unknown individual, introduced a prohibited substance, iso-octanol, into the sewage, with the result that when the sewage was discharged into the river, the prohibited substance also entered the river. The Divisional Court held that D caused the river to be polluted with a prohibited substance. The river would not have been so polluted had D not released its sewage into the river. T's act occurred before D discharged its sewage into the river, and so was incapable of breaking the chain of causation between D's act and the prohibited material entering the river.

Break in the chain cases

Only a *deliberate, voluntary, informed and unreasonable act* occurring *after a* and contributing to *O's* occurring is capable of breaking the chain of causation between *a* and *O*. All six italicised words have to be made out for there to be a break in the chain of causation. As a result a break in the chain of causation is very hard to make out. But not impossible...

Kennedy (No 2) (2007) – D supplied V with heroin, on which V fatally overdosed. It was held that D did not cause V's death. While V would not have died had D not supplied him with heroin, V's injecting himself with heroin was a deliberate, voluntary, informed, and unreasonable act and therefore broke the chain of causation between D's act and V's death.

Jordan (1956) – D stabbed V and V was admitted to hospital. The treatment V received was initially successful in almost healing V's original injury, but then V's treatment went wrong – he was given an antibiotic to which he was allergic (even after he had tested as being allergic to it) and was also given an excessive amount of liquid intravenously. V died from this treatment and it was held that D's stabbing V did not cause V's death. While V would not have died but for being stabbed by D, it is likely that the treatment V received from his doctors was so bad that it broke the chain of causation between D's stabbing and V's death. But the case is a marginal one, turning a lot on the degree of deliberateness and informedness of V's doctors in treating V so badly.

Coincidence cases

There will be a merely coincidental relationship between *a* and *O* if *a* did not materially increase the background risk that V was always exposed to that *O* might occur.

Carey (2006) – D was part of a group that started threatening and taunting another group, which included V. The encounter between the two groups culminated in D's pulling V's hair back and punching V in the face. V ran away and then suffered a heart attack because – unknown to everyone – V's heart was diseased. V subsequently died. It was found that D's unlawful and dangerous act in assaulting V did not cause her death. While V would not have died but for D's assault, the relationship between D's assault and V's dying was merely coincidental. D's assault was not serious enough to materially increase the background risk of suffering a heart attack that V was always subject to as a result of her heart being diseased.

Hart (1986; New Zealand) – D assaulted V and left her lying unconscious on a beach, with the result that V drowned when the tide came in. It was held that D's assault caused V's

death. V would not have died but for D's assault. Nothing happened after D's assault to break the chain in causation between D's assault and V's death. And there was more than a coincidental relationship between D's assault and V's death: D's assault materially increased the risk that V would end up drowning because the assault left her unconscious on a beach. *However*, this third requirement would *not* have been satisfied had D left V unconscious somewhere above the high water mark and V ended up drowning because of a freak tidal wave. D's assault would not have materially increased the risk of V being killed in that kind of way.

Hughes (2013) – D was driving uninsured when his car was run into by V. V was exhausted and on drugs, and not in proper control of his car, with the result that the car veered across the road into D's path. V died in the crash. It was held that D did not cause V's death (D was charged with the crime of causing death by driving when the driver is uninsured under s 3ZB of the Road Traffic Act 1998). While V would not have died had D not been driving, there was a merely coincidental link between D's driving and V's death. D's driving did not materially increase the background risk of V's being killed on the road that V had exposed himself to by driving when he was exhausted and on drugs.

Cases where the courts correctly found causation even though ✓✓✓ was not made out, and why

Wallace (2018) – D threw sulphuric acid in V's face after they broke up, saying 'If I can't have you, no one else will'. V was so disfigured as a result of D's attack that she travelled to Belgium where she was euthanased (killed with V's consent) by T, a Belgian doctor. The CA held that D could be held to have caused V's death if V's choice to be euthanased was a foreseeable response to D's throwing acid in her face. *Simester & Sullivan* criticise the decision, saying that causation should not have been found if 'T made a free, deliberate and informed decision to end V's life' with the result that T's act would have broken the chain of causation between D's actions and V's dying. In principle, this is correct (though given how central (and incorrectly) *Simester & Sullivan* make foreseeability to their discussion of causation, it's funny to see them slagging off the CA for making exactly the same move). However, it might be unacceptable here to find that D has not caused V's death if V asks someone to kill her, given that D has deliberately created the situation in which it is perfectly foreseeable that V would do this.

Environmental Agency v Empress Car Co (Abertilly) Ltd (1999) – a diesel tank on D's premises had a tap on it which overhung a river next to D's premises. One night, an unknown individual T turned the tap, releasing the diesel in the tank into the river. It was held that D had caused polluting matter to enter controlled waters. While the river would not have been polluted with diesel but for D's storing diesel on its land, one would normally expect the courts to find that D did not cause the pollution because T's deliberate, voluntary, informed and unreasonable act broke the chain of causation between D's storing the diesel and the diesel polluting the river. However, the House of Lords held that applying the normal rules on break in the chain would undermine the policy of the Act prohibiting companies like D from allowing polluting materials from entering controlled waters. That prohibition existed in part to encourage companies like D to prevent the meddling of people like T that threaten to result in controlled waters being polluted. So the force of that prohibition would be undermined if D could argue that they were not liable because T's act broke the chain of causation.

Two doubtful cases

Martin (1827) – D went into a pub with V, his four year old child. He ordered a glass of gin and asked V whether he wanted a sip of the drink. V said yes, and when D raised the glass to V's lips, V grabbed the glass and drank all the gin. As a result, V died. It was held that D did not cause V's death because 'the drinking of gin in this quantity was the act of the child.' But it is doubtful that V's act broke the chain of causation between D's offering V a sip of gin to drink, and V's drinking all the gin, because V was not aware of what they were doing in drinking so much gin. D was charged with manslaughter, and it seems unlikely nowadays that D would have been found guilty – but not on the basis of lack of causation, but on the basis that his fault in offering V a sip of the gin was not so great as to warrant a criminal conviction.

McKechnie (1992) – D attacked V, causing V serious head injuries. When treating V, V's doctors discovered that V was suffering from a duodenal ulcer that needed to be removed. However, they were unable to remove it because to do so would require V to have an anaesthetic that could, in combination with his head injuries, kill him. A month later, the ulcer burst and V died. It was held that D caused V's death. The finding of causation here is doubtful because it does not seem to be the case that V would not have died of the ulcer bursting had D not attacked V. Of course, V's doctors would have treated V's ulcer had D not attacked V (Simester & Sullivan's justification of the case), but V would not have been in the care of those doctors had D not attacked V. So it seems likely that had D not attacked V, V would have gone about his normal business and would have died from the ulcer bursting exactly when it did burst. It would be different if, had D not attacked V, V would have discovered the existence of the ulcer before it burst and in good time to have it treated. Then, a but for relationship between the attack and the bursting of the ulcer would have been made out.