IN THE HIGH COURT OF AUSTRALIA **No. S 46 of 2012**
SYDNEY OFFICE OF THE REGISTRY

BETWEEN:

NATALIE BURNS
Appellant
AND
THE QUEEN
Respondent

10 **RESPONDENT'S SUBMISSIONS**

Part I: Publication

This submission is in a form suitable for publication on the internet.

Part II: Concise statement of issues

1. Whether the supplier who acts in concert with the recipient to effect the recipient's ingestion of a prohibited drug is liable as principal for the unlawful and dangerous act of
20 self administration and liable for manslaughter where death results.
2. Whether the supplier who acts in concert with the recipient to effect the recipient's ingestion of a prohibited drug can be said to have contributed causally to the death that results from the recipient's act of ingestion.
3. Whether the supplier who by the supply of a prohibited drug and by assistance in its administration or other conduct, creates, or contributes to the creation of a life threatening situation owes a duty of care to the recipient whose life is endangered by the situation created.

Part III: Section 78B of the Judiciary Act

This appeal does not raise any constitutional question. The respondent has considered whether
30 any notice should be given in compliance with s78B of the *Judiciary Act 1903 (Cth).* No such notice is required.

Part IV: Statement of contested material facts

4. 1 The major area of contention is the suggestion that the deceased was slightly drowsy after injecting the methadone and that after being walked around the room he was sufficiently recovered as to be able to say he did not want an ambulance and to get up and leave without assistance (AWS at [7] – [9]).

4. 2 It is correct that the deceased's psychiatrist, Dr Roberts, described being "on the nod" as meaning being "*observably sleepy ..... a slight degree of drowsiness*" (AWS at [7]). In fact, Dr Roberts likened it to being tired at university lectures: "*like you do in lectures in university, a bit like that 'on the nod'. That you behave in a way that a layperson could see that you're a little bit tired and the head is nodding*"(T343.20) and agreed that the deceased's condition when he saw him that afternoon could be described as being on the nod (T 344.50 – 345.20). However, that was his condition before injecting the methadone, it deteriorated significantly afterwards.

4. 3 The Crown case was that the deceased was unconscious after injecting the methadone. That was the reason he had to be roused and walked round the room. That was also the reason an ambulance was suggested.

4. 4 The evidence was that the deceased left Dr Robert's rooms sometime before 4.30 pm (T 345.40). It would have taken him about 25 - 30 minutes by public transport to get to the appellant's flat (T300.15; Bus Timetable Ex R), so he would have arrived at about 4.50pm. He had telephoned ahead. Ms Malouf arrived at the flat about 10 - 15 minutes later at about 5pm (T108.32).

4. 5 In that interval the appellant and her husband had sold the methadone to the deceased, prepared the syringe, injected him or assisted him to inject and then cleared away all trace of what had happened so that when Ms Malouf arrived about 15 minutes later she saw no signs that the deceased had injected.

4. 6 Ms Malouf said the deceased was sitting with his chin down on his chest (T 114.10) and when spoken to did not respond (T 110.8). Ms Malouf's experience of heroin overdoses was that people collapse, turn blue and stop breathing (T 159.20) and she thought that as the deceased was not collapsed, blue or not breathing an ambulance was not required.(T159.15)[1]. However, Ms Malouf agreed that had she known the deceased was not on the methadone program she would have called an ambulance: "*Yes. I would have been asking detailed question about what he had, what Brian knew he may have taken and I probably would have called an ambulance.*"(T 162.20). Even without knowing his tolerance for methadone Ms Malouf did not think it was a good idea that the deceased be allowed to leave unsupervised, she agreed with the appellant's husband that someone keep an eye on him: "*Brian said "I'll put him outside and keep an eye on him' and I said,*

[1] Or as it was put in the summing up: "It was not as if he was lying on the floor with his lips blue and panting." (SU at 13.30).

I think I said at that stage 'That sounds like a good idea' thinking it was better than putting him outside and then I sort of tuned out of the conversation."(T 142.20).

4. 7 Contrary to the appellant's submission (AWS at [17]) the CCA did not find that the deceased had consumed the methadone either orally or by injection. The CCA noted the recent needle mark in the deceased's arm (CCA at [14]) which established that there had been an injection and found it "entirely unlikely" that he could have injected himself: "*In our opinion the evidence made it entirely unlikely that the victim had injected the methadone. It was open to the jury to conclude to the relevant standard, as we would ourselves, that the appellant or Burns administered the injection. The appellant accepted that they were acting in concert. The act of injection was unlawful and in the circumstances plainly dangerous and tragically led to the deceased's death.*" (CCA at [160]).

PART V: Applicable Legislative provisions

The respondent agrees with the appellant's list of legislative provisions. In addition the respondent refers to s 351B *Crimes Act* 1900 (NSW) No 40.

PART VI: Statement of Argument

Voluntary Human Intervention

6. 1 In ***Kennedy (No2)***[2] it was held that the supplier of a drug can never guilty of manslaughter where the recipient voluntarily ingests the drug.

6. 2 This was not surprising as the certified question answered itself. The question posited that the "cause" of death was the free and voluntary "self - administration" of the drug and that the supplier's role was the "supply" of the drug. On those terms the supply was not the cause of death. The difficulty was largely a matter of failing to particularise properly the unlawful act causing death[3].

6. 3 More fundamentally, the decision affirmed the doctrine of free will and personal autonomy which holds that voluntary human action is never caused and therefore the supplier could never be liable for the recipient's voluntary act of ingestion because that act could never be caused. This "special view" of human actions[4] is that they stand on an entirely different footing than events in the natural world because human beings possess volition through which they are free to choose their actions and that choice precludes that

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[2] ***R v Kennedy (No2)*** [2008] 1 AC 269 at [25].
[3] ***R v Kennedy (No2)*** [2008] 1 AC 269 at [26].
[4] Sanford H Kadish "*Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*" (1985) 73 California L.R. 323 at 334.

their actions can be caused.[5] To some extent this is merely axiomatic. If a human action is free and voluntary then it cannot be said to have been caused for then it would not have been free and autonomous. As Professor Kadish expressed it, man is "total sovereign over his own actions", they are "his and his alone."[6]

6. 4 A free, voluntary and informed human act constitutes a novus actus interveniens.[7] The controversial aspect of this doctrine is not that human beings exercise volition, or that having done so their actions may constitute a new operating cause, but that once exercised all other causes are excluded.[8] Voluntary human intervention ends the causal enquiry and serves as a barrier or limit beyond which causes are not traced.[9]

10 6. 5 The position is somewhat different in causation doctrine generally where it is recognised that there may be a number of operating causes and it is not necessary in ascribing responsibility that any one cause be the sole contributor to an event provided it can be said to be a significant operating cause[10]. The difference is explained on the basis that the doctrine of causation deals with fixing responsibility for natural events whereas the doctrine of complicity deals with fixing blame for the criminal action of another person.[11]

6. 6 The House of Lords characterised this doctrine as "fundamental and not controversial"[12] although there has been considerable debate[13] as to whether the responsibility of a 15 year old girl encouraged to take heroin for the first time can realistically be considered hers and hers alone[14], or whether, as in the present case, a person already visibly affected
20 by drugs who is assisted to take even more drugs can truly be said to be the "total sovereign" of his own actions.

6. 7 Any difficulty arising from this exclusivity is said to be resolved by the law of complicity. Indeed the doctrine of secondary liability was said to have developed

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[5] Sanford H Kadish "*Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*" (1985) 73 California L.R. 323 at 336.
[6] Sanford H Kadish "*Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*" (1985) 73 California L.R. 323 at 330.
[7] Sanford H Kadish "*Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*" (1985) 73 California L.R. 323 at 335.
[8] HLA Hart & T Honoré *Causation in the Law* 2nd Ed (1985) at p 42, 74.
[9] HLA Hart & T Honoré *Causation in the Law* 2nd Ed (1985) at p 44, 75.
[10] ***Royall v The Queen*** (1990) 172 CLR 379.
[11] Sanford H Kadish "*Complicity, Cause and Blame: A Study in the Interpretation of Doctrine*" (1985) 73 California L.R. 323 at 333.
[12] ***R v Kennedy (No2)*** [2008] 1 AC 269 at [14].
[13] T H Jones "*Causation, Homicide and the Supply of Drugs*" (2006) 26 Legal Studies 139; J Feinberg *Doing and Deserving. Essays in the Theory of Responsibility* (Princeton: Princeton University Press, 1970) cited in ***MacAngus v HM Advocate; Kane v HM Advocate*** [2009] HCJAC 8, [2009] SLT 137 at [44] although there the Court appeared to focus more on whether the 15 year old girl was fully informed of the risks of heroin use.
[14] ***R v Khan*** [1998] Crim LR 830; T H Jones "*Causation, Homicide and the Supply of Drugs*" (2006) 26 Legal Studies 139 at 142.

"precisely" because informed voluntary choice was ordinarily regarded as a novus actus interveniens breaking the chain of causation[15]. On the orthodox view, no matter what the supplier did to bring about the act of ingestion, the supplier can "never" be said to have caused the voluntary act of the recipient in taking the drugs. Criminal liability for the supplier's role in bringing about the act causing death will be, if any, as an accessory to the act of self administration (where self administration is unlawful). This preserves the orthodox demarcation between the act of ingestion which remains the single and exclusive cause of death and the supplier's liability which is secondary or derivative.

6. 8 This is the accepted approach to "*render him liable as the secondary party in circumstances where he does not cause the actus reus because the voluntary act of another intervenes*"[16]. The approach from ***Dias*** was cited with approval in ***Kennedy (No 2)*** but the problem in ***Dias*** and in ***Kennedy (No 2)*** was that the act causing death, the self-administration, was not unlawful, therefore the supplier could not be an accessory.[17] That problem does not arise in the present case as self - administration is an offence in NSW[18] but the issue of whether the supplier's liability is primary or secondary remains.

6. 9 In the present case, if the jury accepted that the appellant and the deceased were acting in concert by reason of the appellant supplying the methadone, providing the premises and the necessary equipment for the injection and assisting in the act itself, the appellant would be liable as principal for the unlawful and dangerous act of self - administration.

6. 10 The doctrine affirmed in ***Kennedy (No 2)*** rejects the notion that the supplier can ever be liable for the recipient's act of ingestion other than on a secondary basis. In ***R v Rogers***[19], the Court of Appeal held that the supplier's act of applying a tourniquet while the deceased injected himself constituted the act of administration for the purposes of the offence of administration to another. Similarly, in ***R v Finlay***[20], the Court of Appeal held that preparing the syringe and handing it to the deceased constituted the offence of "causing" the administration of the drug to another. In ***Kennedy (No 2)*** itself, the prosecution put a similar argument based on the appellant's conduct of preparing the syringe.

6. 11 The House of Lords held that applying the tourniquet or preparing the syringe do not constitute administering the drug, or causing the drug to be administered, because the

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[15] ***R v Kennedy (No2)*** [2008] 1 AC 269 at [17].
[16] ***R v Dias*** [2002] 2 Cr. App. R.5 at [6]
[17] ***R v Dias*** [2002] 2 Cr. App. R.5 at [21] – [23]; ***R v Kennedy (No2)*** [2008] 1 AC 269 at [18]. .
[18] Section 12 *Drug Misuse and Trafficking Act* 1985.
[19] ***R v Rogers*** [2003] 1 WLR 1374 at [8].
[20] ***R v Finlay*** [2003] EWCA Crim 3868 (CA (Crim Div)).

cause of death was exclusively the deceased's act of self injection. ***Rogers*** and ***Finlay*** were both overruled.

6. 12 The present case can be distinguished. Firstly, there was no offence of self-administration in the UK and therefore no unlawful act to which accessorial liability could apply. Secondly, it was clear that no matter what contribution the supplier made to the act of administration it could not constitute the offence of "administration to another" because the user administered to himself not to another. Thirdly, and more fundamentally, English law does not recognise that participants acting in concert may be liable as principals for the acts of the other participants to the joint enterprise. Accessorial liability is regarded as essentially and exclusively secondary.[21] Even if self administration were unlawful, the supplier's liability would always be derivative. The supplier may counsel, procure or aid and abet the self-administration but could never be liable as principal for the recipient's act of injection. This view is reflected in the passage quoted from Professor Glanville Williams in ***Kennedy (No 2)***[22]: "*Principals cause, accomplices encourage (or otherwise influence) or help. If the instigator were regarded as causing the result he would be a principal, and the conceptual division between principals (or, as I prefer to call them, perpetrators) and accessories would vanish.. ... ... The final act is done by the perpetrator, and his guilt pushes the accessories, conceptually speaking, into the background. Accessorial liability is, in the traditional theory, 'derivative' from that of the perpetrator.*"

6. 13 The Australian position differs in that the delineation between principals and accessories does not exclude the possibility that accessories can be responsible as principals for the acts of their accomplices. Parties acting in concert may be liable as principals not only for their own acts but for those of the joint participants.[23] Liability in such circumstances is primary and direct. The trial judge's direction in the present case adopted this approach. His Honour directed the jury that the parties to a joint criminal enterprise may be responsible for the acts of the others in carrying out that enterprise (SU at 6.28).

6. 14 From the UK viewpoint this is seen as "*import[ing] into accessorial liability precisely the ingredient of direct liability that necessitates a doctrine of secondary participation. The reason why mere assisters and encouragers do not perpetrate the crime is because they no not legally cause its* actus reus. *If they did, then assuming the appropriate* mens

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[21] R Heaton *"Dealing in Death"* [2003] Crim LR 497 at 504; D Ormerod & R Forston *"Drug Suppliers as Manslaughterers (Again)"* [2005] Crim L R 819 at 826 – 828;

[22] G Williams "*Finis for Novus Actus*?" [1989] CLJ 391 at 392 quoted in ***R v Kennedy (No2)*** [2008] 1 AC 269 at [14].

[23] ***Osland v The Queen*** (1998) 197 CLR 316 at [72] per McHugh J.

rea, *they would satisfy the definition of the crime and be guilty as principal.*"[24] On this analysis, to conceive of joint participants as liable *as principals* for the acts of their accomplices is to render the very notion of accessorial liability superfluous and the decision to that effect in ***Osland*** is regarded as a "*revolutionary revision of the principles of secondary liability.*"[25]

6. 15 In the present case, the CCA noted that this aspect of ***Kennedy (No 2)*** was not an impediment to liability in NSW for self – administration was an offence and, depending on the factual situation, it was possible for a supplier to be jointly liable for that act (CCA at [160]). Where the supplier and the recipient acted in concert for the recipient to inject, the supplier would be guilty as principal for the unlawful act of self administration. Where this act caused death, as in the present case, the supplier would be liable for manslaughter.

6. 16 Such an approach has been said to be circular and contrived[26] and some contrivance may be acknowledged in this resort to accessorial liability but then, on the orthodox view, that is precisely the purpose of accessorial liability. The real circularity lies in the orthodox approach which holds that the law of complicity is the avenue for imposing liability on those who bring about the ingestion of the drug yet in order to be guilty of manslaughter by unlawful and dangerous act the supplier must cause the actus reus of the offence alleged to constitute the unlawful act and as it is never possible for the supplier to cause the acus reus where the deceased voluntarily self - injects the supplier can never be liable for manslaughter. Were it otherwise, so the argument runs, all secondary parties would be principal parties and the whole doctrine of complicity would be otiose.[27] On this approach, the only basis for implicating the supplier in the deceased's death would be that he or she was a secondary party to the deceased's act of self injection but that can never be manslaughter because secondary liability is derivative, and as the recipient cannot be guilty of self manslaughter, the supplier can never be guilty of manslaughter either.[28]

6. 17 However, accepting that accessorial liability may be primary and direct, and that parties acting in concert may be liable for the unlawful and dangerous act of the principal then the liability of a supplier who acts in concert with the recipient to self-administer the drug may be regarded as principal in the act of injection to which he or she was a party. In ***R v***

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[24] R Heaton *"Dealing in Death"* [2003] Crim LR 497 at 504.
[25] D Ormerod & R Forston *"Drug Suppliers as Manslaughterers (Again)"* [2005] Crim L R 819 at 827.
[26] K Dawkins and M Briggs "*Criminal Law*" [2003] New Zealand Law Review 569 at 578.
[27] K Dawkins and M Briggs "*Criminal Law*" [2003] New Zealand Law Review 569 at 579.
[28] ***R v Kennedy*** [1999] Crim. LR 65 at 68.

Franklin[29] Ormiston JA considered that such an approach may be available given the difference between the UK and Australian approach as to the primary liability of those acting in concert.[30]

Voluntary and Informed

6. 18 The accepted way of ameliorating the perceived strictness of the orthodox approach is to broaden the scope for finding that the intervening human action was not wholly voluntary and informed and therefore did not break the causal chain. It is well accepted that where the person acts under duress, necessity, deception or mistake their act may not be regarded as wholly voluntary and informed.

6. 19 Clearly, the lower the threshold of coercion required to render an act not voluntary or the greater the degree of knowledge required before it can be said to be informed, the broader the scope for the doctrine to be qualified. There is no precise definition as to the degree of coercion or influence required to render the act not voluntary for the purposes of deciding whether the chain of causation is broken. Logically, it might be thought that it would be of the same order as would render the act involuntary for the purposes of primary liability but it appears that the standard is somewhat lower[31]. It is also not clear what degree of knowledge is required for a person to make an informed choice. For the purposes of the drug cases Lord Bingham appeared to consider that it was sufficient that the recipient knew the general nature of the drug to be taken, whether it was heroin, or amphetamine or a solvent to be sniffed. Although it was not stated expressly, it appeared from the factual situations of the cases themselves, that it was not necessary that the recipient needed to be informed of the composition of the drug, the level of purity, the presence of additives, the dose or the likely consequences of combining the drug with other substances. The 15 year old in ***Khan*** did not need to be informed that she was being supplied double the usual dose. Absent misinformation or deception the recipient is taken to have run the risk.

Causation

6. 20 There is an alternative notion of causation, more consistent with causation doctrine generally, which acknowledges that voluntary human action is a prime cause, and will often constitute a novus actus inerveniens, but that it may not always exclude other causes.

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[29] ***R v Franklin*** (2001) 3 VR 9.
[30] ***R v Franklin*** (2001) 3 VR 9 at [134] per Ormiston JA.
[31] ***R v Pagett*** (1983) 76 Cr. App. R. 279.

6. 21 This was the approach taken in ***MacAngus and Kane*** where it was held that causation required consideration of all the circumstances (CCA at [149]). In ***MacAngus and Kane***[32] the relevant test was "*whether, in the whole circumstances, including the inter-personal relations of the victim and the accused and the latter's conduct, that conduct can be said to be an immediate and direct cause of the death.*" The High Court held that the deliberate decision to take drugs is an important, and in some cases crucial, factor in determining whether the supplier's conduct was the cause of death but it will not always break the chain of causation.[33] There may be many cases, short of duress, necessity, deception or mistake, where the vulnerability of the drug user to the actings of the supplier will be relevant to whether the direct causal link is made out.[34] The High Court commented that "*Reckless conduct, judged in the context of any vulnerability of the victim, may of its nature have a compelling force*". Where the victim's conduct or reaction is the very result the accused's conduct sought to bring about, where ingestion was the "known, intended and expected purpose"[35] of supplying the drug and the apparatus for ingestion, and of such other conduct of the supplier as contributed to bringing about the result, the victim's act of self ingestion may not break the chain of causation.

6. 22 The classic example to illustrate the correctness of the orthodox approach by Professor Smith in his note to ***Latif***[36] is where A gives B a poisoned cup to give to C who drinks it and dies. If B hands the cup to C not knowing that it is poisoned then B is said to be the innocent agent of A and A is the cause of C's death. However, if B becomes aware that the cup is poisoned but decides to give it to C anyway then B is guilty of murder and A is no longer the cause of death. B's knowing act is regarded as having broken the chain of causation and it becomes the *sole* and *exclusive* cause of the death. On this approach, A's role in engineering the situation to bring about C's death is given no causal significance. There is no possibility that the conduct of both A and B could be seen as operating causes of the death.

6. 23 This example was formulated to explain why, in ***Latif***[37], an importation case where a police operative imported drugs at the direction of the principal, the principal could not be said to have caused the importation because the operative's voluntary and informed

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[32] ***MacAngus v HM Advocate; Kane v HM Advocate*** [2009] HCJAC 8, [2009] SLT 137 at [42].
[33] ***MacAngus v HM Advocate; Kane v HM Advocate*** [2009] HCJAC 8, [2009] SLT 137 at [48].
[34] ***MacAngus v HM Advocate; Kane v HM Advocate*** [2009] HCJAC 8, [2009] SLT 137 at [44].
[35] ***Khaliq v HM Advocate*** [1984] JC 23 at 33; [1984] SLT 137 at 144 quoted in ***MacAngus v HM Advocate; Kane v HM Advocate*** [2009] HCJAC 8, [2009] SLT 137 at [33].
[36] ***R v Latif and Shahzad*** [1994] Crim. L R 750 at 752.
[37] ***R v Latif and Shahzad*** [1996] I WLR 104.

act of importation broke the chain of causation. Yet it also highlights the anomaly that, in the objective realm of causation, causal significance depends on the subjective mental state of the principal rather than on the degree to which the instigator's conduct was responsible for bringing about the result. Where the instigator's design is bought about in precisely the way intended it seems incongruous that such a determining factor should be excluded altogether from the causal enquiry.

6. 24 The approach adopted in ***MacAngus and Kane***, rather than hinging exclusively on the mental state of the recipient, focuses attention on the supplier's conduct and the degree to which it was operative in bringing about the intended result. This is not to repudiate the doctrine of voluntary human intervention, on the contrary, it was acknowledged that in most cases voluntary human action will break the chain of causation.[38] In *Doing and Deserving* Professor Feinberg proposed the appropriate principle as: "*the more predictable human behaviour is, whether voluntary or not, the less likely it is to negative causal connection.*"[39] Professor Feinberg argued that a person may initiate a causal process that takes into account the possibility of voluntary human action, in which case, it may become, not a novus actus interveniens, but a part of the overall plan. In the poisoning example, if A selected B precisely because A knew that B harboured some animosity to C and exploited that animosity to ensure that, should B discover that the cup was poisoned, B would give it to C anyway, then that may be relevant in deciding whether A's conduct may have been an operating cause of C's death. In the same way, where a drug supplier encourages, even assists, the recipient to ingest a drug, that conduct, together with the other circumstances, such as any vulnerability of the recipient to the supplier's urgings would be relevant in the assessment of whether the causal chain was broken.

6. 25 In the present case, the CCA appeared to endorse such an approach commenting that causation depends on the particular circumstances of the case and is a matter for the jury to determine (CCA at [150] – [152])[40]. The Court noted that the more predictable the voluntary human response the more likely it is that the earlier act will be accepted to have caused the later act (CCA at [151]).

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[38] ***MacAngus v HM Advocate; Kane v HM Advocate*** [2009] HCJAC 8, [2009] SLT 137 at [48].
[39] J Feinberg *Doing and Deserving: Essays in the Theory of Responsibility* Princeton University Press 1970 at p . 166. "Predictable" is used interchangeably with "expectable" at p 184. For the contrary view: R Williams "*Policy and Principle in Drug Manslaughter Cases*" (2005) 64 (1) CLJ 66.
[40] ***R v Dias*** [2002] 2 Cr. App. R.5 at [25].

6. 26 A similar principle was adopted by the House of Lords in ***Environment Agency (formerly National Rivers Authority) v Empress Car Co (Aberttillery) Ltd***[41] in ascribing liability for a pollution offence. In ***Empress Car*** the company had overridden the protection afforded by the bund surrounding the tank of diesel by connecting an extension pipe to the tank which was connected to a drum standing outside the bund. The outlet from the tank was governed by a tap which had no lock. The tap was opened by an unknown person and the entire contents of the tank drained into the river[42]. There had been local opposition to the company's business and the incident coincided with a public inquiry to be held the following day. The Crown Court found that the company had implemented "wholly inadequate arrangements" for withdrawal of the diesel outside the bund. The company should have foreseen that interference was an ever present possibility and failed to take the simple precaution of putting a proper lock on the tap and having a proper bund. In the circumstances, this was a "significant cause" of the escape even if the major cause was third party interference.[43]

6. 27 The House of Lords endorsed the view that there may be more than one significant cause and that even where one of those causes is voluntary human intervention that does not necessarily exclude the other operating causes. Lord Hoffman pointed out that the test was not foreseeability for the offence was one of strict liability not of negligence.[44] The more relevant distinction was between normal or ordinary acts or occurrences and those which are abnormal and extraordinary.[45] Accordingly, the issue was whether the act of the unknown person who opened the tap should be regarded as a normal fact of life or something extraordinary.[46] Lord Hoffman held that it was not necessary for the prosecution to show that the company's conduct was the immediate cause of the pollution as long as the prosecution identified some conduct by the company which was said to be an operating cause. Maintaining tanks full of noxious liquid was held to be sufficient even if the immediate cause was the act of a third party.[47]

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[41] ***Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abettillery) Ltd*** [1999] 2 AC 22.
[42] ***Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd*** [1999] 2 AC 22 at 26C.
[43] ***Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd*** [1999] 2 AC 22 at 26F – G.
[44] ***Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd*** [1999] 2 AC 22 at 34C.
[45] ***Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd*** [1999] 2 AC 22 at 35E.
[46] ***Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd*** [1999] 2 AC 22 at 36B.
[47] ***Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd*** [1999] 2 AC 22 at 35G.

6. 28 The correctness of ***Empress Car*** was affirmed in ***Kennedy (No 2)*** although it was confined to its particular statutory context and held not to apply to an offence of manslaughter or administration of a noxious thing[48]. The applicability of a principle of predictability or foreseeability is not unknown within general causation doctrine. In the self-preservation cases where the victim does some act which causes his or her own death in an attempt to escape the attacker, orthodox doctrine regards the victim's conduct as done under threat or duress or fear of personal safety and therefore not wholly free and voluntary. However, even on that view, there are cases where the victim's conduct, like jumping from a moving car, or out a bathroom window, may be so extraordinary that it may break the chain of causation. In such circumstances, a test very similar to that proposed in ***Empress Car*** or ***MacAngus and Kane*** is applied to limit the causal liability of the attacker to conduct by the victim which is normal or expected or foreseeable.[49] There are differences in how the limitation is formulated but, however expressed, it is acknowledged that human intervention does not necessarily end the causal enquiry and that the predictability of the conduct may be relevant to causation.

6. 29 In the present case, this aspect of causation doctrine has assumed a prominence disproportionate to its significance at the trial. At the trial, every aspect of causation was challenged, including whether the appellant had supplied any methadone or whether the deceased had taken any methadone at the flat. It was suggested that the deceased may have ingested it or some other drug after he left the flat. There was even considerable dispute that methadone was the cause of death at all. That was why the bulk of the directions on causation was directed to factors other than the aspect now raised (SU at 15.20 – 20.40).

6. 30 At the trial, as in ***Kennedy (No 2)***, the act causing death was referred to as the supply of methadone. The trial judge directed the jury that the unlawful and dangerous act was the "supply" of methadone, that the "supply" had to be intentional, dangerous, and that it "substantially contributed" to the death (SU at 10.20). It may have been more accurate to have described the act as the injection of the methadone, however, unlike ***Kennedy (No 2)***, the Crown case was not based on supply but on the conduct of the appellant and her husband in either injecting the deceased or assisting him to inject.

6. 31 In the present case, it was apparent at all stages that the Crown case was that the appellant and her husband had actually injected the deceased or assisted him to inject. It was put expressly in those terms in the Crown's closing address: "*Now if you find that the*

[48] ***R v Kennedy (No2)*** [2008] 1 AC 269 at [16].
[49] ***Royall v The Queen*** (1990) 172 CLR 379.

accused and/or her husband injected David Hay or helped him inject or take the drug then criminal responsibility for the charge of the unlawful killing of David Hay on the basis of dangerous and unlawful act is established. That is a matter for you." (T 10/08/09 at p 4.5). This was also made clear in putting the alternative case of criminal negligence which was said to arise only if the jury were not satisfied that the appellant and her husband had injected or assisted the deceased to inject: "*Now, if you're not satisfied beyond reasonable doubt that David Hay injected – sorry, that David Hay was injected with the methadone or helped inject it by Mr and Mrs Burns or either of them or both of them, you can go onto the second and it's this: That is that the accused and her husband failed to render assistance or call for assistance when it was clear that Mr Hay was in difficulty.*" (T 10/08/09 at p 5.12). There was no suggestion that mere supply would have been sufficient.

6. 32 In the CCA, it was again dealt with on the basis that the unlawful act was "the supply of the methadone *by injection*" (CCA at [8]*(emphasis added)).*

6. 33 The CCA found that it was entirely unlikely that the deceased had injected himself and considered that there was no doubt that the appellant or her husband had administered the injection (CCA at [160]).

6. 34 The evidence was that the methadone syrup had to be diluted in order to inject it and that required a very large hypodermic. Ms Donnelly said that the commonly used syringes for heroin injection are 1 mil syringes whereas the dose of methadone was closer to 18 – 20 mils of liquid so it was like injecting 18 of the normal syringes (T287.30). This was a difficult procedure and it took some time. The apparatus had to be balanced and kept stable to allow the flow of such a large amount of liquid (T 276-8, 287). As the deceased had little experience with injecting narcotics and was already visibly affected by some other drug when he arrived at the flat it was highly unlikely that he could have injected himself. He would have required considerable assistance.

6. 35 The appellant's ground of appeal in the CCA averred that manslaughter by unlawful and dangerous act should have been taken from the jury because the deceased made a voluntary and informed decision to take the methadone. As the Crown case involved actual injection by the appellant, the issue of voluntary human intervention did not arise (CCA at [157] – [160]). The question of whether the appellant had injected the deceased was a matter for the jury to determine. On the alternative basis that the appellant had not injected the deceased but had assisted the deceased to inject, there was an issue as to whether the deceased made an informed and voluntary decision to take the methadone

given the evidence that he had little experience with injecting narcotics and was affected by drugs when he arrived at the flat (CCA at [155]). These were factual matters for the jury to determine and the trial judge was correct not to have taken the case from the jury (CCA at [156]).

Duty of Care

6. 36 Stephen[50] famously illustrated the principle that there was no liability for causing death by omission with the example of allowing a stranger to drown: "*A saw 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.*" This was not meant to suggest that no duty of care existed towards strangers. As the House of Lords recognised in ***Miller***[51], there is a significant distinction between the responsibility of a person who happens upon an existing dangerous situation and the responsibility of a person who has created a dangerous situation.

6. 37 Article 212 of Stephen's Digest to the effect that it is not a crime to cause death or bodily injury by any omission must be read in the context of the entire Chapter on Culpable Negligence where Stephen listed a number of circumstances in which a duty arose. Those circumstances covered a variety of dangerous activities and included a general duty on "every one" who does any act which is, or may be dangerous, to human life. The failure to take "ordinary precautions" in relation to such activities could be culpable negligence.[52]

6. 38 Such statements should also be understood in the overall context of liability for homicide as it applied at that time which included objective liability for accidental death by *any* unlawful act[53] and where the felony murder rule operated in relation to all felonies. In NSW the definition of murder included any act or omission "done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him, of an act obviously dangerous to life".[54]

6. 39 Examples of random encounters with an unknown person are of limited assistance in understanding the principle applicable where a supplier sells a drug, provides the premises and equipment for injection, prepares the syringe and assists in the

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[50] Sir James Fitzjames Stephen, ***A Digest of the Criminal Law*** (1877) Article 212 at p 135.
[51] ***R v Miller*** [1983] 2 AC 161.
[52] Sir James Fitzjames Stephen, ***A Digest of the Criminal Law*** (1877) Article 216 at p 137.
[53] Sir James Fitzjames Stephen, ***A Digest of the Criminal Law*** (1877) Article 222(c) at p 143.
[54] Section 9 of the *Criminal Law Amendment Act* 1883 (NSW) which became s 18 of the *Crimes Act* (1900). This aspect of the definition of homicide was not repealed until 1974.

administration of the drug and remains with the recipient to the point where the recipient's life is endangered.

6. 40 In ***Miller***, Lord Diplock drew a clear distinction between the absence of duty in a passing encounter with a total stranger, as in the parable of the good Samaritan,[55] and the responsibility to minimise a dangerous situation which one has created. In ***Miller*** the appellant was asleep when the cigarette dropped onto the mattress and caught alight. The starting of the fire was an accident. The appellant had neither the intent nor recklessness to damage the property. However, when he awoke and became aware of the danger, it was held that there was a duty to take steps to minimise the potential damage of the situation he had created.[56]

6. 41 Lord Diplock acknowledged that in legal theory the liability could either be defined in terms of a duty to minimise the danger created or in terms of liability for the continuing act of setting fire to the bed and leaving the mattress to burn.[57] Lord Diplock preferred Professor Smith's duty approach.[58] There may be technical problems with the continuing act theory, for on one view, the starting of the fire was not the appellant's act for he was asleep. It may be arguable that the relevant act was lighting the cigarette in bed of which the following acts were a continuation but that still left the difficulty identified by Professor Smith that it was necessary to "deem" the original act as intentional or reckless when it was not. The reality was that setting fire to the mattress was an accident. The appellant was guilty because he failed to put out the fire he started.[59]

6. 42 The imposition of a duty arising from the creation of a dangerous situation was closely analogous to Stephen's formulation of a general duty in relation to potentially dangerous activities. The danger-creation aspect of the duty has been applied, in a line of authorities[60] since ***Miller***, to smuggling illegal immigrants, storing fireworks, smuggling cocaine and, in ***Evans***[61], to supplying heroin. These authorities were discussed by the CCA at [101] – [111].

6. 43 In his article "*Liability for omissions in the criminal law*" Professor Smith proposes two further conditions as being necessary for liability. Firstly, the existence of an offence which is capable of being committed by omission, and secondly, the defendant must have

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[55] ***R v Miller*** [1983] 2 AC 161 at 175E.
[56] ***R v Miller*** [1983] 2 AC 161 at 178B.
[57] ***R v Miller*** [1983] 2 AC 161 at 179B.
[58] ***R v Miller*** [1983] 2 AC 161 at 179B.
[59] JC Smith "*Liability for Omissions in the Criminal Law*" (1984) 4 Legal Studies 88 at 92.
[60] The cases are listed in D Ormerod *Smith and Hogan's Criminal Law* Oxford University Press 13th Ed at p 554.
[61] ***R v Evans*** [2009] 1 WLR 1999 at 2007[31].

omitted to act with the fault required for the particular crime.[62] Both conditions are satisfied in the present case.

6. 44 The duty of care in the dangerous situation cases is also closely analogous to the duty of care in the seclusion cases. The duty arises in the seclusion cases because the person removes the victim from the possibility of assistance by others. In that way the seclusion increases the risk of harm to the victim. The duty may also be seen to arise because the person has assumed the care of the victim by secluding him or her although the facts of these cases usually demonstrate that the person has not assumed any care at all.[63] The more consistent approach to the duty in these cases is that it is imposed because the seclusion denies the victim the opportunity of assistance by anyone else, and having created that situation, a duty arises for the person responsible to take reasonable care of the victim they have secluded.

6. 45 The danger-creation aspect of ***Miller*** which was proposed in relation to criminal damage was plainly applicable to the drug supply cases[64] but, from the viewpoint of the orthodox approach, the criticism was made that the supply of the drug does not create the danger, the danger arises because of the recipient's voluntary and informed act of taking the drugs.[65] In ***Dalby***, over a year before ***Miller***, Waller LJ noted that criminal negligence may be available where death had not been caused by the "direct act" of the defendant.[66] The reason was because the issue in criminal negligence is not whether the supplier caused the death by supplying the drugs but whether the omission to render assistance once it was apparent that the recipient's life was threatened caused the death. The basis of liability is the failure to provide assistance.[67] The issue concerns whether the supply created, or contributed to the creation, of the danger. In the case of the creation of a dangerous situation, it is not necessary that the offender be the sole and exclusive creator of every element that made the situation dangerous. In ***Evans*** it was found that it was sufficient that the person created or "contributed" to the creation of the life threatening situation[68].

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[62] JC Smith "*Liability for Omissions in the Criminal Law*" (1984) 4 Legal Studies 88 at 95.
[63] ***R v Taktak*** (1988) 14 NSWLR 226
[64] C Elliott and C de Than "*Prosecuting the Drug Dealer When a Drug User Dies: R v Kennedy (No 2)*" (2006) 69 MLR 986
[65] G Williams "*Gross Negligence Manslaughter and Duty of Care in "drugs" cases: R v Evans*" (2009) 9 Crim LR 631 at 638.
[66] ***R v Dalby*** [1982] 1 WLR 425 at 428.
[67] G Williams " *Gross negligence manslaughter and duty of care in "drugs" cases: R v Evans*" (2009) 9 Crim LR 631 at 639.
[68] ***R v Evans*** [2009] 1 WLR 1999 at 2007[31]

6. 46 In the drug supply cases, this raises the factual issue of what is required to "create or contribute to the creation" of the life threatening situation. It would appear that mere supply would not be sufficient. The duty is more narrowly confined. It arises only where the supplier remains with the recipient and becomes aware that the recipient has overdosed and is in danger.[69] In ***Evans***, involvement in the supply of the drug was held to be an essential element as to whether the duty arose[70] and "taken together"[71] with the other elements may give rise to a duty to act. The other elements were that the appellant remained at the premises with the victim throughout the process, had witnessed the obvious signs of overdose, appreciated that her condition was very serious and believed she was responsible for her half-sister's care after she had taken the heroin[72].

6. 47 In the present case, there was no familial relationship and clearly no belief on the appellant's behalf that she was responsible for the deceased's care, however, the fact that the appellant had supplied the drugs, provided the premises, and the apparatus for injection and most likely prepared the syringe for the deceased, elements not present in ***Evans***, when taken together with the fact that the appellant had remained with the deceased and was aware that he had overdosed and that the situation was dangerous were sufficient to establish contribution to the creation of the life threatening situation such that a duty of care to provide assistance arose.

6. 48 It does not appear that the appellant challenges the correctness of the decision in ***Evans***, rather, the appellant's submissions are concerned with the failure of the trial judge to adhere to the terms required by ***Evans***. The appellant submits that the jury were wrongly directed that the duty of care arose because the appellant had voluntarily assumed the risk of caring for the deceased (AWS at [33] – [34]) whereas in ***Evans*** it had been held that, usually, but perhaps not universally, the duty in such cases does not arise from the voluntary assumption of risk.[73]

6. 49 The crucial element in ***Evans*** was whether the accused was involved in the supply of the heroin. No duty arose without her involvement in that supply,[74] for the reason that the duty arose because of the creation, or contribution to the creation, of the life threatening situation not because the appellant had assumed the care of the deceased.

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[69] G Williams " *Gross Negligence Manslaughter and Duty of Care in "drugs" cases: R v Evans*" (2009) 9 Crim LR 631 at 639.
[70] ***R v Evans*** [2009] 1 WLR 1999 at 2009[35].
[71] ***R v Evans*** [2009] 1 WLR 1999 at 2009[35].
[72] ***R v Evans*** [2009] 1 WLR 1999 at 2003[12].
[73] ***R v Evans*** [2009] 1 WLR 1999 at 2009[36].
[74] ***R v Evans*** [2009] 1 WLR 1999 at 2009[35].

6. 50 It is true that the trial judge in the present case referred to the appellant as having voluntarily taken upon herself a duty of care towards the deceased (SU at 22.45,23.25) but that was not the basis on which the duty was put as it was obvious that this was not a case of voluntary assumption of care, quite the contrary, the appellant had refused any responsibility and insisted the deceased be expelled. That was the essence of the case against her.

6. 51 The written and oral directions were in terms that a duty of care arises in relation to the supply of drugs where the drugs are to be consumed on the premises "*and where such recipient may be or become seriously affected by drugs to the point where his or her life may be endangered, the drug supplier has a duty to conduct himself towards the drug recipient without being grossly or criminally neglectful.*" (SU at 11.35). The appellant submits that there is a further error in this direction in that the test in ***Evans*** was in terms of a situation that "*has become*" life threatening whereas his Honour's direction was in terms of a situation where the recipient's life "*may be*" endangered (AWS at [34]). The difference appears to be that in one formulation the duty of care arises in the face of actual danger whereas his Honour's formulation posed it in terms of potential danger. This grammatical nuance was of no significance in the context of the present case where the deceased's condition was so obviously serious that it was thought an ambulance was required. The trial judge explained to the jury that if the deceased's life was not endangered then the test would not be satisfied: "*Or if you take the view that, whatever happened, he was walking about, his life was not endangered and again the facts do not fit that formula.*" (SU 12.20).

6. 52 The appellant submits that the ***Evans*** test was in terms of a duty "*to act*" not in terms of an omission. (AWS at [33] – [34]). The ***Evans*** test was in terms of a duty "*to act by taking reasonable steps to save the other's life*" perhaps paraphrasable to be a duty to take reasonable steps, or in other words, to render assistance, which is indistinguishable from the direction in this case of a "*duty to conduct himself towards the drug recipient without being grossly or criminally neglectful*" (SU 11.40). This was a duty to render assistance in the situation which the appellant had created or contributed towards. The most obvious measure was to seek medical attention or call an ambulance[75] but there also were other simple measures that could have been taken such as to keep the deceased talking or active so as to prevent him lapsing into unconsciousness and his respiration

[75] In order to encourage suppliers and users to call for assistance the current protocol is that police do not routinely attend overdoses: P Williams & G Urbas "*Heroin Overdoses and Duty of Care*" Australian Institute of Criminology Trends and Issues in Crime and Criminal Justice No. 188 at p 2.

becoming further depressed. The evidence was that such measures prevented recipients from being "on the nod" (T151.25).

6. 53 These were the measures being applied by the appellant's husband until the appellant stopped him. This was not a case of mere failure to render assistance, it involved the appellant interceding to stop the assistance the deceased was receiving. The appellant's husband realised that the deceased needed care and tried to find out what else he had taken. Ms Malouf said he said: "Something like 'mate what have you taken'. He repeated it a few times" (T 141.30). He walked him round the room, and proposed calling an ambulance. He told the appellant that the deceased could not be left alone but the appellant insisted he be removed (T 142.22). The appellant said she did not want him in the unit in "that state" (T 117.8) or "like that" (T 142.21) and demanded that her husband make him leave. In ***Miller*** Lord Diplock spoke of active and passive conduct.[76] The appellant's behaviour in the present case went beyond passive conduct and certainly beyond mere omission.

6. 54 The appellant contends that even if a duty arose it was "negated" by the deceased's conduct in voluntarily engaging in the prohibited risk taking venture (AWS at [42]). It is said, on the basis of this Court's decision in ***Miller v Miller***, that it would be incongruous to hold that a duty of care arises where the drug supplier and recipient are voluntarily engaged in a dangerous and prohibited activity.

6. 55 While there may be incongruity for a party to a joint criminal enterprise to be required to compensate other parties for risks voluntarily and jointly undertaken in that enterprise, no such incongruity inheres in holding parties to an unlawful and dangerous enterprise criminally responsible for the consequences of that enterprise. Indeed, in the drug context where every aspect of the undertaking is prohibited, from the possession, supply, administration and self administration, it would be incongruous if the consequences of such unlawful conduct were not also punishable. The attempt to apply the defence of voluntary assumption of risk to criminal liability is also misconceived as the criminal law recognises no such defences to the infliction of serious physical injury or death.

6. 56 The appellant also submits that the imposition of a duty on the appellant to render assistance when the deceased's life was threatened compromised the deceased's personal autonomy (AWS at [44]). The deceased is said to have communicated his autonomous decision that an ambulance not be called and the appellant may have been liable for false imprisonment or perhaps battery had she tried to detain him until the ambulance arrived.

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[76] ***R v Miller*** [1983] 2 AC 161 at 175H.

6. 57 This submission, like many of the appellant's submissions, is based on the premise that the deceased was fully conscious and capable of making decisions about whether to stay or go and whether he needed treatment or care. Had it been the case that the deceased was responsive and up and walking independently as the appellant suggests, then, as the trial judge told the jury, the situation was not one where his life was endangered and a crucial requirement for the duty to arise would not have been satisfied (SU 12.20).

6. 58 The duty only arose if the jury accepted that the deceased's life was threatened which meant, on the facts of this case, that he was in an unconscious or semi-unconscious state such that an ambulance was required. The appellant's husband told the appellant that "*Oh well we can't just put him out*" and suggested that he would put the deceased outside and keep an eye on him (T142.20).

6. 59 The appellant relies on Ms Malouf's account but, as the Crown Prosecutor told the jury, Ms Malouf was a friend of the appellant and her version was clearly an attempt to minimise the culpability of all concerned, including herself (T 10/8/09 at 18.35). The recorded conversations showed that the appellant and the appellant's husband and Ms Malouf rehearsed the version they were to give to the police (T 10/8/09 at p 12 – 18). Ms Malouf was charged with concealing a serious offence and hindering the investigation (T 61.1, 99.15). Her version was inherently contradictory for it was evident that if the deceased was in no state to stay, as the appellant insisted, then he was in no condition to be put out.

6. 60 Even on Ms Malouf's version, the deceased left because he was told to leave. There was no question of detaining or battering him. Unknown to Ms Malouf, the appellant had supplied and helped administer methadone to him about 15 minutes earlier and was well aware that he was suffering the effects of that injection. The duty of care arose because the appellant contributed to the creation of the situation in which the deceased's condition had been reduced to such a level that he was only able to go about 15 metres to the back toilet where he died from the combination of drugs in his system.

Dated: 30 March 2012

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kidnapping referred to in section 86, shall be liable to imprisonment for fourteen years.

350 Punishment of accessories after the fact to other serious indictable offences

An accessory after the fact to any other serious indictable offence is liable to imprisonment for 5 years, except where otherwise specifically enacted.

351 Trial and punishment of abettors of minor indictable offences

Any person who aids, abets, counsels, or procures, the commission of a minor indictable offence, whether the same is an offence at Common Law or by any statute, may be proceeded against and convicted together with or before or after the conviction of the principal offender and may be indicted, convicted, and punished as a principal offender.

351A Recruiting persons to engage in criminal activity

(1) A person (not being a child) who recruits another person to carry out or assist in carrying out a criminal activity is guilty of an offence.

Maximum penalty: Imprisonment for 7 years.

(2) A person (not being a child) who recruits a child to carry out or assist in carrying out a criminal activity is guilty of an offence.

Maximum penalty: Imprisonment for 10 years.

(3) In this section:

child means a person under the age of 18 years.

criminal activity means conduct that constitutes a serious indictable offence.

recruit means counsel, procure, solicit, incite or induce.

351B Aiders and abettors punishable as principals

(1) Every person who aids, abets, counsels or procures the commission of any offence punishable on summary conviction may be proceeded against and convicted together with or before or after the conviction of the principal offender.

(2) On conviction any such person is liable to the penalty and punishment to which the person would have been liable had the person been the principal offender.

(3) This section applies to offences committed before or after the commencement of this section.

(4) This section applies to an indictable offence that is being dealt with summarily.