a "Slavery Czar" – to co-ordinate the administrative effort. And predictably, it proposes to "send a signal" by raising the maximum penalties (already high) for offences of people-trafficking and slavery so that in future they will carry imprisonment for life.

No less predictably, however, the Draft Bill ignores the Centre for Social Justice's suggestion that there should be a legislative provision "for ensuring that victims of human trafficking are not prosecuted for crimes they may have committed as a direct consequence of their trafficking situation". So in future this aspect of the matter will, as now, be regulated by the discretion to prosecute, reinforced by the power of the court to stay proceedings as an abuse of process.

This common law power to stay a prosecution as an abuse of process must surely be one of the most astonishing developments in the history of English criminal justice. Created fifty years ago, more or less accidentally, by a dictum from the House of Lords in *Connelly v DPP* [1964] A.C. 1254, it has grown into a virtually open-ended power in the courts to force a halt to any criminal proceedings which they feel to be fundamentally unfair. On the negative side, this creates uncertainty in the substantive law, and in criminal procedure, a new source of expense and delay. But on the positive side, it is – together with the discretion to prosecute and "jury equity" – an important instrument for ensuring that the over-sharp tooth of English criminal law is, where necessary, blunted.

That such devices lead to paradoxes goes without saying. One is the double-standard as to the impact of public international law which was mentioned at the beginning of this note. A bigger one is the resulting gulf between what the letter of English criminal law theoretically prescribes, and the way it operates in practice. When compared with the criminal codes of most of Continental Europe, English criminal law looks remarkably severe: both in the wide range of behaviour that it penalises, and in the narrow range of defences that it will accept. But in practice, happily, it usually contrives to be more or less humane.

J.R. SPENCER

CAUSATION AS FAULT

SECTION 3ZB of the Road Traffic Act 1988 makes it a crime if D "causes the death of another person by driving a motor vehicle on a road" should D, at the time of driving, be committing one or more predicate offences: driving without a licence, or without insurance, or while disqualified. The offence carries a maximum of two

years' imprisonment. No fault on the part of D seems necessary. The predicate offences are strict liability offences. D's connection to V's death is a causal connection and nothing more. The Court of Appeal had twice ruled that, for the purposes of section 3ZB, involvement in a fatal collision while unlawfully present on the road satisfies the causal requirement. In *Williams* [2010] EWCA Crim 2552, [2011] 1 W.L.R 588 (noted [2012] C.L.J. 290) D's driving was faultless and it was accepted that there was nothing he could do to avoid hitting V, who suddenly stepped out in within a few feet of D's car. In *Hughes* [2011] EWCA Crim 1508, D, driving carefully and within speed restrictions, rounded a right hand bend and was confronted by V's car travelling in the opposite direction and on the wrong side of the road: D had no chance of avoiding the collision. In both these cases it was accepted that in any civil action, no fault whatever would have attached to the defendants in respect of the deaths. Yet they were found to be causal agents within the terms of section 3ZB.

In *Hughes* [2013] UKSC 56, [2013] 1 W.L.R. 2461, the Court of Appeal's unnuanced approach to the causal requirement for this offence was found wanting by the Supreme Court. Unless reined in, that "causation without limits" approach could result in guilty verdicts that were not merely harsh but indefensible in terms of standard causation doctrine. To take an example given by the Supreme Court, suppose that D is travelling by hired car with his wife and children, and is stationary at a red light. V, in a suicidal frame of mind, furiously drives into D's car (as in *Brown* [2005] EWCA Crim 2868). D survives the collision, unlike V and D's wife and children. While waiting at the lights, D would still be driving on a road: *Planton v. Director of Public Prosecutions* [2001] EWHC Admin 450; [2002] R.T.R 107. He had reasonably assumed he was driving with insurance cover but, owing to a mistake, he was not insured. (The insurance company employee who assured him that his cover extended to car hire had got it wrong.) Applying the Court of Appeal's reasoning in *Williams* and *Hughes*, it seems that in law D is a killer of his wife and children.

A great virtue of the Supreme Court's decision in *Hughes* is that it took the prospect of such awful verdicts seriously and was determined to minimise their likelihood (at [9]; [16]). In doing so, the Court endorsed a number of propositions that are, or should be, uncontroversial. A welcome first step was the Court's insistence that a mere *sine qua non* relationship between D's driving on the road and V's death did not of itself constitute a legally effective cause of V death (at [23]). "*Causing* death by driving" is not the same thing as "being involved in a death *while* driving". Moreover, although Parliament could have enacted a wider offence satisfied by mere involvement, "a penal statute falls to be construed with a degree of strictness in

favour of the accused" (at [26]). Especially in light of the gravity of homicide convictions, dispensing with common-law causation requirements must be unambiguous (at [27]).

This implies that such common-law doctrines exist, even if they are partly context-dependent (at [20]). The Court also endorsed the rule in *Kennedy (No 2)* [2007] UKHL 38, [2008] A.C. 269 that D should not be held causally responsible for V's freely chosen, deliberate and informed act (at least, if not done in concert with D), but pointed out that, in *Hughes*, V did not deliberately choose to kill himself (at [21]–[22]). This rejection of the relevance of *Kennedy* may seem confusing, since in *Kennedy* V was not trying to kill himself; he was taking heroin to satisfy his cravings for that drug. The difference lies in a peculiarity of constructive manslaughter: V's taking of the drug was freely chosen in *Kennedy*, and it was not caused by Kennedy's unlawful act of supplying the heroin.

What else, then, does legally effective causation require? According to the Supreme Court, some element of D's driving must have contributed "in a more than minimal way" to the death (at [29]). In *Hughes*, such an element was said to be lacking: whereas D's presence on the road merely "created the opportunity for his car to be run into by [V], what brought about the latter's death was his own dangerous driving under the influence of drugs" (at [25]).

The requirement that some aspect of D's driving made a more than *de minimis* contribution to the death seems right. However the case was resolved in favour of the appellant on a more expansive ground: that causation in section 3ZB requires "at least some act or omission in the control of the car, which *involves some element of fault*, whether amounting to careless or inconsiderate driving or not, and which contributes in some more than minimal way to the death" (at [36], emphasis added). This interpretation is put forward as a "common sense" causal analysis rather than as a glossing of the terms of section 3ZB.

The Court reached this conclusion because, in its view, there was no middle ground available between the all-accommodating "causation without limits" approach of the Court of Appeal and the fault-based formulation quoted above. Their Lordships rejected the attempt by Sullivan and Simester to identify a middle ground involving fatalities caused without fault. Contrary to Simester and Sullivan, a driver who swerves the wrong way in an emergency involves "no principled difference" in criminal responsibility from one who is unable to swerve (at [30]), and that ascribing causation to a driver who skids on black ice "is to attach guilt to mere presence on the road" (at [31]). To draw fine distinctions between such cases, they say, "would be to make the law confusing and incoherent" (at [32]).

Confusing, perhaps. Incoherent, no. There seems no problem about saying that D's swerving to avoid one crash caused him to hit someone else, even if no blame attaches. The steering of D's car is a crucial part of the explanation why V died— it is not a mere *sine qua non*, a presence there to be hit ([17]). Similarly, if E drives onto black ice, his doing so causes the skid that results. The car's momentum, which E has generated by acceleration, makes a significant contribution to what follows. The point here is that some (but not all) ascriptions of causation are independent of foreseeability. When Brandon Lee died during filming of *The Crow*, after an error in preparing the prop gun, it was actor Michael Massee who pulled the trigger. Massee's doing so was a cause of Lee's death (albeit not the most important cause), notwithstanding his lack of fault. We can trace a direct forensic sequence between his behaviour and Lee's death. But if the Supreme Court is right, that possibility no longer exists and Massee's act was not a cause of death, because it involved no element of fault. That conclusion should be rejected. Causation overlaps, but should not be confused, with fault.

That said, the temptation is entirely understandable in the context of section 3ZB. Suppose that D, an average motorist, unaware through no fault of his own that he lacks insurance, drives onto black ice and is skidding towards a nearside tree. In the agony of the moment he brakes and attempts to swerve, causing his car to careen across the road, and to collide with V's car, killing V. It would be appropriate for D to feel responsible for V's death, a death caused in some part, a more than *de minimis* part, by his driving. Yet it would be Draconian to convict D of a homicide offence. Commendably, the Supreme Court would not countenance this degree of severity. Ideally the issue that should have been addressed directly in *Hughes* is the propriety, in constitutional and human rights terms, of convicting non-culpable persons of serious criminal offences. Yet very recently the Supreme Court has upheld strict liability for a very serious offence because the elements of the offence were clearly couched in strict terms: *Brown* [2013] UKSC 43. Section 3ZB imposes liability, in very clear terms, for a homicide offence on the basis of any one of three predicate offences of strict liability provided there is a causal nexus between D's driving and V's death. In *Hughes* itself the Supreme Court accepted that the duty of the Court when interpreting legislation "is faithfully to construe its meaning" (at [13]). Thus the issue of the legitimacy of strict liability as the basis of convictions for serious criminal offences could not be taken head on. It is perhaps unsurprising that the meaning of the phrase, "causes the death of another person by driving", was therefore cashed out in terms of fault.

A.P. Simester and G.R. Sullivan