

HOMICIDE: *NOVUS ACTUS INTERVENIENS*

WHEN is the undisclosed intention of the defendant, in supplying or making available to the victim a potentially harmful substance, relevant to whether its self-administration by the victim is free, voluntary and informed, so as to relieve the defendant of criminal responsibility in the event of the victim's death? In *Field* [2021] EWCA Crim 380, the Court of Appeal held that in the context of a charge of murder based in part on the supply of alcohol to the victim, the defendant's undisclosed intention to bring about the victim's death was sufficient to render his decision to drink the alcohol uninformed, such that it did not relieve the defendant of causal responsibility for his death. While the outcome of the case was entirely understandable on the evidence, an alternative analysis based on voluntariness and foreseeability may have provided a more principled route to verdict on this issue in the case.

Benjamin Field befriended and seduced his elderly victim, Peter Farquhar, and persuaded him to change his will. Over many months and years Field "gas-lighted" Mr. Farquhar, including by covertly drugging him so as to make it appear that he was suffering from some illness of the mind, such as dementia. Mr. Farquhar was found dead in his home. Initially the cause of death was given as "acute alcohol toxicity". However, suspicions were raised when Field sought to persuade another elderly person to change her will. Mr. Farquhar's body was exhumed and a second post-mortem was carried out revealing the presence of Dalmane, a drug prescribed for insomnia; the pathological evidence was that the combination of Dalmane and alcohol could have proved fatal. The prosecution placed substantial reliance on a note found in Field's personal journal, "Feed Dalmane and alcohol and less air". Based in part on that note, it was alleged that Field intentionally killed Peter Farquhar by doing one or more of the following acts: giving him drink and/or Dalmane, and/or suffocating him.

Of the possible causative acts alleged by the prosecution, the issue of an intervening act arose only in relation to self-administration of alcohol and/or Dalmane. In relation to the causative significance of self-administration, the judge directed the jury:

An act causes the death of another if it is more than a minimal cause of it. If it is proved that, with intent to kill, Ben Field, in person, gave Peter Farquhar drink then, even if Peter Farquhar agreed to drink it, *it would be open to you to conclude that the giving was a cause of death, unless Peter Farquhar's decision was informed in that he knew that the drink being offered to him was intended to cause his death.* [S]imply having left the bottle to tempt Peter Farquhar is not the prosecution's case, and it is not sufficient for proof of guilt on this count. (Emphasis added)

After conviction, it was argued on appeal that the judge should have left to the jury the question as to whether Mr. Farquhar's consumption of alcohol or drugs was voluntary and whether it "broke the chain of causation", relying on the principle laid down by the House of Lords in *Kennedy (No. 2)* [2007] UKHL 38 that it is not appropriate to find someone guilty of unlawful act manslaughter where that person had been involved in the supply of controlled drugs, which are then freely and voluntarily self-administered by a fully-informed and responsible adult, and the administration of the drug then causes death.

There was some merit in this submission. In relation to the judge's written directions, the inclusion of the words "*it would be open to you to conclude*" signified the issue being left to the jury, but did not set out the applicable evaluative test, except to say that it would not have been a cause of death if Mr. Farquhar knew the drink was being offered to him with the intention of causing his death – an unlikely inference. Perhaps unsurprisingly, and certainly indicative of a jury giving the matter careful consideration, the jury specifically requested "clarity" on that paragraph of the legal directions; a request met with reiteration of the written direction.

The Court of Appeal rejected that ground of appeal. It alighted upon a concession made by counsel for the appellant by way of an example apparently illustrating the potential significance of an undeclared intention: if an accused encouraged a weak swimmer to take to the water having promised to provide assistance if the swimmer encountered difficulties, but privately had no intention of doing so, the accused could be criminally liable for the victim's subsequent death by drowning. The Court of Appeal held that the example was highly pertinent in the present case:

the undisclosed murderous intention of the appellant . . . substantively changed the nature of the undertaking upon which PF embarked, in this particular case. . . . PF, therefore, would have believed that he was drinking 60% proof whisky in the company of someone who loved and would care for him, not someone who wished for his death. As a consequence, PF would not have had an informed appreciation of the truly perilous nature of what was occurring.

But was the undisclosed intention to kill the critical factor in this case? Arguably there is quite a distinction between the present case and the hypothetical case of the deceived swimmer: in that case an explicit, false promise to provide assistance in the event of difficulty meant the victim was deceived as to the risk involved in swimming. In the present case, the risk of death in consuming a large quantity of strong alcohol in combination with another sedative would have remained significant, regardless of the intent of the person providing the alcohol and even if done "in the company of someone who loved and would care for him". It was not a case involving any promise to provide assistance; moreover, it was not a case where

anyone's intention could by itself affect the known risks of drinking the substance in question.

Perhaps the more apposite question was to ask whether any self-administration by Mr. Farquhar was truly voluntary in view of the preceding course of conduct perpetrated by Field involving deceit, emotional manipulation and the covert administration of drugs. In *Wallace* [2018] 2 Cr. App. R. 22, the Court of Appeal held that the decision of the victim of an acid attack to seek "voluntary" euthanasia was not necessarily voluntary for the purposes of the *novus actus* principle: it was not an event independent of the defendant's conduct, nor "the product of the sort of free and unfettered volition presupposed by the *novus actus* rule", rather it was a direct response to the inflicted injuries and to the circumstances created by them for which the defendant was responsible. In that case, the Court of Appeal held that the issue of evaluating the significance of the victim's own acts should be left to the jury by reference to the concept of foreseeability: "(b) Are you sure that at the time of the acid attack it was reasonably foreseeable that the defendant would commit suicide as a result of his injuries?"

Either way, decisions such as *Wallace* and *Field* illustrate that in analysing the causative significance of an "intervening act" in cases involving an alleged intent to kill or cause really serious bodily harm the Court of Appeal is willing to explore the range of the evaluative concept of voluntariness and whether an act is free, deliberate and informed, in order to limit the exculpatory effect of the *novus actus* principle articulated by Lord Bingham in *Kennedy (No 2)*. (See also *obiter* in *Gnango* [2012] 1 A.C. 827, at [83]–[92] (Lord Clarke), cf. [130]–[132] (Lord Kerr)). To the extent that such an evaluation is an issue for the jury, the issue should be left to them in a way that facilitates the principled evaluation by the jury of the respective causative effects of the defendant's culpable acts on the one hand, and the acts of the victim or third party on the other.

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#### ILLEGALITY AND TORT IN THE SUPREME COURT

THE effect of illegality on claims in private law is an exceptionally knotty problem. In *Patel v Mirza* [2016] UKSC 42, an unjust enrichment claim, the Supreme Court (following the Law Commission's nudge) adopted a discretionary approach, balancing relevant public policy concerns to determine whether an illegality defence applied. Lord Toulson identified a "trio of considerations":