

## CHAPTER 3

### CONDUCT ELEMENTS

**3.1** The conduct elements of offences are mainly found in the sections of the Penal Codes creating particular offences. There are, however, some issues respecting conduct elements that are covered by general provisions of the Codes. This chapter examines these general provisions.

#### *Omissions*

**3.2** Provisions of the Penal Codes reflect common law principles respecting liability for omitting to prevent harm occurring. It is a general principle of criminal responsibility at common law that there is no liability for omitting to prevent harm occurring. Criminal liability at common law ordinarily requires some positive act. In *R v Coney* (1882) 8 QBD 534 at 557–8, it was said: ‘It is no criminal offence to stand by, a mere passive spectator of a crime, even of murder.’ The common law has not subscribed to any ‘good Samaritan’ principle that imposes a general duty to take positive action to prevent harm from occurring. Nevertheless, there can be specific statutory exceptions. For example, it is an offence called ‘neglect of felony’ to know that a felony is being planned or committed and to fail to try to prevent it: Penal Codes SI s 382; Ki/Tu s 375. Moreover, common law has recognised liability for harm resulting from breach of certain duties of care based on prior relationships or understandings between the parties or upon responsibility for the creation of a dangerous situation: see the discussion in *Burns v The Queen* [2012] HCA 35; (2012) 246 CLR 334, [22] and [97]. Such duties are also incorporated in the Penal Codes SI ss 210-214; Ki/Tu ss 203-207.

**3.3** The distinction between an act and an omission is usually clear-cut but can sometimes cause difficulty. There has been some debate about the proper classification of cases where life support systems have been terminated. In *Airedale National Health Service Trust v Bland* [1993] AC 789 at 866, [1993] 1 All ER 82 (HL), the House of Lords held that the conduct of a doctor who terminates a life support system should be characterised as an omission to maintain life. In contrast, it was said that the same conduct by an interloper would amount to an act of interference in the treatment.

**3.4** A breach of one of the specific duties of care can give rise to criminal liability for resulting harm. Offences that may be committed include murder, manslaughter, unlawfully causing grievous bodily harm and unlawfully wounding. In addition, there

is a separate offence of failing to provide necessities of life, in breach of a duty of care, where such breach endangers or is likely to endanger life, or causes or is likely to cause permanent injury to health, even if no harm actually occurs: SI s 232; Ki/Tu s 225.

**3.5** The categories of duty in the Codes largely reflect the categories of duty recognised at common law and in the legislation of many other jurisdictions. Each of them is based on a prior relationship or understanding with the person who needs assistance, or upon responsibility for the creation of a dangerous situation.

**3.6** The Codes impose a duty on everyone having charge of a helpless person (a person who is unable to withdraw from the charge and unable to provide their own necessities of life) to provide that person with the 'necessaries of life': SI s 210; Ki/Tu s 203. Necessaries of life are not defined but extend at least as far as medical aid, food, shelter and clothing, and protection from the infliction of harm by third parties: see *Macdonald and Macdonald* [1904] St R Qd 151 at 170; *R v Russell* [1933] VLR 59. The duty may be imposed by law or may be assumed by the person under a contract or through their conduct. The duty can be avoided by not taking charge in the first place. Once charge has been taken, however, there is potential liability if the duty is not fulfilled. The rationale is that when a person takes charge of a helpless other person, that other person may be deprived of the opportunity to obtain assistance elsewhere.

**3.7** SI s 211; Ki/Tu s 204 impose a duty to provide necessities for children under the age of 15 on 'heads of families' in charge of such children who are members of their household, regardless of whether the children are actually helpless.

**3.8** SI s 212; Ki/Tu s 205 impose a duty on employers ('master or mistress') who have contracted to provide necessary food, clothing or lodging for servants or apprentices under the age of 15 to fulfill the contract.

**3.9** SI s 213; Ki/Tu s 206 impose a duty, except in a case of necessity, to have reasonable skill and to use reasonable care upon persons undertaking to do acts which are or may be dangerous to life or health, including acts of surgical or medical treatment. Surgical treatment includes the advice to undergo surgery, the surgery itself and post-operative care: *Patel v The Queen* [2012] HCA 29; (2012) 247 CLR 531, [26], [158]. Although they are located in the provisions relating to omissions, SI s 213; Ki/Tu s 206 provide a foundation for criminal liability for certain negligent acts.

**3.10** SI s 214; Ki/Tu s 207 impose a duty upon persons in charge or control of dangerous things to use reasonable care and to take reasonable precautions to ensure

that they do not endanger life or health. Like SI s 213; Ki/Tu s 206, this provision establishes criminal liability for certain negligent acts, but it can also create criminal liability for omissions such as a failure to fence in dangerous machinery, materials or animals.

**3.11** At common law and in some statutory schemes, a person who undertakes to do any act is under a legal duty to carry out the undertaking if the omission to do so might be dangerous to life. This duty of care is not specified in the Penal Codes of Solomon Islands, Kiribati and Tuvalu. It is uncertain whether it would be implied as a matter of common law.

**3.12** In order for criminal liability to be imposed for an omission, there must be not only a specific duty to act but also a breach of that duty. A duty to act is not a duty to do everything conceivable in order to prevent harm occurring. The duty is to do whatever would be reasonable under the circumstances. In *R v Macdonald and Macdonald* [1904] St R Qd 151 at 170, it was said that the scope of a duty to act was to be assessed ‘not according to any exaggerated opinion of supersensitive or over-refined persons, but according to the plain commonsense ideas of ordinary English people’. Undoubtedly, a Pacific test would now refer to ordinary people of the relevant jurisdiction.

**3.13** In *Airedale National Health Service Trust v Bland* [1993] AC 789 at 863-5, [1993] 1 All ER 82, the House of Lords discussed the principles governing decisions by health providers to discontinue care and treatment. Lord Goff said that in cases where a patient is capable of expressing his or her wishes, the principle of self-determination should prevail over the principle of the sanctity of human life. In cases where the patient is not capable of expressing his or her wishes, the operative principle should be the principle of the patient’s best interests, taking into account medical opinion.

**3.14** In *Bland* itself, a declaration was issued that it would be lawful to discontinue care and treatment in a case of irreversibly severe brain damage where the patient was in a ‘persistent vegetative state’ and could not benefit from care. In such cases, *Bland* is authority supporting decisions to discontinue measures such as medication and artificial ventilation, and even hydration or nourishment. The decision did not, however, provide any guidance for handling less extreme cases.

**3.15** Some jurisdictions have enacted statutory schemes enabling individuals to direct that life-sustaining measures be withheld or withdrawn from them in the event that certain specified circumstances eventuate and they lose the capacity to express their own wishes. This has not yet occurred in Solomon Islands, Kiribati or Tuvalu.

## ***Causation***

**3.16** The conduct elements of offences can include causing a result, such as causing death in the offence of murder or causing bodily harm in the offence of assault causing bodily harm. Causation can create medical problems in cases where there is difficulty in identifying the operative cause of a death or injury. Causation can also create legal problems in cases where there are multiple causal factors and a chain of events leads to the result. To find that a person has committed an offence in this kind of case, the contribution of this person must be held to have caused the result despite the presence of other causal factors.

**3.17** It is well established as a matter of common law that there can be multiple causal factors in a result and that the causal responsibility can be attributed to a person whose contribution was neither the only nor the immediate factor. A leading English case is *Pagett* (1983), 76 Cr. App. R. 279 at 288 (CA). In that case, the court upheld a manslaughter conviction where the appellant had shot at armed police in a dark area, while using a girl as a shield, and the girl had been killed by shots fired by the police in self-defence instinctively and without taking particular aim.

**3.18** In handling cases of complex causation, a distinction is often drawn between issues of *causal connection* (or *factual causation*) and *causal responsibility* (or *legal causation*): see, for example, *Krakouer v State of Western Australia* (2006) 161 A Crim R 347; [2006] WASCA 81 at [21]–[23]. The question in relation to causal connection is whether the accused was connected with the death or injury in a way which is recognised by the law: certain kinds of causal factors are excluded from consideration. If this question is answered positively, the matter of causal responsibility still needs to be addressed. The question in relation to causal responsibility is whether the connection to the accused is sufficiently strong in light of any other contributing factors to justify attributing causal responsibility for the death to the accused. Certain principles and rules are used in determining when a person is causally responsible for a result despite not having been the immediate or sole cause of this result.

**3.19** Causal connection is usually established by applying the ‘but for’ test: see *Krakouer v State of Western Australia* (2006) 161 A Crim R 347; [2006] WASCA 81 at [21]–[23]. The question is asked: ‘Would the death have occurred but for (that is, without) the contribution of the accused?’ A negative answer establishes causal connection.

**3.20** It is immaterial that a deceased person would soon have died in any event. The Penal Codes SI s207(a); Ki/Tu s 200(d) state that a person is deemed to have caused a

death 'if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused the death'.

**3.21** There are some causal connections that the law does not recognise:

- Causal contributions to deaths which do not occur within a year and a day of the contribution are excluded under SI s 209; Ki/Tu s 202. The year-and-a-day rule is an old common law rule which has now been repealed in most jurisdictions but still operates in much of the Pacific region.
- Omissions are excluded in the absence of express provisions or breach of a duty to act: see the discussion above.
- Coincidental results of acts or omissions are excluded at common law, even though the acts or omissions exposed the victim to the coincidental harm. See, for example, *Bush v. Commonwealth* 78 Ky 268 (1880) (Ky CA), where the deceased had been hospitalised as a result of a wound and had contracted scarlet fever from a surgeon who was operating on him. The death was held to be due to a 'visitation of Providence' and not the act of the assailant.
- Deaths or injuries brought about through using an innocent agent, such as a postal officer who delivers a bomb, are usually considered to be caused not by the agent but by the manipulator of the agent. On the doctrine of innocent agency at common law, see *White v Ridley* (1978) 140 CLR 342.

**3.22** Causal responsibility in cases of complex causation is usually assessed through the 'substantial contribution' test: see, for example, *Swan v The Queen* [2020] HCA 11; *Krakouer v State of Western Australia* (2006) 161 A Crim R 347; [2006] WASCA 81 at [21]–[23]. The 'substantial contribution' test is retrospective. It looks backwards from a death or harm to ascertain whether, in light of all that happened, the contribution of the accused was a substantial one. The test is inherently vague and susceptible to differences in application.

**3.23** If a 'substantial contribution' is identified, the relative weight of other contributions is immaterial. *Swan v The Queen* [2020] HCA 11 provides an example of a complex chain of causation with multiple factors. The defendant had attacked the victim intending to cause grievous bodily harm; the victim had suffered severe injuries as a result of the attack and was in poor mental and physical condition; the victim later fell from his bed and suffered a fractured femur; it was decided not to undertake surgery at least in part because of the victim's low quality of life; the lack of surgery permitted fat emboli to be released into the blood stream and then the lungs, with the result that the victim died. On an appeal from a murder conviction, it was argued that there were five factors that influenced the decision not to operate. The High Court at [46] dismissed the argument in this way:

It was never suggested that the jury should, or could, have filleted the factors within the decision-making process to attempt to isolate the relative contribution of some or all of the five matters above upon which the appellant relied. Instead, on the undisputed direction given by the trial judge, it was sufficient that the effects of the assault substantially or significantly contributed to the decision which, in turn...prevented the surgery that was reasonably expected to save Mr Kormilets' life.

**3.24** The courts have sometimes referred to a special doctrine whereby a causal chain can be broken by a *novus actus interveniens*. A *novus actus interveniens* is a new act performed by someone else which relieves the original actor of causal responsibility. The term has often been used loosely, but the doctrine appears most useful in cases where two or more independent actors would each be causally responsible on general principles. The application of this doctrine results in the law choosing to assign responsibility to the later actor.

**3.25** In *Pagett* (1983) 76 Cr App R 279, 289, it was suggested by the English Court of Appeal that in order to constitute a *novus actus interveniens* the act would have to be 'free, deliberate and informed'. If this is right, inadvertently negligent conduct could never constitute a *novus actus interveniens*, no matter how wide the departure from the standard of reasonable conduct. It may be questioned whether this conclusion is correct as a matter of general principle. The causal chain from the first actor should surely be regarded as broken when there is gross negligence, to a degree sufficient for criminal responsibility, on the part of a subsequent actor. See, for example, *Thomas* [2002] QCA 23, where the Queensland Court of Appeal appeared to assume that negligent conduct could sometimes constitute a *novus actus interveniens*. The case involved an appeal from a manslaughter conviction by the owner of a vehicle who had been present as a passenger when a young unlicensed driver crashed the vehicle and died as a result. The basis for the conviction was that he had been criminally negligent in allowing her to drive the vehicle. Immediately prior to the crash, however, the steering wheel had been grabbed and pulled by another passenger. The Court quashed the conviction on the ground that the trial judge had not instructed the jury that it could conclude that the cause of the driver's death was the negligence of the other passenger. See also the special provision dealing with cases of death resulting from medical treatment in the Codes SI s 207(a); Ki/Tu s 200(a), discussed below at **3.26**.

**3.26** Some problems relating to causal responsibility in homicide cases can be resolved definitively by reference to the Codes SI s 207; Ki/Tu s 200. These sections provide that a person is deemed to have caused the death of another person in certain cases where their act was not the immediate or whole cause of the death:

- SI s 207(a); Ki/Tu s 200(a) provide that if one person inflicts bodily injury

upon another, but the victim dies directly from medical treatment rather than the injury, the original assailant causes the death. The quality of the treatment is said to be immaterial unless it was 'not employed in good faith' or 'was so employed without common knowledge or skill'. By implication in these latter instances, the doctor can be held to have caused the death.

- SI s 207(b); Ki/Tu s 200(b) make it immaterial that death from some injury might have been prevented by taking precautions to prevent the injury occurring, or by its care or treatment. The original assailant is deemed to have caused the death. Thus, in cases where doctors have omitted to provide proper treatment, the original assailant causes the resulting death as long as the injury itself provides the operative cause of death. It is immaterial that the doctors might otherwise meet the general criteria for causal responsibility. Moreover, a victim is under no duty to save their own life. See the case of *Blaue* [1975] 3 All ER 446, where a Jehovah's Witness who had been stabbed died after refusing a blood transfusion because of her religious convictions. Her assailant was held to have caused the death. The result would have been the same under SI s 207(b); Ki/Tu s 207 (b).
- SI s 207(c); Ki/Tu s 200(c) provide that one person is deemed to kill another if actual or threatened violence causes the other person to do something which results in her or his own death, if the victim's action 'in the circumstances would appear reasonable to the person whose death is so caused'. The main application of this provision is in cases where victims attempt to escape assailants by dangerous means such as jumping into rivers or from moving vehicles or from windows. See, for example, *Royall v R* [1991] HCA 27; (1991) 172 CLR 378.
- SI s 207(d); Ki/Tu s 200(d) provide that a person causes a death even where they hasten the death of a person suffering from a disease or injury that would eventually have caused death in any event. The death would not have occurred when it did but for the action taken. This would apply, for example, to cases of 'mercy-killing'.
- SI s 207(e); Ki/Tu s 200(e) provide that a person causes a death even though their act or omission would not have caused death without the contribution of an act or omission of the victim or another person. This would apply to a case where a victim died from the cumulative effect of injuries inflicted by two assailants.

**3.27** The rules in SI s 207; Ki/Tu s 200 only apply expressly to causing death. However, they reflect similar rules at common law which are likely to be applied in cases of causing injury.