

**ON APPEAL FROM THE COURT OF APPEAL
(CRIMINAL DIVISION)
[2026] EWCA Crim 413**

BETWEEN:

The King

-v-

Benjamin FIELD

Respondent

**WRITTEN CASE ON BEHALF
OF THE APPELLANT**

INTRODUCTION

1. The Respondent planned to kill the deceased, Peter Farquhar, for his money. Over a period of years the Respondent drugged him covertly; ‘gaslit’ him; manipulated him; and falsely and dishonestly pretended that theirs was a caring and loving relationship. He tried, and failed, to persuade the deceased to kill himself. On 25 October 2016, he implemented his next plan to bring about the death; and on the morning of 26 October 2016, Mr Farquhar was indeed found dead.
2. The jury had no doubt about the intention of the Respondent: their verdict unquestionably established that they were sure that he had carried out an act by which he intended to kill Mr Farquhar. It appears, moreover, that events leading to the death

must on any view of the evidence have unfolded much as the Respondent planned them. The essential issue in this appeal is whether the Respondent may so have orchestrated matters that Mr Farquhar brought about his own death without the Respondent being, in law, responsible for it.

THE GROUNDS OF APPEAL

3. This case has been considered by the Court of Appeal on three separate occasions. By a judgment dated 18 March 2021, under reference [2021] 1 WLR 3543; [2021] EWCA Crim 380, Fulford LJ, Whipple and Fordham JJ (‘the first Court of Appeal’) dismissed the Respondent’s appeal against conviction; they subsequently declined to certify that a point of law of general public importance was involved in their decision. By a judgment dated 16 March 2022, [2022] 1 WLR 3495; [2022] EWCA Crim 316, Dame Victoria Sharp P, Sir Nigel Davis and Sir Stephen Irwin (‘the second Court of Appeal’) refused an application to reopen the appeal under Crim PR 36.15. That decision principally concerned the circumstances in which the relevant jurisdiction will be exercised, rather than the intrinsic merits of any appeal. Finally, following a reference under section 9 of the Criminal Appeal Act 1995, the Vice President of the Court of Appeal (Criminal Division) (Edis LJ), Goose and Butcher JJ (‘the third Court of Appeal’) reached the opposite conclusion from the first Court of Appeal, allowed the Respondent’s appeal and granted the Crown leave to appeal to the Supreme Court.
4. In doing so, the third Court of Appeal certified, in accordance with section 33(2) of the Criminal Appeal Act 1968, that the following constitute points of law of public importance, and that the points are ones which ought to be considered by the Supreme Court:

“1. Were the directions given to the jury by the trial judge in this case right in law?”

2. Did either the first or third Court of Appeal err in their understanding and application of R v Kennedy (no 2) [2007] UKHL 38; [2008] 1 AC 269; and is any reconsideration of that decision required?”

5. For the reasons set out below, the Appellant invites the Court to answer the first question in the affirmative. The judge’s directions correctly recognised that in the factual circumstances of this particular case (including the intention to kill which, by the jury’s verdict, the Respondent had, and the financially motivated deception which,

by his plea, the Respondent admitted being engaged in), it was only if Mr Farquhar decided to go along with the Respondent's plan knowing full well what it was intended to do (that is, to kill him) that he would not be legally responsible for causing the death. Only in those circumstances would Mr Farquhar's decision making be sufficiently independent of the acts of the Respondent that his acts would be, in law, sufficiently free, deliberate and (especially) informed and responsible to remove the Respondent's legal responsibility. The Court is also invited to conclude that the first Court of Appeal was essentially right, and the third Court of Appeal essentially wrong, in their understanding and application of *Kennedy (no 2)* [2007] UKHL 38; [2008] 1 AC 269. No reconsideration of that decision is required, although as *Kennedy* itself emphasises, each case must be considered in its own specific factual context.

Tab A15 (p1666)

FACTUAL BACKGROUND

6. Some fifteen years ago, the Respondent, then a young man in his early twenties, met Peter Farquhar, a retired English teacher in his late sixties, through the University of Buckingham where the Respondent was studying and Peter Farquhar teaching. The Respondent set out cynically to seduce Mr Farquhar, even though he, the Respondent, was in fact heterosexual and had relationships with women during the relevant period (which relationships he concealed from Mr Farquhar); his motives were not romantic but exploitative. Having moved into Mr Farquhar's home in October 2013 and undertaken a "betrothal ceremony" with him in January 2014, the Respondent persuaded Mr Farquhar to change his will so that the Respondent had the contingent expectation of a large inheritance.
7. Meanwhile, the Respondent gave the impression that he was caring for Mr Farquhar while he appeared to be suffering from some undiagnosed illness. The truth was that the Respondent was causing the symptoms in question by drugging Mr Farquhar, covertly introducing prescription medication and hallucinogenic drugs in his food or drink. He also 'gaslit' him by secretly moving his possessions around or concealing them. These acts were not significantly disputed at trial, being evidenced in journal entries made by Mr Farquhar, which the prosecution was later able to match to notes made by the Respondent recording matters such as the drugs administered or the personal effects misplaced.

8. By these means and by what he said to others, the Respondent sought to convey the impression that Mr Farquhar was drinking to excess, suffering from dementia and/or developing suicidal ideation. His plan was that Mr Farquhar should appear to die as a result of alcoholism (although he was not, in fact, an alcoholic).
9. On 26 October 2015, Mr Farquhar was found dead at home by his cleaner. Initially, it was accepted that he had drunk himself to death and a cause of death of “acute alcohol toxicity” was entered on the death certificate. The Respondent then came into his inheritance under Mr Farquhar’s will.
10. Shortly before Mr Farquhar’s death, the Respondent commenced a relationship with Ann Moore-Martin, a woman then aged 83, who lived a very short distance away on the same street as Mr Farquhar had lived. He implemented a similar plan, subjecting her to ‘gaslighting’ and creating what purported to be messages to her from God, encouraging her likewise to leave her estate to him. There was some evidence that the Respondent encouraged Miss Moore-Martin to take her own life by committing suicide or alternatively that he conspired to kill her, although he was later acquitted on counts reflecting those allegations. He did, however, persuade her to change her will in his favour. The coincidental fact that she approached the same solicitor as had been used by Mr Farquhar led to a re-examination of the circumstances of the latter’s death, and ultimately to the Respondent’s arrest.
11. The Respondent was tried on an indictment containing a number of counts relating to Mr Farquhar, Miss Moore-Martin and others, but the present appeal concerns only his conviction for the murder of Mr Farquhar. It is, however, relevant to note that at the start of the trial, the Respondent pleaded guilty to an offence of fraud by false representation alleging that *“Between the 22nd day of April 2013 and the 27th day of October 2015, dishonestly and thereby intending to make a gain for [himself, he] made representations to Peter Farquhar which were and which [he] knew were or might be untrue or misleading, namely that Benjamin Field was in a genuine, caring relationship with Peter Farquhar”*. The gain alleged was the inheritance resulting from the change to the will. It follows that the dishonesty inherent in the relationship, and the intention of securing an inheritance, were undisputed facts at trial.
12. The Respondent was tried at the Crown Court at Oxford before Sweeney J and a jury and, on 9 August 2019, was convicted by the jury of the murder of Peter Farquhar,

having previously entered guilty pleas to four counts of fraud and two counts of burglary.

THE POSSIBLE MECHANISMS OF DEATH

13. There was evidence that the plan to kill Mr Farquhar was longstanding: one of the Respondent's own notes said: *"I moved in [that is, in 2013] so he could die [which took place in October 2015]."* The Respondent's apparent plan for the death is recorded in the Respondent's notebook: *"High percentage malt £. Suffocation only a mistake if either survival or evidence ensues. Feed 'Dalmane' and alcohol and less air."*
14. There are two possible mechanisms by which the death may have come about. As the judge rightly directed the jury:

"...you do not all have to be sure which of the alleged methods of killing was used by Ben Field, it is sufficient for a verdict of guilty that between you, you are all sure that it was one or the other."
15. The first possible mechanism is that the Respondent smothered Mr Farquhar with a pillow or similar item. The medical evidence neither proved nor disproved that possibility. The prosecution alleged that he had 'almost certainly' done this and the sentencing judge observed: *"I have no doubt that, if it was necessary, you then finished him off by suffocating him in a way that left no trace."* There can be no dispute that, if the Respondent smothered Mr Farquhar, he is guilty of murder; but there are issues arising from the possibility of suffocation in light of the approach taken by the third Court of Appeal to the judge's directions in relation to this issue.
16. The second possibility is that the cause of death was the combination of 'Dalmane' (the prescription sedative Flurazepam) and alcohol. These substances are more dangerous in combination than separately, and their combined action may so suppress breathing as to bring about death: if it does so, the death may be medically indistinguishable from smothering since in both cases death is the result of asphyxiation.
17. In the second case, it is possible that Dalmane was covertly administered (consistent with the many previous occasions when the Respondent had covertly administered drugs) or that the whisky which Mr Farquhar drank was 'spiked' to increase its strength. Again, the judge said in his sentencing remarks that he considered that the Respondent had administered the Dalmane covertly. There are, moreover, references to 'chocolate Dalmane' in the Respondent's planning notes, suggesting a means of covert

administration, in addition to the plan to ‘feed Dalmane’ which does not connote a coincidental and independent decision by the deceased to take it. If any substance was covertly administered or the deceased was misled as to the nature of the substance ingested, there can again be no dispute that the Respondent is guilty of murder.

18. The residual possibility is that, by giving Mr Farquhar whisky and/or Dalmane, the Respondent brought about his death without the use of any force and without any deception as to what it was that Mr Farquhar was consuming. Subject to the parts of the decision of the third Court of Appeal which address the possibility of smothering, the decisions of the Court of Appeal, and the certified question, are all concerned with the legal consequences of this residual possibility.
19. In considering the overall safety of the conviction, the Court is invited to bear in mind the relative implausibility of this residual possibility. It requires that Mr Farquhar decided or agreed, either shortly before, during or after spending the evening drinking high-strength whisky, to take a drug that had been prescribed to help him sleep. Although he had a prescription for it, Mr Farquhar took Dalmane only as needed, and there was no particular reason for him to take it that evening. This possibility also implies that the Respondent, who as the jury found intended to kill Mr Farquhar that night, did not use covert means to administer Flurazepam, notwithstanding that he had drugged Mr Farquhar covertly many times previously and that to do so would have been consistent with his recorded plan. While it is acknowledged that the possibility that Mr Farquhar was aware of ingesting the substances that caused his death was one of the possibilities left to the jury for their consideration, that is only one – and it is submitted the least likely – of the ways in which the murder may have been committed. While the Crown recognises that it is a possibility that cannot be wholly disregarded, the ultimate question for the Court, notwithstanding the certified questions, is whether the conviction is safe, and that is part of the background when assessing how likely it is that the jury were drawn into error by the directions.

THE JUDGE’S RULINGS AND DIRECTIONS

20. It is important to note at the outset that the judge directed the jury very clearly that they needed to be sure that Ben Field did an act, with the intention of killing Mr Farquhar, which caused his death.

21. While it is right to consider the judge's directions as a whole, it is equally important not to lose sight of the core direction:

"Murder is committed if, unlawfully and with intent to kill, a person does an act which causes the death of another... An act causes the death of another if it is a more than minimal cause of it."

22. At least insofar as it goes that direction is unassailable. On the basis that the doctrine of *novus actus* is largely descriptive of, rather than a qualification to, a common sense notion of causality, it is worth bearing in mind the question whether more than that was ever strictly required in this case.

23. The wider context in which it appeared is as follows (emphasis in original):

"Ben Field is alleged to have carried out the murder of Peter Farquhar, in accordance with the plan that he should 'die an alcoholic's death', by being present in person and physically giving him alcohol and/or Dalmane, and/or by smothering him

"It is for the prosecution to prove its case as thus advanced. I mention that simply having left the bottle to tempt Peter Farquhar to drink the whisky is not the prosecution case, and is not sufficient for proof on this count.

[...]

"Murder is committed if, unlawfully and with intent to kill, a person does an act which causes the death of another..."

"An act causes the death of another if it is a more than 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 death was informed in that he knew the drink being offered to him was intended to cause death.

"I repeat, simply having left the bottle to tempt Peter Farquhar is not the prosecution's case, and is not sufficient for proof on this count. Rather, the prosecution must make you sure of the case they have advanced.

"That said, you do not all have to be sure which of the alleged methods of killing was used by Ben Field, it is sufficient for a verdict of guilty that between you you are all sure that it was one or the other."

24. The judge then provided the following 'ultimate questions' (that is, the jury's route to verdict) on that count:

“1. Have the prosecution made you all sure that Ben Field intended to kill Peter Farquhar? If you all answer yes, go to question 2. If you all answer no – verdict Not Guilty.

2. Have the prosecution made you all sure that with that intent, Ben Field did one or more of the acts alleged by the prosecution (i.e. in person, giving Peter Farquhar drink and/or Dalmane and/or suffocating him), which was or were a more than minimal cause of Peter Farquhar’s death? If you all answer yes, verdict Guilty. If you all answer no – verdict Not Guilty.” (emphasis added)

25. After retiring to consider their verdicts, the jury asked the following question:

“Could we have clarity on the 4th paragraph on p 22 of your legal directions, especially regarding the implications if [the Respondent] and Peter were drinking together on 25 October 2015?”

26. The judge responded to this as follows:

“In order to answer your question, I am firstly going to remind you what the definition of murder is, because that is going to underlie my answer. And it begins at the bottom of page 21. “Murder is committed if, unlawfully and with intent to kill, a person does an act which causes the death of another....

...And “an act causes the death of another, if it is more than a minimal cause of it.” I am going to stop there insofar as that paragraph is concerned. It is then, important to remember what the cases on either side are insofar as the actual murder itself is concerned. In which event, we need to go back to page 20, at the bottom. The prosecution case, Ben Field is alleged to have carried out the murder of Peter Farquhar in accordance with the plan that he should die an alcoholic’s death by being present in person and physically giving him alcohol and/or Dalmane and/or by smothering him. It is for the prosecution to prove its case as thus advanced. I emphasise that simply having left the bottle to tempt Peter Farquhar to drink the whisky is not the prosecution case and is not sufficient for proof of guilt on this count....

...If we then go on to the ultimate questions that I have posed for your consideration in Ben Field’s case on murder. Against the background that he denies an intention to kill, the first question addresses that issue.

Have the prosecution made us all sure that Ben Field intended to kill Peter Farquhar? If you all answer yes, go to question 2. If you all answer no, the verdict is not guilty... If, however, you have all answered yes, i.e. you are sure that he did intend to kill Peter Farquhar, it is then and only then, that you go on to question 2, which is have the prosecution made us sure that with that intent, Ben Field did one or more of the acts alleged by the prosecution, i.e. in person, gave Peter Farquhar drink and/or Dalmane and/or suffocating him. In other

words, he has to have had the intention to kill when doing one or more of those alleged acts. And then the critical words, “which was or were a more than minimal cause of Peter Farquhar’s death.”

So if we then go back to the paragraph about which, your question has been asked. 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, that is the decision to drink, was informed in that he knew that the drink being offered to him was intended, by Ben Field, to cause his death. Why the difference between the two? In the first part of the sentence, 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 to drink was informed, in that he knew that the drink being offered to him was intended to cause his death.

The difference is because it is not the prosecution – the prosecution do not put its case in that way and they must prove their case. And the reason why they do not put their case in that way is that if Peter Farquhar’s decision to drink was in the knowledge that the drink was being offered to him with the intention of causing his death, then his decision in that knowledge, to drink, would in law, be the only cause of his death. It would not be the responsibility of Ben Field.

On the other hand – and here, we have the prosecution case, that they were together and that Peter Farquhar most certainly did not know that he was being offered drink with the intention of killing him by his consumption of it, that in those circumstances, even if he agreed to drink - not knowing that it was intended by Ben Field that it was to kill him - it would be open to you to conclude that the giving was a cause of death. And it is open to you so to conclude because then, it is a matter of fact. And you and you alone are the judges of fact and therefore, it would be open to you to conclude, if you thought it right, that in those circumstances, that the – notwithstanding the agreement to drink, that the giving of the drink or the drug was more than a minimal cause of death.

Can I try and put it also in another way, to make it even simpler? If, at the end of the day, it was or might have been that even though they were together and even though Ben Field was intending to kill Peter Farquhar, that Peter Farquhar drank in the knowledge that Ben Field was giving him the drink, he,¹ Ben Field intending to kill Peter Farquhar - then it would not be right to convict Ben Field. If it was or might have been that, then the prosecution would have failed to prove their case, which was that he was given alcohol with that

¹ This sentence has been repunctuated to reflect the way in which the third Court of Appeal indicated that they understood the transcript of the direction.

intention and most certainly, without the knowledge that Ben Field was intending to kill him thereby. Now, is that clear? I see nods. Thank you.”

27. These directions followed legal submissions on the appropriate way in which to leave the case to the jury. In particular, the Respondent had sought a direction that the jury needed to be “*sure that [Peter Farquhar] had been forced or deceived by [Ben Field] into [consuming the drugs or alcohol] to the extent that he had been deprived of his capacity to exercise free will, so that his decision to consume the alcohol and/or drugs could not be regarded as a voluntary act by him and an exercise of his free will... you should distinguish between manipulating a person’s free will and depriving them of their capacity to exercise free will*”.
28. The learned judge rejected that submission, and specifically rejected a submission that the jury should be directed that deceit as to intention was not a permissible basis on which to leave the count of murder to the jury. He did not give his reasons for doing so at the time, but in a later written ruling dated 30 August 2019 he held that the jury directions as given were both in accordance with law and simpler for the jury to follow. For the reasons set out below, the Appellant respectfully agrees.

LEGAL FRAMEWORK

29. Causation in murder under the law of England and Wales is, and has always been, a question governed by common law.
30. The principle affirmed in *R v Kennedy (no 2)* may be understood by considering the certified question, and the answer given to it, in that particular case:

“When is it appropriate to find someone guilty of manslaughter where that person has been involved in the supply of a class A controlled drug, which is then freely and voluntarily self-administered by the person to whom it was supplied, and the administration of the drug then causes his death?” – see [2];

Answer – “In the case of a fully informed and responsible adult, never.” – see [25].

31. The answer to the certified question is specific to the controlled drug context, and in addressing the specific topic of unlawful act manslaughter arising from drug supply, the opinion of the Committee rests on two main legal propositions: that “*the act of supplying, without more, could not harm the deceased in any physical way, let alone*

cause his death” (see [7]); and that handing a ‘noxious thing’ such as a syringe of heroin to a drug user did not in law amount to administering it to him (see [19]).

32. Over and above these conclusions specific to the heroin use which formed the factual framework within which the court was considering the issues, the judgment reflects the wider and well established principle – which was not actually in issue before the House of Lords in the *Kennedy* case – that the free, voluntary, fully informed act of a responsible adult breaks the ‘chain of causation’ and relieves a prior actor of any responsibility for the consequences.
33. The judgment of Lord Bingham of Cornhill, giving the opinion of the Committee in *Kennedy (no 2)*, bases the exposition of the doctrine of intervening causes – which, as he said, was “*fundamental and not controversial*” ([14]) – on two seminal pieces of academic writing dealing with causation and, in particular, the circumstances in which a subsequent action extinguishes a prior actor’s causal responsibility: dealing, that is, with the doctrine often referred to under the label ‘*novus actus interveniens*’. Both are referenced in Lord Bingham’s central statement of this principle at [14]:

“The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also of deception and mistake. But, generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act, and none of the exceptions is relied on as possibly applicable in this case. Thus D is not to be treated as causing V to act in a certain way if V makes a voluntary and informed decision to act in that way rather than another. There are many classic statements to this effect. In his article “Finis for Novus Actus?” [1989] CLJ 391, 392, Professor Glanville Williams wrote:

“I may suggest reasons to you for doing something; I may urge you to do it, tell you it will pay you to do it, tell you it is your duty to do it. My efforts may perhaps make it very much more likely that you will do it. But they do not cause you to do it, in the sense in which one causes a kettle of water to boil by putting it on the stove. Your volitional act is regarded (within the doctrine of responsibility) as setting a new ‘chain of causation’ going, irrespective of what has happened before.”

In chapter XII of Causation in the Law, 2nd ed (1985), p 326, Hart & Honoré wrote:

“The free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.”

This statement was cited by the House with approval in R v Latif [1996] 1 WLR 104, 115. The principle is fundamental and not controversial.”

34. As reflected in the final observation, *Kennedy (no 2)* did not establish any new legal principles, although it clarified how the law applied to the specific context of overdoses following an unlawful supply of controlled drugs and analysed the meaning of the term ‘administer’.

35. In *Finis for Novus Actus*,² Glanville Williams made three observations which are of great assistance in understanding the reasoning in *Kennedy (no 2)* and the scope of the principle with which it is concerned.

36. First, he places the doctrine firmly on a moral footing. At p 392 he observes:

“...the doctrine is supported because it accords with our ideas of moral responsibility and just punishment, and serves social objectives... an intervening act is thought to break the moral connection that would otherwise have been perceived between the defendant's acts and the forbidden consequence.”

37. This is an important touchstone. The question whether a matter is, in law, causative, and in particular whether an intervening act breaks the chain of causation, is not a question to be answered mechanistically, but is to be understood as reflecting the existence or otherwise of a ‘moral connection’. The doctrine of *novus actus* exists to provide the legal and philosophical explanatory underpinning for situations in which the consequence is one for which the defendant should bear responsibility. To put this another way, if the result of applying principles of causation is that a defendant appears morally but not legally culpable in relation to the consequences of his actions, that may tend to suggest that the principles in question have been misinterpreted or misapplied.

38. It bears emphasising that the concept of a ‘moral connection’ does not refer to the simple blameworthiness of an action. An act may be morally objectionable in and of itself (as was the supply of drugs by the defendant *Kennedy*) without having any ‘moral connection’ to a subsequent death (which *Kennedy*’s supply did not). However,

² [1989] Cambridge Law Journal, 48(3), November 1989, pp 391-416

Bosque, to whom Kennedy supplied the drug) was in the context of that case fully responsible for the act of self-injection.

39. Second, Glanville Williams expressly notes:

*“The doctrine is unlikely to apply if the defendant from the beginning intended the result that occurs; but occasionally it can.”*³

Tab A28 (p1956)

40. The Appellant respectfully submits that that is correct. It is a reflection of the first principle. If a defendant acts with the intention of causing a result, it is rare that there is no ‘moral connection’ between his action and that result. Thus, in the example of *Michael*,⁴ the defendant with murderous intent provided a bottle of laudanum and instructed a foster-mother to administer it to her child. The bottle was seized by her son aged about 5 and administered to the infant all at once. She was convicted, and (says Glanville Williams) *“rightly so, because she achieved the criminal result she wanted”*.⁵

Tab A1 (p1536)

Tab A28 (p1961)

41. Third, which likewise follows from the first two points, it is clear that questions of causation are highly context-sensitive. That is a point which Lord Bingham also made in *Kennedy (no 2)* at [15]:

“Questions of causation frequently arise in many areas of the law, but causation is not a single, unvarying concept to be mechanically applied without regard to the context in which the question arises.”

42. He also applied that principle, declining to cast any doubt on the correctness of the different approach taken by the House of Lords in *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* [1999] 2 AC 22 by saying (at [16]) that the reasoning in *Empress Car* *“cannot be applied to the wholly different context of causing a noxious thing to be administered”*.

Tab A13 (p1638)

43. This principle was echoed in *R v Hughes* [2013] UKSC 56; [2014] 1 WLR 2461. Lord Hughes and Lord Toulson, giving the judgment of the Supreme Court, said:

Tab A17 (p1714)

³ The example given of the doctrine applying is: *“If D murderously attacks a victim and leaves him for dead, when in fact he is not dead or even fatally injured, and if X then comes along and, acting quite independently from D, despatches the victim, the killing would be X’s act, not D’s, and D would be completely innocent of it. It makes no difference that X’s act reduced the victim to a condition of helplessness so that he could not defend himself against D.”* It is noted that Professor Williams appears to have exchanged the roles of X and D in the final sentence of this example. It is submitted that the words “acting quite independently” are crucial in the context of the present case.

⁴ (1840) 9 C & P 356, 173 ER, 2 Mood CC 120, 169 ER 48; see p 401

⁵ That was a case of innocent agency, given the age of the son. It is worthwhile to consider, however, whether Mr Farquhar would have been regarded in law as an innocent agent, had he been encouraged by the Respondent to give the alcohol to a third party rather than to take it himself, not knowing of the intention to kill the third party.

“... It is trite law, and was common ground before us, that the meaning of causation is heavily context-specific and that Parliament (or in some cases the courts) may apply different legal rules of causation in different situations. Accordingly, it is not always safe to suppose that there is a settled or ‘stable’ concept of causation which can be applied in every case.”

44. The context in which the question of causation arose in *Kennedy (no 2)* was in fact comparatively straightforward. The drugs were supplied at the instigation of the deceased himself and the plan to take them was his own plan from the outset. He was clearly to be regarded as a ‘responsible adult’ – that is, responsible for the decision being made – and was, in fact, the prime mover.

45. The relatively straightforward circumstances of *Kennedy (no 2)* must not be allowed to obscure, however, the fact that the mere existence of some element of choice available to the second actor may not be sufficient to absolve the first of causal responsibility.

46. In *R v Wallace* [2018] 2 Cr App R 22; [2018] EWCA Crim 690,⁶ a case of murder, the Court of Appeal considered whether injuries which had led to such unbearable suffering that the victim had travelled to a country where he successfully sought euthanasia were nevertheless a cause of death. The question was whether by obtaining euthanasia, the victim had brought about a break in the chain of causation. Overturning a terminatory ruling withdrawing this issue from the jury, the Court of Appeal (Sharp LJ; Carr J; Spencer J) found that it was open to a jury, properly directed, to convict. Considering the impact of the victim’s decision, the Court stated (at [60]-[61]):

“The intervening acts of [V] and the doctors were not, on these facts, random extraneous events, or acts unconnected with the fault element of the defendant’s conduct. They were very closely, indeed inextricably, bound up with it. Equally, the injuries and their sequelae were not a random result of the defendant’s conduct: on the evidence of [V], the defendant planned to inflict permanent and horrific injuries on him and succeeded (“If I can’t have you, no-one else will”).

Looked at in this way, [V’s] death, his request to the doctors, and the act of euthanasia itself carried out in accordance with his wishes, were not discrete acts or events independent of the defendant’s conduct, nor were they voluntary, if by this is meant they were the product of the sort of free and unfettered volition presupposed by the novus actus rule. Instead they were a direct response to the inflicted injuries and to the circumstances created by them for which the defendant was responsible. If the question is then asked whether, on a common

⁶ CACD1-436

sense view, the defendant's conduct merely set the stage for [V's] death, or was instrumental in bringing it about, we consider the jury could properly answer that question in the prosecution's favour."

47. In that case, the moral connection between the act and the result was not severed, either by V's decision to seek euthanasia or by the doctors' decision to provide it. It is clear that in different factual circumstances it might have been: if, for example, V had sought euthanasia because of some separate psychiatric trauma unrelated to the injuries, the causal connection would not exist.

48. The reference to the fact that the defendant had planned to inflict injuries and succeeded in doing so is important in the context of the present case. So too is the reference to the level of connection between the acts of the doctors and the fault element of the defendant's conduct ("*random extraneous events*" or acts "*very closely, indeed inextricably, bound up with it*".) The same emphasis on assessing the closeness of the connection between the two acts appears in *R v Pagett* (1983) 76 Cr App R 279, the case of an accused convicted of the manslaughter of a girl after he had opened fire on the police, who were attempting to arrest him. He used her body to protect himself from any retaliation by the officers. She was killed when the police opened fire. Robert Goff LJ explained the position in the following way, at 288:

"...where, although an act of the accused constitutes a causa sine qua non of (or necessary condition for) the death of the victim, nevertheless the intervention of a third person may be regarded as the sole cause of the victim's death, thereby relieving the accused of criminal responsibility. Such an intervention, if it has such an effect, has often been described by lawyers as a novus actus interveniens. We are aware that this time-honoured Latin term has been the subject of criticism. We are also aware that attempts have been made to translate it into English; though no simple translation has proved satisfactory, really because the Latin term has become a term of art which conveys to lawyers the crucial feature that there has not merely been an intervening act of another person, but that that act was so independent of the act of the accused that it should be regarded in law as the cause of the victim's death, to the exclusion of the act of the accused."

49. In similar vein, Hart and Honoré refer, at p 364, to the exercise of authority, saying that it would be homicide "*to order an inferior to do a specifically dangerous act, in the absence of justification, which results in the inferior's or another's death*". Likewise, it would be homicide "*for a husband to hit his wife and tell her to jump in the river, knowing she cannot swim, so that when she does as he says she drowns*". The latter

Tab A6 (p1574)

Tab A27 (p1926)

Tab A23 (p1813)

example is drawn from the case of *State v Myers* 7 NJ 465 (1951), in which the Supreme Court of New Jersey did not accept that the wife's compliance with the husband's instruction was capable of negating causation, saying at 479-80: "*It smacks rather of a preconceived scheme to bring about her death in a manner which would still give him an opportunity to deny full responsibility if he could find a jury gullible enough to agree with him.*"

50. In each of these cases, there was an element of decision making by subsequent actors. The victim in *Wallace* could have decided not to seek euthanasia, or the doctors could have decided not to provide it. The police in *Pagett* could have chosen not to return fire, and must be taken to have appreciated the risk that if they did so, the bullet would find the wrong target. The woman in *Myers* could have decided not to jump in the river, leaving it to her husband to put her in by force or not. In each case, however, the law regarded the level of autonomy involved as insufficient – rightly, it is submitted. Their acts were not so independent of the original actor as to make the police, or the doctors, or the wife, responsible for the consequences to the exclusion of the original actor. In relation to Lord Bingham's formulation in *Kennedy*, it might be said of each act that it was not sufficiently 'free' or 'voluntary', or simply that it was not the decision of a 'responsible' adult – responsible, that is, for the consequences.

51. Edis LJ referred, in the judgment of the third Court of Appeal at [62], to allegations of homicide by causing death where the death was the result of suicide following a lengthy period of domestic abuse. There are at present no appeal decisions to consider on this subject, although the Law Commission has recently issued a consultation which addresses the issue and which analyses the position by reference to *Wallace*.⁷ The viability of such prosecutions appears likely to be substantially influenced by this Court's approach to the *Wallace* decision, which the Appellant submits was correctly decided; although it is noted that in *Causing Euthanasia* (2019) 22 LQR 135, Professors Simester and Sullivan suggest that a domestic abuser may cause a victim's suicide even if, as they consider, *Wallace* itself is wrongly decided.

Tab A39 (p2088)

Tab A30 (p1989)

52. Finally, it is right to note that the decision in *Kennedy (no 2)* has not been universally accepted in the common law world. In *MacAngus v HM Advocate* [2009] HCJAC 8, Lord Justice General Hamilton, Lords Osborne, Nimmo Smith, Kingarth and Mackay

Tab A25 (p1839)

⁷ Homicide Offences: Law Commission Consultation Paper no 277, 17 June 2026, Chapter 14

of Drumadoon considered the position in Scotland. In declining to follow *Kennedy* (no 2) in concluding that a deliberate decision by a drug user to ingest a drug would not necessarily break the chain of causation when considering the culpability of the supplier, the Court noted that the *Kennedy* approach had been followed in Ontario, Canada, but that a looser approach appeared to exist in various states of the United States of America (usually in the context of a criminal code) and in South Africa (see [46]). They considered that in declining to give such a definitive answer as had Lord Bingham, they were taking a more pragmatic approach, citing at [47] *Blaikie v British Transport Commission* at p 49 (p 191):

Tab A24 (p1828)

“The law has always had to come to some kind of compromise with the doctrine of causation. The problem is a practical rather than an intellectual one. It is easy and usual to be bedevil it with subtleties, but the attitude of the law is that expediency and good sense dictate that for practical purposes a line has to be drawn somewhere, and that, in drawing it, the Court is to be guided by the practical experience of the reasonable man rather than by the theoretical speculations of the philosopher.”

53. While the Appellant does not invite the Supreme Court to overturn *Kennedy*, the fact that it is not universally followed is significant in this sense: it indicates that by adopting the *Kennedy* approach, the law of England and Wales has formulated a more nuanced approach to causation than other legal systems.

THE JUDGMENT OF THE FIRST COURT OF APPEAL

54. The Respondent appealed on the basis that the learned judge’s directions were wrong in law. As noted above, the Respondent’s first appeal was heard by Fulford LJ, Whipple and Fordham JJ ([2021] WLR 3543), who dismissed the appeal.
55. The starting point for the first Court of Appeal’s analysis is that Mr Farquhar was not aware of the Respondent’s murderous intention. That much is indisputable, since it is a necessary corollary of the jury’s verdict: they had been very clearly directed that if he was or might have been aware, they must acquit.⁸
56. The remaining question was therefore whether it was right in law that the information which the deceased did not have was information sufficiently relevant that a person

⁸ See paragraph 23 above.

without it was necessarily “uninformed”, and whose actions could not, therefore, break the chain of causation. The Court of Appeal ruled that it was. At [60], they said:

“The undisclosed murderous intention of the defendant, in our judgment, substantively changed the nature of the undertaking upon which PF embarked, in this particular case... PF... 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. Being provided with the whisky, he was being encouraged by the [defendant] to consume a significant quantity of a powerful alcoholic drink, which inevitably would have started to impair his judgment, most particularly as it interacted with the Dalmane. Engaging in this activity was not, as a consequence, the result of a free, voluntary and informed decision by PF. To the contrary, he was being deliberately led into a dangerous situation, as with the weak swimmer, by someone who pretended to be concerned about his safety: As was undisputed on the evidence in the case, the defendant posed as his lover and partner - someone who PF would undoubtedly have assumed would be solicitous of his wellbeing - whereas, in reality, the defendant simply desired PF’s demise. The defendant, therefore, manipulated and encouraged PF into a position of grave danger, given the combination of the sedative effects of the substances risked decreasing the levels of the victim’s consciousness, thereby fatally impairing his airway. The defendant’s undisclosed homicidal purpose, in these circumstances, changed the nature of the act: PF was to a material extent unwittingly lured into a perilous drunken and drugged position by someone who feigned to be his loving partner. Once the effects of the substances started to affect PF’s judgment and as he succumbed, the defendant would have been a mere bystander, or worse. He certainly would not have sought medical assistance, given he admitted he wanted to increase the risk of PF dying.”

57. The reference to a ‘weak’ swimmer is to an analogy originally posited in the Respondent’s submissions. At [49], the Court had explained:

“It is accepted by [counsel for the Respondent] that a defendant’s intention can, in certain circumstances, be relevant to the risk attaching to a course of action. He gave this example. If an accused, for instance, 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 and did not do so, the accused could be criminally liable for the victim’s death by drowning in these circumstances. The victim had volunteered to swim on the false assurance of rescue if the need arose. The victim’s uninformed state as to the defendant’s actual intention would have changed the nature of the act embarked upon and rendered it more dangerous.”

58. Thus the Court of Appeal concluded, at [59]:

“The concession made by [counsel for the Respondent] in relation to the weak swimmer is both correct in our view and important. As he accepts, the victim’s uninformed state of mind in this example as to the accused’s real intention would have changed the nature of the undertaking on which the victim embarked, by rendering it more dangerous. The false friend was potentially liable to a conviction for homicide on account of his or her undisclosed intention that the victim should die by not providing assistance in the event of difficulty. This is highly pertinent in the present case. [Counsel for the Respondent]’s concession also recognises that whether the victim’s ignorance of the accused’s real intention does relevantly change the nature of the undertaking on which the victim embarks, as in his example, will depend on the specific nature of the individual case. The concession acknowledges, moreover, the appropriateness of the trial judge addressing the nature of the individual case in deciding how to direct the jury. It follows that in situations exemplified by the weak swimmer example, it would be appropriate for the judge to give the jury a direction on causation referable to the victim’s knowledge or ignorance of the accused’s intentions.”

59. At [63], they added:

“For these reasons we consider that the approach of the judge was correct. He left it to the jury to determine whether the defendant’s actions were a more than minimal cause of PF’s death. He told the jury if they were sure that, with intent to kill, the defendant in person gave PF drink, and PF drank it, it was open to them to conclude that the giving of drink was a cause of the death; but he told them that conclusion would not be open to them if PF knew the drink being offered was intended to cause his death. He also told them that if PF agreed to drink not knowing that it was intended by the defendant that it was to kill him, it would be open to them to conclude that the defendant’s giving of drink was a cause of death. These directions rightly recognised that in this particular case the jury had to be sure that the drink was given to the deceased with intent to kill, that the drink was a (more than minimal) cause of death and that PF’s act of drinking was not a free, voluntary and informed decision such as to break the chain of causation. The judge’s directions captured the essence of the issue in a clear and admirably succinct manner. Those directions were, moreover, given in the broader context of the supposedly caring and protective nature of the relationship, whose falsehood lay at the centre of the undisputed evidence in the case, as the jury undoubtedly understood.”

60. In short, therefore, the analysis of the first Court of Appeal was that:

- (i) The jury had properly been asked to determine whether the defendant’s actions were a more than minimal cause of death;

- (ii) If Mr Farquhar was unaware of the Respondent’s intention to kill him, then any decision to drink the whisky given to him was not capable of breaking the chain of causation, even if it was in other senses free and voluntary, since it was not informed; and
- (iii) The judge’s directions reflected that position without undue complexity.

SUBSEQUENT ACADEMIC COMMENTARY

61. The third Court of Appeal considered four articles or extracts from publications, each commenting on the decision of the first Court of Appeal: *Homicide: novus actus interveniens* CLJ 2021, 80(2), 213-215; ‘*Deadly whisky*’ G.R. Sullivan and A.P. Simester, LQR 2022 138 (Jan) 11–15; *Involuntary Voluntary Action* Amy Elkington, J Crim L 2023, 86(5/6), 407-416; and an extract from *Smith, Hogan & Ormerod’s Criminal Law*.

Tab A32 (p2014)

Tab A33
(p2017)

Tab A34 (p2022)

Tab A36 (p2053)

62. There are three central criticisms of the first Court of Appeal:
- (i) First, it is suggested that *Kennedy (no 2)* cannot be distinguished from the present situation on the basis that that decision “*seems to settle that, if a substance is taken without any duress and with knowledge of its properties, the taking of the substance is a voluntary intervention that is uncaused by the defendant*”: ‘*Deadly whisky*’, cited above; see also *Involuntary Voluntary Action* and the suggestion that the court “*effectively circumnavigated Kennedy (no 2), eroding the concept of ‘voluntariness’*”: *Smith, Hogan & Ormerod’s Criminal Law*.
 - (ii) Second, there is criticism of the use to which the first Court of Appeal put the ‘weak swimmer’ example: “*...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*”: ‘*Homicide: novus actus interveniens*’; see also *Involuntary Voluntary Action*.
 - (iii) Third, it is suggested that an alternative analysis would be to conclude that the Respondent was guilty of murder on the basis of omission to act (in failing to act on the duty of care owed to the victim through their relationship; or in

creating a dangerous situation and failing to mitigate it): *Involuntary Voluntary Action* (cited above).

THE JUDGMENT OF THE THIRD COURT OF APPEAL

63. Under the heading ‘Question 1: Did CACD Judgment 1 impermissibly depart from *Kennedy*?’ the third Court of Appeal noted the commentary set out above ([38]), and especially the suggestion that the facts of the present case could not be distinguished from *Kennedy*. It appears that they concluded that this critique was right. At [41] – [43], they said:

“In CACD Judgment 1 [60], cited above, the court decided that Field’s undisclosed intention that Mr Farquhar should die “changed the nature of the act” of Mr Farquhar in drinking whisky. He thought he was drinking whisky with someone who “cared for him, not someone who wished for his death”. It was in this context that the weak swimmer analogy became relevant. But there was no evidence that Mr Farquhar believed himself to be in any danger as a result of drinking whisky, something he did often, or that his decision was affected by any thoughts he may have had about what [the Respondent] might do if he were to get into difficulties. The weak swimmer chose to swim because an accused had “promised to provide assistance if the swimmer encountered difficulties”. As the matter is put in Smith, Hogan and Ormerod (17th Ed) at page 86:-

“...in confirming that behaviour as murder, the court effectively circumnavigated Kennedy (no 2), eroding the concept of ‘voluntariness’ so that the basis of homicide liability could be expanded.”

It is true that the authors misunderstood the facts in one respect, because Field did not merely leave the bottle of whisky out to tempt Mr Farquhar to drink. He did more than that on the jury’s finding, see [14] above. However there was no evidence that he did anything which could amount to “administering” the whisky, within the meaning of section 23 of the Offences Against the Person Act 1861 (offence (1) in the passage quoted from Kennedy (No 2)) and so the same problem which caused [counsel for the Crown] to make his concession in that case arises here. There was no evidence that [the Respondent’s] act in relation to the whisky was in any legally material way different from the act of the drug supplier in Kennedy No 2.

That being so, we respectfully disagree with the court in CACD Judgment 1, and consider that they were bound by Kennedy (No 2) to quash the conviction.”

64. Further, under the heading “*Question 2*”, they criticised the jury directions, finding that the learned judge had not sufficiently left the questions of fact arising from the issue of *novus actus interveniens* to the jury.
65. Under the heading “*Question 3*”, the third Court of Appeal considered a discrete issue arising from the use of the phrase “and/or” in the directions, which is set out further below.

SUBMISSIONS ON THE APPLICATION OF KENNEDY (NO. 2)

66. It is submitted that the directions of the judge and the decision of the first Court of Appeal involved no departure from the principles articulated by Lord Bingham in *Kennedy (no. 2)*: only their application in the circumstances of the present case.
67. In support of that submission, the Appellant makes the following observations.
68. First, *Kennedy (no 2)* was rightly decided and states the applicable legal principles, but is also to be seen in the context of its particular facts. As noted above, the heroin was injected by the deceased in that case after he made a free choice to do so, having himself sought out the drugs. *Kennedy (no 2)* correctly concludes that the deceased and those in a similar position to the deceased are to be treated as free, voluntary, informed, responsible adult actors: in such cases there is no evidence upon which the moral connection between the original supplier of the drugs and any overdose could be said to survive.
69. Second, and relatedly, the finding in *Kennedy (no 2)* is specifically that those who seek out illicit drugs in this way are to be treated as having sufficient autonomy to negate the causal responsibility of any prior actor. It is not right to draw from the decision any broader principle that the law will never take a more paternalistic approach. Lord Bingham says, at [14], that *generally speaking*, informed adults of sound mind are to be treated as autonomous beings able to make their own decisions how they will act, but there are exceptions, which he also recognises, including exceptions for the ‘vulnerable’, for those who for any reason are not responsible for their own actions, children, and those acting under duress, deception or mistake.
70. Third, moreover, *Kennedy (no 2)* itself emphasises that each factual context is different. Particular caution should therefore be taken as to the potential for drawing any more specific principle such as that “*if a substance is taken without any duress and with*

knowledge of its properties, the taking of the substance is a voluntary intervention that is uncaused by the defendant” (see *Deadly Whisky*, cited above). That is not stated in the judgment, but is an extrapolation which focuses on only two specific aspects of the relevant test: duress or coercion, and knowledge of the properties of the substance. It is a conclusion which might be considered inconsistent with the subsequent decision of the Court of Appeal in *R v Rebelo* [2021] EWCA Crim 306. There is, moreover, nothing in the judgment in *Kennedy (no 2)* which leads to the conclusion that it is only knowledge of the nature of the substance ingested that is relevant: even without considering the facts of this case, one could consider, for example, a case in which a person was induced to consume a drug by being given some false information that some calamity had befallen them. A person who deceived them in that way with the intention to kill would clearly be causally responsible for the ingestion.

71. Fourth, it is submitted that Glanville Williams was right to observe that *novus actus interveniens* is unlikely to apply in a case where the defendant intended the result that in fact occurred – as by the jury’s verdict they found he did in this case. On this point it is respectfully submitted that the third Court of Appeal’s analysis at [46] looks at the matter the wrong way round. The jury were entitled to find, and did find, that the Respondent did an act intended to cause death. This at the very least strongly suggests that he was causally responsible for the result. The third Court of Appeal were wrong to approach the matter at [46] on the basis that the direction as to intention required analysis of the possibility of a *novus actus*: intention in criminal law is a concept recognised generally to be well within the understanding of juries without the need for any specific explanation.
72. Fifth, the first Court of Appeal were fundamentally right to treat the example of the ‘weak swimmer’ as closely analogous. It was wrong for the Criminal Cases Review Commission to say, as it did in its Reference, that “*the risks to Mr Farquhar of consuming whisky were the same regardless of the intentions of Mr Field*”. The first Court of Appeal were right to say, at [60], that the undisclosed murderous intention of the defendant substantively “changed the nature of the undertaking” on which Mr Farquhar embarked in this particular case, making it more dangerous.⁹ The deception

⁹ Later in the same paragraph ([60]), the first Court of Appeal say that it “*changed the nature of the act*”. The reference to an ‘act’ may not be quite right: it changed the calculus of the decision to drink rather than the act of drinking.

of Mr Farquhar – which, by virtue of the Respondent’s plea of guilty to fraud was an admitted fact – colours the entire context for decision making.

73. The effect of drink is, moreover, progressive. The more alcohol that the Respondent gave to Peter Farquhar, the more he would be affected by it; and the more vulnerable he might be to further persuasion. A decision by a man who is sober to take one drink may be free, voluntary and informed; whereas a decision by a man who has already taken multiple drinks to take another may less clearly constitute a true exercise of free will. On this basis, the example of the weak swimmer remains apt.

THE DIRECTIONS

74. The effect of the decision in *Kennedy (no 2)* is that the jury must be sure that the deceased did not act on a basis that was the free and voluntary act of a fully informed and responsible adult. If he may have done (if there may have been a break in the chain of causation), they must acquit.
75. Thus, for example, if they were satisfied that the deceased did not act freely and voluntarily, they could convict. If he had not been a fully responsible adult, they could convict. If his position was not fully informed, they could convict. Each of these would in principle have been an alternative route to a conviction.
76. In this case, the judge did not leave multiple alternative routes to conviction. This was a decision in the accused’s favour: of several potential routes to a guilty verdict, he left only one: that Ben Field gave the deceased drink but that the decision to drink was not informed. In other words, the judge’s directions assumed in the Respondent’s favour that the act of the deceased was free and voluntary, but required the jury to be satisfied as to causation and expressly precluded a conviction if it was also fully informed (that is, if the deceased had been aware of the Respondent’s intention to kill him).
77. Likewise, although there were potential bases on which it could potentially have been left to them to consider whether leaving whisky to ‘tempt’ Mr Farquhar in his absence could have caused his death, the judge expressly prevented the jury from considering the possibility of conviction on that basis.
78. It is submitted that the resulting direction was appropriately simple and was correct in law.

79. As to the first stage, the judge directed the jury that to convict they must be sure that the Respondent “*did one or more of the acts alleged by the prosecution ... which was or were a more than minimal cause of Peter Farquhar’s death*”.
80. As to the second stage, he directed them that if “*it was or might have been that Peter Farquhar drank in the knowledge that Ben Field was giving him the drink... intending to kill Peter Farquhar - then it would not be right to convict [the Respondent]. If it was or might have been that, then the prosecution would have failed to prove their case, which was that he was given alcohol... without the knowledge that Ben Field was intending to kill him thereby.*”
81. The consequence was that the jury had to be sure that the Respondent did an act which caused the death, with the intention of killing Mr Farquhar, and that Mr Farquhar was not aware of what was taking place (and particularly that it was part of a plan to kill him).
82. In particular, it is submitted that the learned judge was right to conclude that in those circumstances, Mr Farquhar’s actions were not, in law, capable of extinguishing the causal relationship between the accused’s acts and the consequence. The learned judge rightly left to the jury the question whether Mr Farquhar was *in fact* fully informed. The legal consequence was a matter which was embedded in the structure of the directions.
83. By their verdict, following the direction that they could not convict if Mr Farquhar was aware of the intention to kill him, the jury effectively excluded any possibility that Mr Farquhar had joined in with the plan, and thereby attempted suicide by drinking the whisky or taking the Dalmane. The crux of the analysis, therefore, is whether there is any alternative consistent with the jury directions which would sever the chain of causation (or the moral connection) between the Respondent’s act and any death, given that the deceased must have been unaware that the Respondent was intending to kill him.
84. It is submitted that there is not. The deceased’s ignorance of the murderous plan necessarily colours the whole context: the act cannot be said to be “*so independent*” (to use the formulation in *Pagett*) of the acts of the Respondent on the facts found by the jury that it was capable, in law, of breaking the chain of causation. The third Court of Appeal suggested, at [47], that this was an issue of fact that should have been left to the jury, but that the conclusion of the first Court of Appeal was a conclusion of law:

that if the jury found (as it must have done) that the deceased acted in ignorance of the plan in which he was engaged, that necessarily coloured the entire picture.

85. Even if the jury would have considered (if asked) that Mr Farquhar would have ingested the substances if he had been informed of the true position, that would not avail the accused. The decision if Mr Farquhar had been fully informed would have been a different one and would have had different causal consequences.

‘AND/OR DALMANE’

86. The third Court of Appeal identified an additional reason for finding the conviction unsafe, even if the directions relating to *novus actus* were legally sound. This was based on Question 2 of the Route to Verdict:

*“Have the Prosecution made us sure that, with that intent, Ben Field did one or more of the acts alleged by the Prosecution (i.e. in person, giving Peter Farquhar drink, **and/or** Dalmane, **and/or** suffocating him) which was/were a more than minimal cause of Peter Farquhar’s death?”* (emphasis as added by third Court of Appeal at [48])

87. The third Court of Appeal considered that it was objectionable that this formulation *“left it open to the jury to convict on the basis that the cause of death may have been alcohol, on its own, or Dalmane, on its own, or smothering on its own, or some combination of them”* ([54]). They identified, at [58], three reasons why they considered that the way in which the jury was directed was wrong:

- (i) First, the summing up did not sufficiently direct the jury to consider and make a finding about the circumstances in which the Dalmane came to be consumed;
- (ii) Second, it left it open to the jury to convict on the basis that Mr Farquhar had been killed by smothering without requiring the jury to make a finding that this was so, and when there was insufficient evidence for any such finding;
- (iii) Third, the jury were not directed correctly and in accordance with the pathologist’s evidence as to the cause of death, either in the two questions they were required to answer (the steps to verdict) or in answer to the jury note.

88. None of these criticisms of the directions is well-founded. The Court of Appeal’s analysis starts, in fact, with the wrong question. It seeks (at [54]) to identify *“the”* cause of death, and by implication works backwards from ‘the’ cause to consider whether that cause is attributable to the accused. But it is not a requirement of the law that every

causal factor involved in a death should be attributable to the accused in order for him to be guilty of murder. The question is whether the deceased has done *an* act (or acts) which is a more than minimal cause of death.

89. The direction of the learned judge, by contrast, rightly starts by seeking to identify *acts* which the jury might conclude were more than minimally causative, and which coincided with a guilty state of mind. The structure of Question 2 is wholly unobjectionable: it asks whether the prosecution has made the jury sure that with relevant intent, the accused did an act which was a more than minimal cause of death. That is a correct and sufficient direction in a case of murder.

The Circumstances in which the Dalmane came to be consumed

90. As to the first point made by the Court of Appeal, the evidence of the pathologist was that alcohol and Dalmane in combination may have caused Mr Farquhar's death (rather than that either substance on its own may have caused death). If the jury accepted that evidence, however, that does not mean that they were required to find that Ben Field caused (in the relevant legal sense) the ingestion of both the alcohol and the Dalmane. Causing the ingestion of *either* alcohol *or* Dalmane could have been found by them to be an act which was a more than minimal cause of death. The accused would be guilty on the basis of an act relating to one substance, even if he did no guilty act relating to the other and it was the combined effect that killed the deceased. Indeed, on the basis of the egg-shell skull rule,¹⁰ the Respondent would be guilty even if he was unaware of the ingestion of the second substance, provided that he nevertheless caused (in law) the ingestion of the first with the necessary intent. On this basis alone, it was unnecessary for the jury to make any finding as to the circumstances in which the Dalmane came to be consumed. Indeed, for reasons also set out in relation to smothering below, the jury were not required to make any such finding, or even necessarily to agree, on whether the Respondent's guilty acts included the administration of Dalmane.

91. In any event, the judge had very clearly explained that drink could not be a cause of death if it was informed in that he knew that the drink being offered to him was intended to cause his death. No ordinary juror, hearing this direction and considering Dalmane in isolation in light of the direction that they must be sure that the defendant had carried out an act which was more than a minimal cause of death would understand that

Tab A5 (p1568)

¹⁰ See *R v Blaue* (1975) 61 Cr App R 271

different principles would apply to the giving of a drug simply because the drug was not expressly referred to in that part of the direction.

92. As to the judge's additional directions following the jury note, that note specifically asked for clarity regarding "*the implications if Ben and Peter were drinking together on 25 October 2015*" (emphasis in original). There can be no legitimate criticism of the judge for responding to the question which had been asked, and providing the requested clarity specifically by reference to alcohol. It further suggests that the jury were considering alcohol as at least one relevant causative act, an act for which the "informed" direction had been correctly given.

No requirement to make a finding of smothering

93. The third Court of Appeal considered that the judge's sentencing remarks – to the effect that if alcohol and Dalmane had not killed Mr Farquhar, then the Respondent smothered him in a way that left no trace – suggested that he considered that there was no sufficient evidence that smothering had played a part in causing death. They said, at [56]: "*The judge's directions therefore left a possible cause of death to the jury of which there was no sufficient evidence. This is a deficiency in them*".
94. With respect to the third Court of Appeal, it is their own analysis which is erroneous. It has never been the case that a jury in a murder trial must be sure as to which of a number of possible acts caused death, provided that they are sure that one of them did. To introduce such a principle would lead to unjustifiable conclusions. On that basis, a would-be murderer would have only to leave a doubt as to which of two possible mechanisms was the operative cause of his victim's death in order to evade criminal liability entirely: there would be doubt as to (say) poisoning because of the possibility of suffocation, and doubt as to suffocation because of the possibility of poisoning. That is not the correct approach: while the jury needs to agree that the legal ingredients of the offence are proved, they need not agree or individually be sure on merely evidential or ancillary matters. Thus in *R v Gianetto* [1997] 1 Cr App R 1, a jury was entitled to convict even if they could not decide (or reached different views as to) whether the accused carried out the murder himself or encouraged another to do so (for which, under section 8 of the Accessories and Abettors Act 1861, he would also be liable as a principal). The judgment of the Court (Kennedy LJ, Laws and Maurice Kay JJ) concluded that "*If the jury does convict it may do so with some jurors satisfied that the*

Tab A12 (p1625)

Tab A2 (p1538)

defendant was actually the killer, but all will be satisfied that if not himself the killer at least he encouraged...". Likewise, the prosecution may prove murder even if the deceased has never been found and the cause of death is unknown: *R v Onufrejczyk* [1955] 1 QB 388. A conviction may be returned despite the fact that necessarily in such a case there can be no "sufficient evidence" of any particular cause of death.¹¹

Tab A21 (p1791)

95. In the present case, it is sufficient that the jurors were each individually sure that the accused did an act causing death; they need not each have been sure, or have agreed, which of the possible acts it was. The judge was right to direct the jury that "*you do not all have to be sure which of the alleged methods of killing was used by Ben Field, it is sufficient for a verdict of guilty that between you are all sure that it was one or the other.*"

**Tab A22
(p1807)**

96. The third Court of Appeal was wrong to suggest that smothering could not be left to the jury unless they made a finding that it was the mechanism of death, and consequently unless there was evidence on which they could be sure of that. Even assuming in the Respondent's favour that there was not sufficient evidence for them to be sure that smothering occurred, to exclude it from consideration would have been contrary to the authorities, and would have led to the indefensible result that the jury would have been directed that if they considered that there was a possibility that the Respondent had smothered Mr Farquhar, they must acquit on that basis.

The Pathologist's evidence

97. On the third issue, the third Court of Appeal took a wrong approach to the evidence. They said at [50] that "*The evidence of the pathologist was that the only cause of death of which there was evidence was the combination of alcohol and Dalmane.... There was no expert evidence that suffocation had been a cause of death, save that there were no external signs of trauma, and no evidence that it was alcohol alone.*"

98. The reference to "*the only cause of death of which there was evidence*" is, at best, liable to confuse. In fact, the pathologist said that there was "*no clear anatomical or natural cause of death identified on both the first coronial and second forensic examination*" (Evidence of Dr Lockyer, internal page 9E). As to the combination of Dalmane and alcohol, he put his evidence no higher than that these "*may*" have proved fatal (10C) if

Tab 47 (p1230)

¹¹ For further analysis of the relevant principles, see *R v Ames* [2023] EWCA Crim 1463 and *R v Letby* [2024] EWCA Crim 748 at [152]-[167].

the airway became blocked. He also observed in his evidence that the position in which Mr Farquhar was seen on police bodyworn footage on the morning after his death was one which he would not regard as being potentially dangerous to the airway (11B). Despite the evidence that Mr Farquhar had ingested alcohol and Dalmane, the pathologist decided not to give a cause of death which attributed the death to those substances; instead, he gave a narrative cause of death, specifically in recognition of the fact that it was also plausible that Mr Farquhar had been smothered without there being any visible injuries. It is right to say that there was no positive medical sign of smothering (and perhaps in that sense alone, “no evidence”), but it is equally right to say that the post-mortem examinations did not conclusively establish that the cause of death was consumption of Dalmane and alcohol, just because those substances were found – the pathologist specifically noted, indeed, that ingestion of those substances would have facilitated a smothering and might itself explain how Mr Farquhar might not have struggled, so that he might have been smothered without there being any visible sign of any injury. The judge’s factual summing up of the pathology evidence (transcript 69F – 70D), was unobjectionable. Both the factual and legal directions correctly reflect the fact that death resulting from smothering, on the one hand, or from obstruction of the airway after ingesting Dalmane and alcohol, on the other, were both consistent with the evidence.

Tab 33 (p651)

99. For these reasons, the third Court of Appeal was wrong to take issue with the directions under the heading ‘Question 3’; and the directions given to the jury were not wrong in law.

CONSENT IN THE CONTEXT OF SEXUAL OFFENDING

100. One of the grounds on which the Criminal Cases Review Commission referred the Respondent’s conviction to the third Court of Appeal was that there was a new argument that the jury was misdirected, drawing on the authorities addressing the criminality of obtaining consent to sexual activity by various forms of deception.
101. On this issue, the Appellant adopts without qualification the following observation of the third Court of Appeal at [40]:

“...the CCRC suggests that the cases about what kind of deception may vitiate consent in a case involving an alleged sexual offence may come into the analysis. We doubt that there is much to be gained by importing that difficult subject into this more straightforward area of the law. We venture to suggest

that the state of the authorities about sexual cases is not entirely coherent and this is not a suitable case to attempt to resolve that and then import whatever the result may be into this analysis.”

102. Neither the authorities nor any of the academic commentary supports any suggestion that principles derived from this very different criminal context have any bearing on the law of causation, or that it would be a welcome development if they did.

CONCLUSION

103. For the reasons set out above, the Court is invited to answer the certified questions in the following ways:

“1. Were the directions given to the jury by the trial judge in this case right in law?”

- Answer: yes

2. Did either the first or third Court of Appeal err in their understanding and application of R v Kennedy (no 2) [2007] UKHL 38; [2008] 1 AC 269; and is any reconsideration of that decision required?”

- Answer: the first Court of Appeal were substantially correct in their understanding and application of *Kennedy*, and the third Court of Appeal erred. No reconsideration of the *Kennedy* decision is required.

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