

K had prepared a heroin mixture for V in a syringe which he then gave to V. V injected himself with the heroin and subsequently died. K was convicted of manslaughter, a conviction upheld by the Court of Appeal (see [1999] Crim LR 65; S&S2 p. 101). However, following uncertainty in the subsequent case law, the case was referred back to the Court by the Criminal Cases Review Commission under section 9(1) of the Criminal Appeal Act 1995.

At issue was whether K had caused V's death by an unlawful act. The main difficulty was that, although K's conduct was unlawful (being the supply of a controlled substance), and had played a part in the events leading to V's death, *prima facie* there was an intervening act by another, V himself, who had self-administered the injection. The intervention by V was free, deliberate, and informed; as such, it seemed to be a *novus actus*, absolving K of causal responsibility for the homicide. There was also the problem that V's act of self-injection was not unlawful, which ruled out the alternative possibility of convicting K on the basis of his aiding or abetting V.

Previous Court of Appeal authority was unclear. In the more-or-less similar cases of Dalby [1982] 1 All ER 916, Dias [2002] 2 Cr App R 41, and Richards [2002] EWCA Crim 3175 the defendant's conviction was quashed; in Rogers [2003] 1 WLR 1374 and Finlay [2003] EWCA Crim 3868 the convictions were upheld. Now, in upholding the defendant's conviction, the Court of Appeal in Kennedy has clarified the law. There are two key steps to the Court's decision.

Finding the unlawful act causing death, and restricting the scope of *Empress*

Ruling (a): the relevant unlawful act that causes death is the administration (or the causing to be administered) of a noxious substance, contrary to section 23 of the Offences Against the Person Act 1861.

Clearly, the administration of the heroin caused death, and it was a noxious substance, so this ruling seems unproblematic. It does not involve the Court in the rather more problematic claim that K's unlawful act of supplying the heroin was itself a direct cause of death, notwithstanding the free, deliberate, and informed intervening act by V.

In particular, the Court of Appeal did not adopt the test of causation set out by Lord Hoffman in *Environment Agency v. Empress Car Company Ltd* [1999] 2 AC 22 (HL): whether the intervening act (by V) was an "ordinary" occurrence, which would not be a *novus actus*, or something "extraordinary" [S&S2 pp. 99-101.] Notwithstanding that this test had previously been adopted in *Finlay*, the Court in *Kennedy* (2) emphasises that the decision in *Empress* is not, and was not intended by Lord Hoffman to be, of general application. The decision should be understood as a matter

Ruling (b): It is open for a jury to find that K is a joint principal in the administration of the heroin. It is not enough to show that K is a secondary party to that act (say, because K encouraged V to self-inject), since self-injection is not a crime. K must be a co-principal, responsible directly for the actus reus of section 23. [See paras 28(v)-30.]

K may be a principal, of course, where he causes V's act and V is not a free, deliberate, and informed intervener. But that analysis was not available here. Instead, the Court in Kennedy (2) identified an alternative route by which K may be responsible as a principal: if V and K are acting in concert. According to the Court,

"if a defendant is acting in concert with the deceased, what the deceased does in concert with the defendant will not break the chain of causation, even though the general principles as to causation have to be applied.... If Kennedy either caused the deceased to administer the drug or was acting jointly with the deceased in administering the drug, Kennedy would be acting in concert with the deceased and there would be no breach in the chain of causation." [Paras 42-3.]

The idea here seems to be that where K's and V's actions are intimately bound together, it is artificial to divide up what in reality is a joint operation, a single "combined" transaction for which both are responsible [para 53]. Thus K, too, may be held responsible for V's actions. As such, K becomes personally responsible—as a principal—for causing the administration of a noxious substance to V, an offence under section 23, and in turn for manslaughter.

The scope of action in concert

The good news is that Empress is, rightly, confined to its statutory context and not of general application. But we now have a new rule of causation, which is said to be of general application. When does one act in concert with another? It would seem that the key features of Kennedy are (i) that K was present throughout the events; (ii) that K's own contribution was immediately and intimately connected to V's conduct; and (iii) that K's contribution was pursuant to a shared understanding that encompassed V's subsequent conduct.

Even so, the distinctions in play are vanishingly fine. So fine, indeed, that one cannot be sure of their application to future cases. In Dalby, for example, D supplied V with Diconal tablets. Each then injected himself with solutions of the drug. Yet D's appeal against conviction of manslaughter was successful. The difference was apparently that Dalby merely supplied the tablets, whereas Kennedy prepared the syringe and handed it to V for immediate injection. But in Dalby, everything that followed was part of a mutual project, and the tablets were supplied for that very purpose. Were they not, in the language of Kennedy (2) [para 53], "working as a team"? The reality

applying complicity liability principles to the specific context of self-harm by the principal. But general principles should not be created to deal with specific problems. Inevitably, they have wider ramifications, something evidenced by the failure of the Court properly to answer the question, posed by the Criminal Cases Review Commission, of why preparing a syringe to assist another's suicide would not be murder [paras 46-9]. Clearly, on this new general principle, it would. One hopes that, in future, this extension of ordinary complicity principles will be restricted to manslaughter cases such as Kennedy where, because self-injection is not an offence, the principles of secondary liability are displaced.