The object of this essay is to attempt to discover whether, in the criminal law, negligence ever breaks the chain of causation and to determine the circumstances if this is ever so. In order to do this it is necessary to first identify what causation is.

In basic terms, causation is simply a question of who or what caused a specific event to happen. For example, in a result crime, it must be proved that the defendant's conduct caused the forbidden consequence. If this cannot be proved, D is not guilty of the crime. Obviously then, causation is an important issue. It is not, however, always a contentious one, as in many cases the cause is obvious and not disputed.

Questions on causation usually arise in cases of murder. In order to be guilty of murder you must have caused an acceleration of death. It makes no difference if the victim was already sick, injured or dying, as it can be said that since we will all die someday, we are all dying anyway. As Lord Alverstone CJ said in *Dyson*[1]: -

"The proper question to have been submitted to the jury was whether the prisoner accelerated the child's death by the injuries which he inflicted in December, 1907. For if he did, the fact that the child was already suffering from meningitis, from which it would in any event have died before long, would afford no answer to the charge of causing its death."

Causation is in some sense a difficult area of the law. As The Criminal Law and Penal Reform Committee in south Australia stated[2]: -

"There is no more intractable problem in the law, than causation."

Causation can be split into two parts, factual causation and legal causation. The issue of factual causation is generally one for jury to decide. However, when answering the

[1] [1908] 2 KB 454
[2] Criminal Law and Penal Methods Reform Committee, South Australia, 4th Report

question, they must apply the legal principles that the judge has explained to them. As Lord Salmon said in *Alphacell Ltd v Woodward*[3] in a passage approved by the House of Lords in *Environment Agency v Empress Car Co (Abertillery) Ltd*.[4]: -

"What or who has caused a certain event to occur is essentially a practical question of fact which can best be answered by ordinary common sense rather than by abstract metaphysical theory."

An example of this is doctors giving evidence. They may say what they consider to be the cause of death, but it is up to the jury to make the final decision.

Another principle the courts look for is what is known as the "but for" principle (sometimes known as "causation - in – fact"). This can be explained by saying that something would not have happened "but for" D's actions. For example, the victim would not have died but for D's strangling him. It is apparent that any act D performs cannot be the cause of an event if the event would have happened, in exactly the same way, whether D had committed the act or not. Even this very simple rule may have exceptions, but only in very rare circumstances e.g. if A and B, independently of each other, shot at P and hit him, simultaneously, in the head and the heart, they would both be held to have caused P's death. The rule that the act must be a sine qua non of the event is only a starting point. If this rule were used alone too many innocent people would be accused. Many acts are sine qua non of an event but are not the cause of it, e.g. If I leave my house to go for a walk and am shot by a maniac it is not my failure to stay at home which caused me to be shot. Common sense must be used in the jury's decision. In most crimes it is obvious that D caused the crime by, for example, pulling the trigger. In some situations it is not so simple to determine who caused death. For example, if a Jehovahs Witness, stabbed by D, refused a blood transfusion and died, the judge will give directions that D so injured the victim that they had to choose between transfusion and death. There can be more than one cause of a consequence and these may come from the

[3] [1972] AC 824
[4] [1998] 2 WLR 350

deceased themselves. In *Swindall and Osbourne*[5], where an old man was run over and killed, Pollock CB directed the jury that it did not matter that the man was drunk or deaf or negligent and contributed to his own death.

A very important case in the "but for" test is *Dalloway*[6]. It is shown here that the accused must have been able to prevent the crime. In this case D was driving a cart recklessly when a child ran out in front of him and was killed. It was held that D was not liable for the girl's death because even if he had been driving properly he could not have avoided her. D did "cause" her death in the literal sense because she wouldn't have died if he hadn't been driving the cart but he was not responsible for it in criminal law because it was shown that the death was not due to his negligence. Negligence did not break the chain of causation in this instance.

Proving factual or "but for" causation does not prove legal causation. Legal causation is concerned with whether criminal responsibility can fairly be attributed to the accused. Another issue, which arises, is whether D's action was a substantial cause of death. The term 'substantial' in this case means only the cause must be more than di minimis. The trial judge in *Kimsey*[7] translated this as meaning "slight or trifling". Also D's act need not be the sole or main cause of death. It is sufficient that his act contributed significantly to the victims demise. "Significantly" meaning "more than negligibly". Therefore, there is no requirement to show that the defendant's act was the dominant or even substantial cause of death. This was the case in *Cheshire*[8].

The chain of causation may be broken by the act of another, intervening between that of D and the result he is alleged to have caused. This is known as novus actus interveniens. As Robert Goff LJ said in *Pagett*[9]: -

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[5] (1846) 2 Car & Kir 230
[6] (1847) 2 Cox CC 273
[7] [1996] Crim LR 35
[8] [1991] 3 All ER 670
[9] (1983) 76 Cr App Rep 279

"[The intervening] act was so independent of the act of the accused that it should be regarded in law as the cause of the victims death to the exclusion of the act of the accused."

The intervening act must also be 'free, deliberate and informed' to break the chain of causation. The problem is illustrated in *Pagett*. In this case D was using a girl as a shield when he shot at the police. The police fired back and killed the girl. It was held that D was liable for her death. The chain of causation was not broken by the police's shooting of the victim. Their actions were found to be instinctive and, therefore, not free, deliberate and informed.

If their actions had broken the chain of causation it would have been an example of novus actus interveniens. D's conduct would no longer be the operating cause of death, but merely part of the history. This case demonstrates how there can be more than one cause. The police were the immediate cause of death, but the defendant was held to have been the legal cause. The basic rule is that D can only escape liability if the supervening event was unforeseeable. As Lord Parker CJ said in *Smith*[10]: -

"Only if the second cause is so overwhelming as to make the original wound part of the history, can it be said that the death does not flow from the wound."

The jury is not asked to choose which was the dominant cause. It only has to determine whether or not D's act contributed significantly to the victim's death.

One of the main areas where the question of whether the chain of causation has been broken is in cases involving medical treatment.

As previously discussed, the criminal law insists on D's act being both a "factual" and a "legal" cause of V's death for the defendant to be held liable for it. In the medical treatment cases currently under discussion the issue of factual causation is very unlikely

[10] [1959] 2 QB 35

to arise since medical treatment will almost never prove to be necessary in the absence of the original injury inflicted by D. Legal causation, on the other hand, is more problematic. The basic rule is that D will be held criminally responsible for P's death providing that any one of the three criteria to be discussed below are satisfied and of course, that his acts are factual causes of P's death.

The first principle derived from cases concerning medical negligence is known as the "operative cause" principle. This means that even if the victim would not have died but for the negligence of their doctor, D is still liable for their death providing that the wounds the defendant inflicted were still an "operating cause" at the time of the victims death. An example of this principle can be seen in *Holland*[11]. In this case D attacked V and seriously injured V's finger. V was advised by doctors to have his finger amputated, but refused. He subsequently contracted tetanus and died. D was held liable for the death despite his defence that the wound he inflicted on V only became life threatening because of V's neglect of it. As J.C. Smith says[12]: -

"Maule J's direction to the jury reflected the common laws answer to the problem. He who inflicted an injury which resulted in death could not excuse himself by pleading that his victim could have avoided death by taking greater care of himself."

Another example comes from *Smith*[13]. The victim was stabbed by D in a brawl. On the way to the dressing station the V was dropped several times and received "thoroughly bad" medical treatment once he got there. V subsequently died. Giving his judgment on the case lord Parker CJ said[14]: -

"If at the time of death the original wound is still an operating and substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating."

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[11] (1841) 2 Mood & R 351
[12] Smith & Hogan, Criminal Law Cases and Materials, 7th Edition (1999), P54
[13] [1959] 2 QB 35
[14] [1959] 2 All ER 193 at 198

The wound inflicted by D was held to be an operating and substantial cause of V's death so his conviction for murder was upheld. This is a clear case of medical negligence failing to break the chain of causation.

The operative cause principle also applies in *Malcherek*[15]. In this case D wounded V to the extent that she required surgery. V underwent the surgery and seemed to be recovering, when she suffered a relapse and was placed on a life support machine. Doctors then found her to be "brain dead" and turned off the machine. D argued that the doctors should not have turned the machine off, but it was D who was on trial, not the doctors and evidence from other doctors who might not have turned the machine off could not be admitted. The wounds inflicted by the D were still the operative cause of the death, therefore he as liable for it.

This principle can have far reaching consequences when applied to medical treatment. It seems very harsh that D be liable for the V's death if, for example, V is hospitalized by D and could be saved by a simple dressing, but is left to bleed to death on the hospital floor because a negligent doctor choose to watch Casualty instead of treating them. However this is the law. It is evident that it is only the actions of D that put you in a position to receive this negligent treatment in the first place. Therefore D is always liable, providing the wound he inflicted is still operative at the time of death.

However, the boundaries of this principle are shown in *Jordan*[16]. In this case D's conviction for murder was quashed by the Court of Appeal. The facts of this case are: - D and the victim got into a fight in a café in Hull, which resulted in D stabbing V. V was taken to hospital where his wound was stitched up, but he nevertheless died a few days later. It was held that the V's death was not caused by the stab wound inflicted by D but by the negligent treatment received in hospital. V had been given a drug, terramycin, which he was intolerant to. This was noticed and stopped by one doctor but

[15] [1981] 2 All ER 422
[16] (1956) 40 Cr App R 152

recommenced by a second doctor the following day. This was described by Hallet J in his judgement as "palpably wrong" and as the "direct and immediate cause of death"[17]. This is a distinct case of negligence breaking the chain of causation. However this is very much an exception, Hallet J calling it an "exceedingly unusual case." In Jordan the wound inflicted by D was found to no longer be operative at the time of the victims death, not only because of the incredibly incompetent medical treatment, but also because the wound had almost healed. Jordan has been critisised for placing emphasis on the actions of the doctors when it was not they who were on trial[18].

It is evident from looking at these cases that the chain of causation will virtually never be broken by medical negligence and that the law will follow this rule as set down in Smith and as applied recently in *Cheshire*[19] and *Mellor*[20]. This rule will only be broken when the original wound has almost healed or where the medical treatment received is so bad it was "the direct and immediate cause" of death, if the doctor were to shoot an injured patient in the head, in the name of medicine, for example.

The second principle this essay will look at is known as the "foreseeable result" principle. This can be explained by saying that if D causes something to happen to V that is reasonably foreseeable to cause his death then D is liable for the death, even if the injury inflicted is not an operating cause of it. A good example of this was illustrated in *Pagett*. Here it was obvious that the police would return fire after the defendant fired at them. Their actions were a foreseeable result of D's behaviour and so D is still liable for V's death even though it was the police's bullets that killed her.

It is clear that in cases involving medical treatment it will be extremely hard for D to escape liability for his actions and to break the chain of causation because it is foreseeable that V will seek medical treatment for their injuries

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[17] (1956) 40 Cr App R 152
[18] Michael Jefferson, Criminal Law, P41
[19] [1991] 3 All ER 670
[20] [1996] 2 Cr App R 245

This is shown in the case of *Forrest*[21] where D wounded and hospitalized V who ultimately died of blood poisoning due to bad ventilation in the hospital ward in which he was being treated. The fact that the wounds would not have caused V to die but for the blood poisoning was of no comfort to D as he was convicted of manslaughter.

An excellent example of the "foreseeable result" principle as applied to medical negligence can be seen in the case of Cheshire[22]. In this case the victim was shot in the leg and stomach by D and was taken to hospital where he developed breathing difficulties and a tracheotomy was performed. V died two months later due to problems arising from the removal of the tube from his throat. The medical staff treating V failing to diagnose the problem. It is clear that the wounds inflicted by D were not the cause of V's death. However, the Court of Appeal upheld D's conviction for murder. As evidence a consultant surgeon, Mr. Eadie, said: -

"The cause of his death was the failure to recognize the reason for his sudden onset and continued breathlessness after the 8th February."

In his view the cause of V's death was the negligence of the doctors. Although the medical treatment V received was negligent, it was not reckless or bad enough to be considered "abnormal" and so break the chain of causation.

As illustrated again in the above cases it is extremely difficult for medical negligence to break the chain of causation. In order to exclude D from liability in medical treatment cases, the treatment given must be so harmful that it itself causes V's death and render the original act by D insignificant. It should be noted again that in *Jordan* the chain is broken despite it being foreseeable that the victim would undergo medical treatment after being stabbed. Nevertheless, this is very much an exception.

[21] (1886) 20 South Australia LR 78
[22] [1991] 3 All ER 670

The third principle to be discussed is that 'you take your victim as you find him'. This comes from Lawton LJ's judgement in *Blaue*[23]: -

"It has long been the policy of the law that those who use violence on other people must take their victims as they find them."

In this case V, a Jehovahs witness, was stabbed four times by D, causing her to require a blood transfusion. V refused this as it was contrary to her religious beliefs and subsequently died. D's defence that V caused her own death by refusing the blood and therefore not acting in a foreseeable way was dismissed and his conviction upheld by the Court of Appeal. Lawton LJ saying that you must take "the whole man, not just the physical man", as you find them, meaning that V's religious beliefs were no defence for D.

However, what would have been D's liability if V had been refusing treatment out of spite? Following the principle set out in *Blaue,* D would still be liable for V's death. This is reaffirmed by the case of *Dear*[24]. In this case D slashed V with a Stanley knife after allegations that V had sexually abused D's 12 yr old daughter. V died of his injuries 2 days later, but there was evidence that V had intentionally caused his own death by reaggrevating his wounds. The Court of Appeal upheld D's murder conviction and suggested that it didn't matter that V's actions were unforeseeable.

This decision seems to disagree with previous cases in which it has been said that the chain of causation is broken when the victim does something which could not reasonably be foreseen to be a "natural consequence'[25] of D's actions. Or to put it another way, when V does something "daft". An example can be found in *Roberts*[26], where V was traveling in a car with D who made sexual advances towards her. V then jumped out of the moving vehicle and sustained injuries. D was held liable. It is because of this confusion that it has

[23] [1975] 3 All ER 446
[24] [1996] Crim LR 595
[25] From *Evans,* [1992] Crim LR 659
[26] (1971) 56 Cr App R 95

been said that the rule of "you take your victim as you find him" should be left to the law of tort.

Nonetheless, we can see from the *Blaue* case that a persons refusal of medical treatment for whatever reason will not break the chain of causation. This is clear since the wounds inflicted by D to require the medical treatment will be the operating cause of V's death.

This essay has sought to identify if and when negligence can break the chain of causation in criminal law. It has attempted to do this by concentrating on medical treatment cases and by examining the way the chain can be broken and the criteria that the prosecution must satisfy to prove a defendant criminally responsible for a victim's death.

In conclusion it is extremely difficult to break the chain of causation, especially in cases where negligent medical treatment is involved. For the chain to be broken in this way, the negligence must not only be so terrible as to be enough to cause the death in itself, but must also occur at a time when the original injuries inflicted by D are no longer seen to be an operating cause of V's death. This is virtually nonexistent. The law works in this way, as the courts are extremely reluctant to place the blame for patient's deaths on doctors who are trying to save peoples lives.

It is apparent that the Judiciary, through the development of case law, have reached the conclusion, that with few exceptions. The chain of causation will not be broken by medical negligence.

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