

Chapter 5

Ewan in a fit of spite forces his former girlfriend, Cameron, who is pregnant, to drink a vile substance. He hopes that the substance will cause the baby to be born seriously disabled. In fact the substance causes Cameron to miscarry. Cameron, overcome with grief, commits suicide. What offences have been committed? (Do not forget to consider here whether the doctrine of transferred mens rea could apply.)

Ewan could also be charged with Cameron's murder. There would need to be a consideration of the causation issues and in particular whether Cameron's act of suicide broke the chain of causation. The prosecution would probably argue that Ewan has to take Cameron as he finds her (referring to *Blaue*) or that Cameron's act of suicide was not a free voluntary informed act and so did not break the chain of causation. However, the defence may refer to *Roberts* and argue that the act of Cameron was not reasonably foreseeable. Further problems will face the prosecution in considering whether or not the *mens rea* of murder is present. One argument would be that Ewan foresees there to be a miscarriage and this would be a grievous bodily harm for Cameron. However, foresight would not be enough for murder and so could only be used for a manslaughter prosecution. Alternatively it may be argued that he intended to kill the baby and this intention could be transferred to Cameron under the doctrine of transferred malice. The defence in reply will bring up *Attorney-General (3 of 1994)*, where the House of Lords refused to allow a transfer from a pregnant woman to the child her foetus later became. Arguably Ewan's case is stronger from the prosecution's point of view because he clearly intends the death of one person (the baby when born) and that is transferred to another person (Cameron) and there is, therefore, no need to transfer 'through' the foetus.

There are also some interesting issues surrounding the miscarriage offences which could be discussed here.

Following a brain injury suffered in a car crash Mick finds that he suffers from moments of intense irritability. One day Paul calls him a 'short tempered idiot', following which Mick flies into a terrible rage and kills Paul. Is Mick guilty of murder?

In considering this question you would need to consider the law of loss of control. It appears from what we are told that the *actus reus* and *mens rea* of murder are made out. In relation to loss of control it would need to be shown that Mick had a justifiable sense of being seriously wronged if he was to have a qualifying trigger. It seems highly unlikely that the phrase used here would be sufficient. Even if it were it is unlikely the jury would find that an ordinary person would react in the same way. A better argument for Mick may be to rely on diminished responsibility.

One Saturday, Thomas, the President of the International Pogo Stick Society, was travelling down the pavement of a crowded street on his pogo stick. He was jumping carefully when his attention was grabbed momentarily by a striking poster advertising colourful knitwear. When he looked back to where he was going he thought he realized that he was about to crash into Clare. He decided to attempt a highly complex manoeuvre which he thought would avoid the accident.

Unfortunately it failed and he landed on top of Clare, killing her, and breaking her valuable watch.

Clare's fiancé, Michael, who has a mental age of 9 and has difficulties in controlling his temper, had been walking beside Clare. He was so upset at what had happened that he picked up a traffic cone and threw it at Thomas, intending to cause him an unpleasant injury. Thomas parried the cone with his pogo stick, but the cone landed on the head of Alfred, a young child who was passing by. Alfred fell to the ground. Thomas immediately rushed over and attempted to give Alfred mouth-to-mouth resuscitation. Unfortunately it had been a long time since he had attended his first-aid classes, and his efforts resulted in asphyxiating Alfred, who died. What offences, if any, have been committed?

In relation to Thomas's pogo stick jumping, there are several offences which can be quickly dealt with. As regards criminal damage in relation to the watch and any offence of assault these can be dismissed because on the facts as we are given there was no recklessness. He did not realize there was a risk that he would touch Clare or damage property. The prosecution might try and argue that when we are told he thought there would be no accident that does not mean he did not think there was any risk at all. Reference could also be made to *Parker* in an attempt to argue that he must have known in the back of his mind there was a risk of injury to person or property.

The prosecution might also argue that he is guilty of gross negligence manslaughter. This does not require proof that the defendant foresaw a risk of harm. Everything would appear to depend on whether the jury decide that Thomas's negligence (presuming he was negligent) was gross.

As regards Alfred's death there are two possible defendants: Michael and Thomas. Dealing with Michael first, it would be necessary to consider whether or not he can be said to have caused the death. Michael is a 'bur for' cause of the death. But, there are two possible breaks in the chain of causation. First there is Thomas's parrying of the cone. Following the reasoning in *Paggett* it may well be argued that this was not a free voluntary and informed act because Thomas was acting in self-defence. The second possible break is Thomas's attempts at mouth-to-mouth resuscitation. The court may well draw on the case law as regards medical treatment received by victims. If an analogy is made with *Jordan* then Thomas's attempted resuscitation will break the chain of causation if it renders Michael's act no longer an operating and substantial cause of the death. This could be shown if the cause of death was entirely asphyxiation caused by the Thomas. Also, it would need to be shown that Thomas's treatment was palpably wrong, which no doubt it would be. If it is shown that Michael's act was an operating and substantial cause of the death then there would probably be no difficulty in showing *mens rea*, relying on the doctrine of transferred malice. The key issue would then be whether or not a defence of loss of control or diminished responsibility can be made out.

In relation to Thomas's bungled first aid the natural charge would be one of gross negligence manslaughter. The jury would need to consider whether or not the level of skill he showed was below that which could be expected of the reasonable first aider (not of Thomas himself: *Adomako*) and whether the negligence was gross.

McHugh J in Masciantonio (1994-5) 183 CLR 58 (High Court of Australia) questioned whether it is right to judge a person by the standard expected of 'a white middle class Australian of Anglo-Saxon-Celtic heritage'. Do you agree with the statement? Should people from certain educational, ethnic, cultural or socio-economic backgrounds be expected to have lower (or higher) levels of self-control than others?

This is an interesting and important question. It is discussed in Power (2007). The Coroners and Justice Act 2009 indicates that apart from age and sex there are no other reasons which can justify having a lower level of self-control for the purposes of loss of control. This raises the question of why these two are excepted. One argument could be that age and sex are outside the control of the individual, but that could equally well be said of a person's mental abnormality or indeed their socio-economic background. Of course we normally do expect people to comply with the criminal law regardless of their educational, ethnic, cultural or socio-economic backgrounds. It may simply be too complex for a court to properly take these into account. Or it may be that whatever disadvantages one may have society is entitled to expect you to rise above them at least to the extent of complying with the criminal law.