On Being A Cause of Death

In 2022, a 12 year old boy, Archie Battersbee, sustained severe brain damage as a result of a domestic accident. His doctors decided after several weeks that it was in his best interests for his life support, artificial ventilation, to be withdrawn. Indeed, it was the view of his doctors that Archie Battersbee was brain-dead, and therefore legally dead. Archie Battersbee's family, however, wanted him to remain on life support until his heart stopped. They did not accept that he was dead and took the view that withdrawing ventilation would cause his death prematurely and, as such, amounted to murder. A pro-Christian legal body, the Christian Legal Centre, supported this view and offered this brief reason:

> On an appointed day, the doctors come into the room and do the act which they know for certain will result in his death. In this context, is the ethical difference so clear?[i]

The implication here is that an action was performed by a medical professional that led in some way to Archie Battersbee's death, and that it was therefore a cause of his death. In English law, if you act to cause someone's death then you may be guilty of murder. Was the doctor in this case a cause of Archie Battersbee's death, and are they therefore guilty of murder?

A similar though importantly different case in 1993 involved Tony Bland, who had sustained serious brain injuries at the Hillsborough Disaster in 1989. Tony Bland differed from Archie Battersbee in that

he was not officially brain-dead, but was in what is known as a persistent, vegetative state. This is where the so-called 'higher' brain is irreversibly damaged, but the brainstem maintains its basic life-supporting functions. He did not require ventilation but did require artificial nutrition. It was decided to remove Tony Bland's artificial nutrition in 1993 and again, a medical professional would have performed an action that terminated this support. Was this action a cause of Tony Bland's death, and was the medical professional therefore guilty of murder?

The law approaches the question of causation from two rather different directions. It first asks whether an event is a 'cause in fact' of an effect. C is a 'cause in fact' of an effect, E, if it is decided that E would not have occurred if C had not. C is considered a *sine qua non* (without which not) of E. The test for causation here is known as the 'but for' test. The Battersbees no doubt felt that 'but for' the actions of a medical professional, Archie Battersbee would not have died when he did. So, they would no doubt argue that a medical professional was a 'cause in fact' of his death. But the law never bases liability only on whether something is a cause in fact of an effect. In addition, it is concerned with the blameworthiness of an action, with such notions as culpability and responsibility. This influences whether an event is regarded as what is called 'the legal cause' of an effect. This complicates matters considerably, because in

assessing responsibility for an effect, the law will look more widely than the mere consideration of whether the effect would not have occurred but for a particular action. It can therefore transpire that an action can be a cause in fact of an effect, but the perpetrator not be held blameworthy for that effect, i.e not be a legal cause of that effect. At times, it can also seem that an action is blameworthy for an effect without being regarded as a cause in fact of that effect. It could therefore be established that a medical professional was a cause in fact of, for example, Tony Bland's death, but not blameworthy for that death, and certainly not guilty of murder. This is significant, for it seems undeniable that a medical professional can be regarded at least as a cause in fact of Tony Bland's death. It is possible that those outside the law – such as the Battersbee family for example – may find this state of affairs rather confusing. A common sense notion of cause might suggest that if you are in some sense a cause of an effect then you are in some sense responsible, even blameworthy, for the effect. You are blameworthy because you are a cause. But the legal approach to causation does not accept this fully, arguing that frequently you may only be regarded as a cause if indeed it can be shown that you are blameworthy.

In cases of the kind we are considering, the law sometimes seems to take the view that the actions of a medical professional are, in fact, not a cause at all of death. For example, Sir Stephen Browne, in the

High Court, adjudicating on the removal of artificial nutrition from Tony Bland, commented:

> The fact that Anthony Bland's existence will terminate does not in my judgment alter the reality that the true cause of death will be the massive injuries which he sustained in what has been described as the Hillsborough disaster.[ii]

Justice Browne's language here, in talking of 'the true cause' of Tony Bland's death may seem to suggest that the actions of a medical professional were in no way a cause of it. And, despite the existence of the notion of a cause in fact, there may be a tendency in legal judgements concerning causation to focus primarily on the question of blameworthiness, to the extent that nothing really counts as the cause of an effect unless it is legally blameworthy for it. In this way, whether something is a cause in fact of an event, while it is normally regarded as important to show, may frequently be disregarded when considering issues of liability.

We will see that according to the main philosophical, as opposed to legal, definitions of a cause, it will clearly follow that medical professionals were in some sense causes of the deaths of Archie Battersbee and Tony Bland. Certainly, attempts to argue that they were *in no sense* causes of these deaths are difficult to sustain. Sometimes, in philosophical discussions of this kind of case, there does seem to be an attempt to argue that a medical professional

should in no sense be seen as a cause of death. We see this, for example, in attempts to argue that a medical professional cannot be a cause of death in such situations because their involvement in the death only took the form of an omission and an omission cannot be a cause. It is often suggested in this way that the medical professional did not *kill* the patient (because they did nothing that caused a death), but they simply *let the patient die.* But it will be seen that on the main philosophical accounts of causation it is mistaken to suggest, in cases like these, that a medical professional is in no sense a cause of death, although the sense in which medical professionals are causes of death in these cases may not support the view that the doctor in question actually *killed* the patient, even if they neither the support the view that they simply let the patient die.

As far as philosophical definitions of a cause go, the classic account is that of David Hume, although Hume perhaps confused matters by appearing to offer us two different definitions of a cause. His first definition is often called the regularity view of causation; in this way he defines a cause as,

" An object precedent and contiguous to another, and where all objects resembling the former are placed in like relations of precedency and contiguity to those objects that resemble the latter."

While this definition may be significant, there is no doubt that it seems to give us little assistance if we are interested in understanding

when something is the cause of a particular event. Hart and Honoré, in their account of causation in the law, suggest that the regularity view of causation is actually of little general use in helping us to pin down particular causes and the lawyer, they suggest, is mostly concerned with the truth of singular causal statements, not of general ones. To this extent, Hume's second account of causation, which for some odd reason he seemed to think was equivalent to his first, may seem more fruitful. In this he defines a cause as 'the first object' where,

"if the first object had not been, the second never would have existed"

This so-called counter-factual definition of causation, while it has numerous difficulties, many of which are also pointed out by Hart and Honoré is, as we have seen, incorporated not one legal conception of a cause known as the 'cause in fact'. This so-called counter-factual account of a cause has been developed by many philosophers, notably David Lewis[iii], as a superior account to the regularity view. It is plausible that it is more helpful than the regularity view as a way of understanding causes of particular events. To determine whether X was the cause of Y, we are simply asked to say whether if X had not been, Y would have occurred. We will certainly find it easier to answer this question – perhaps much too easy – than to establish whether all objects resembling X are placed

in like relations of precedency and contiguity to those objects resembling Y.

John Stuart Mill, in developing Hume's regularity theory of causation pointed out, correctly, that statements of causal regularity would rarely be framed anyway – as Hume does - in terms of a single event following regularly upon another. What is clear is that for the bringing about of any effect, a great number of conditions are usually required. For instance, a man might start a fire in a forest which leads to a forest fire. But among the conditions that lead to the forest fire, apart from the man's efforts, may be the sudden rising of a breeze. Also, there must be oxygen in the atmosphere, and the wood in the forest must be of a sort that encourages burning & so on. Equally, some negative conditions may be relevant. The fire brigade may have been called, but the fire engine might not have arrived for some reason, so the absence of the fire engine may be seen to play a part in the forest fire.

For this reason, Mill thought that a statement of causal regularity would typically link a wide set of conditions to an effect. The coming to be of these conditions would invariably be followed by the effect. John Mackie has usefully developed Mill's account to suggest that a causal regularity will typically show a link between a disjunction of conjunctions of conditions and an effect, of the following form:

All (ABnot-C or DGHnot-H or JK-notL) are followed by P and all P are preceded by (ABnot-C or DGHnot-H or JK-notL)

Each conjunction of conditions is minimally sufficient for the effect. The conjunction would not however be necessary for the effect, for some other conjunctions might do just as well. And none of the individual elements of a conjunction would be either necessary or sufficient for an effect. In any particular case, we could infer from the regularity that at least one of the conjunctions must have occurred and this is what led to the effect. Mackie refers to each element of such a conjunction in such a regularity as an *inus* condition of an effect. This denotes an insufficient, non-redundant part of an unnecessary but sufficient condition of an effect. It is non-redundant because it is part of a minimally sufficient set of conditions. Without it, that set would not have been minimally sufficient.

While such statements of causal regularity are no doubt useful, and seem to underpin our causal knowledge, how is it determined from the many conditions that brought about a particular P what should be treated as a cause of P? Mill's own approach to this question was quite promiscuous. He took the view that every individual antecedent item in a known causal regularity was on a par with every other. Therefore, there was no requirement to denote one of these asa cause of P on a particular occasion as opposed to any other. For

Mill, the ‘real cause’ of P was in fact every condition referred to in the relevant causal regularity:

All the conditions were equally indispensable to the production of the consequent; and the statement of the cause is incomplete, unless in some shape or other we introduce them all.[iv]

It is interesting that David Lewis, in developing his counter-factual analysis of causation is also very sympathetic to the view that distinguishing ‘the’ cause from the set of conditions that together brought about an effect is, as he puts it, ‘invidious’:

We sometimes single out one among all the causes of some event and call it "the" cause, as if there were no others. Or we single out a few as the "causes,'' calling the rest mere "causal factors" or "causal conditions." Or we speak of the "decisive" or "real" or "principal" cause. We may select the abnormal or extraordinary causes, or those under human control, or those we deem good or bad, or just those we want to talk about. I have nothing to say about these principles of invidious discrimination.'[v]

But it is clear that in the kinds of cases that interest us, distinguishing ‘the cause’ from the ‘mere conditions’ of an event is scarcely invidious. There is no doubt for example that one could count among the *conditions* of Tony Bland’s death that his life support was removed. There is no question that it played some part in his actual death. But Justice Browne, for one, saw it as a very substantial matter that we should identify Tony Bland’s brain injuries as ‘the true cause’ of his death whatever the part played by the removal of his life support. In questions where criminal liability is at issue, one

cannot really imply, as Lewis seems to, that such distinctions as these are largely invidious.

In terms of Mackie's analysis of causal regularities 'the cause' of a particular P may be seen as one of the conjunctions of conditions in the regularity, although it is possible that Mill's view was that 'the cause' of P should be understood 'philosophically speaking' to be the full disjunction of conjunctions in the regularity. if this last is done, then the cause of an event is understood as those conditions that are both necessary and sufficient for the effect. Mackie dubs this 'the full cause' of an event, but recognises that 'what is ordinarily called a cause … is never anything like this'[vi] Typically, when we talk of the cause of an event we do not even pick out a set of minimally sufficient conditions, but seem to denote one element of one conjunction of minimally sufficient conditions as the cause, what Mackie calls an inus condition of an event. Mackie agrees that what we normally call the cause of an event is an inus condition of it. The challenge remains, of course : which inus condition should we pick?

Hart and Honoré see it as a serious defect of Mill's account that he fails to distinguish between the conditions and what should be seen as the cause of an effect, 'For the contrast of cause with mere conditions is an inseparable feature of all causal thinking'[vii] But again we can ask, how is this contrast to be made? What entitles us to pick

out from the minimally sufficient conditions that bring about an effect one that might be deemed the cause? One of their suggestions is that this will often depend 'on the context of the inquiry, who asks the question and why'. In some ways, this echoes Mill's attitude that 'for the purpose in view' we tend to disregard some conditions as causes, although he does not approve of this. But what is odd about Hart and Honore's suggestion is that then what is seen as the cause of an effect becomes relativised to a particular form of enquiry in an arbitrary way. For instance, if we ask 'Why did Tony Bland die?', we may seem to be asking why he, of all such men of his age, died. To this question, it may seem most relevant to point out that he suffered severe brain damage. But if we ask a more particular question, 'Why did Tony Bland, of all those in UK hospitals with severe brain damage, die at time t?', it might seem otiose to now mention his severe brain damage, for we want to know why of all those with brain damage he died. The best answer to this question might then seem to be that his life support, and not theirs, was removed. But in this way, two different causes of Tony Bland's death are identified in answer to two very different questions. And depending on the answer, we seem to get two different views of liability. And surely because we ask the second question in the way we do, it cannot therefore follow that Tony Bland's brain damage was still not a significant causal factor in his death, even following the removal of his life support. After all, if removing his life support did

cause his death, one of the reasons it did is that Tony Bland had sustained significant brain damage. Had he not, then the removal of his life support would have made little difference to him. We might therefore wonder whether the mere nature of the enquiry should thus be allowed to determine the answer to the causal question. The difference between a cause and a condition surely cannot depend only on the matter of who is asking, and why.

Hart and Honoré are rightly concerned that this way of distinguishing causes and conditions may seem to make the distinction between them 'arbitrary and subjective'. To this end, they propose that the difference between causes and conditions reflects our sense of what are normal and abnormal conditions in a certain situation. When we pose a causal question, we appear to assume a background of normal conditions relative to the question. In asking for the cause of an effect, we are interested in what has disturbed these normal conditions. Their view is that what are normal and abnormal conditions relative to a certain causal enquiry is not an arbitrary and subjective matter. Thus, if a forest fire breaks out, normal conditions would include the presence of oxygen, so this would not be selected as the cause of the forest fire, and this is not seen as an arbitrary and subjective matter. And if a fire breaks out in a laboratory where normally the presence of oxygen is controlled, the presence of oxygen might then be treated as a cause, and not a condition of the

fire and again, this is not seen as arbitrary and subjective. However, it is not clear that this contrast between normal and abnormal conditions helps us to distinguish causes and conditions in relation to the death of Tony Bland for example. What here are the normal conditions? We would probably say that Tony Bland's brain damage is an abnormal condition and so identify this as a cause of his death. But what of the removal of his life support? Is this a normal or abnormal condition? While Tony Bland was in hospital, he was normally on life support. The removal of this support was therefore abnormal, so must count as a cause, not a condition of his death in those circumstances. We again end up with two causes of Tony Bland's death, depending how one addresses the situation, rather than a clear distinction between causes and conditions.

We see this same problem in relation to John Mackie's view that causal questions are always posed in relation to what he calls a 'causal field'. Mackie also criticises Mill's view that the entire antecedent condition of a causal regularity should be regarded as the 'real' cause of an effect, and the view that any individual element of this condition can just as easily be treated as the cause as any other. Like Hart and Honore, he accepts that 'what is normal, right, and proper is not so readily called a cause as is something abnormal and wrong'[viii], and believes this idea can be clarified through the notion of a causal field. When we pose a causal question, he thinks, we do so

relative to a field. So, suppose Jones, who lives in a block of flats, lights a match, not knowing there is a gas leak, and an explosion occurs. We might naturally ask, 'What caused the explosion?'. How we answer this question will depend on the causal field. Suppose we designate the causal field as 'this block of flats as normally used and lived in'. Then, it seems we must choose the gas leak as the cause of the explosion. Jones' lighting a match is not the cause, because it is part of the field. Jones often lights matches. And what is part of the field cannot be, says Mackie, a cause: 'Any part of the chosen field is decisively ruled out as a cause'. But if we apply the notion of a field to the question of what caused Tony Bland's death, we encounter familiar problems. We may ask this question and regard the causal field as all young men in the UK. If so, we would say that his death was caused by brain damage. But we may ask a similar question and treat the causal field as all patients in hospital with brain damage on a particular day. Of them, why did Tony Bland die? Here, apparently we are not *permitted* to mention Tony Bland's brain damage, for it is part of the causal field. So, we would say that the removal of his life support, in this causal field, caused his death. Again, we end up with two equally good causes of Tony Bland's death, relative to different causal fields. And again, we seem to obscure the fact that the removal of Tony Bland's life support, if it was a cause of his death, was so because of the part played by his brain damage. Certainly, in referring to the removal of his life support as a cause of his death it

seems unhelpful to suggest that we are not permitted to mention his brain damage, because it forms part of the causal field in this case.

Thus far, therefore, it would seem appropriate to identify the removal of Tony Bland's life support as at least a part of the cause of his death, or as a cause of his death. In his particular case, the minimally sufficient set of conditions that brought about his death appears to include both his brain damage and the removal of his life support. Other conditions will belong to this set, but these seem the most important. In his case, his brain damage alone was not minimally sufficient to bring about his death. We know that it was possible that he could have survived for years on life support. The removal of his life support was therefore part of the minimally sufficient conditions that brought about his death. Indeed, what the hospital achieved by removing his life support was to bring about the existence of this minimally sufficient set of conditions for his death, having recognised that otherwise they would not exist. If we regard the minimally sufficient set of conditions as the cause of his death, then the removal of his life support becomes part of this cause. But it would be a mistake to refer to it as *the* cause. *The* cause would also include his brain injuries (and other conditions). In this sense, it was misleading for Justice Browne to describe Tony Bland's brain injuries as 'the true cause' of his death. Equally, it would have been misleading for the Battersbee family, in their situation, to describe

the removal of Archie Battersbee's life support as *the* cause of his death. Both would have been mistaken in identifying a part of the cause of an event with *the* cause of an event. However, it clear that we tend to pick out from a minimally sufficient set of conditions for an effect on event and dub it the cause. If we do this depending on the nature of our enquiry, or on the nature of the causal field that interests us, then it is clear that some enquiries and causal fields will give rise to the conclusion that the removal of life support in each case may have been a cause of death. Again, it would be misleading to denote this as *the* cause of death, for other forms of enquiry and other causal fields would give rise to different answers. We may conclude from this that we have no reliable way of picking out causes from among sets of minimally sufficient conditions for effects, and that such choices are always arbitrary, being determined by one's particular interests at a time.

However, this would perhaps be a pessimistic conclusion. What is particularly difficult about the kinds of case we are considering is that they seem in a significant sense to involve two conditions that might each be considered as a cause, depending on one's interests. in law, this situation is known as a case of concurrent causation, and it can arise in different forms. In one form, known as additional causation, two events occur both of which are sufficient to bring about an effect. We can imagine, for instance, that someone, Jones, is

simultaneously shot by two persons, Brown and Green. Either shot would have been sufficient to bring about the death. In such a case, the law regards both Brown and Green as 'legal causes' of and as liable for, the death. The case of Tony Bland, though, is not like this, because neither of the main conditions of his death, his brain damage, and the removal of his life support, were sufficient alone to bring about his death. They may therefore be regarded as *contributory* causes of his death. Both are arguably conditions *sine qua non* of his death, so both may be considered a cause in fact of his death. The question arises whether there are any legal considerations that can come to bear which will allow us to clearly denote one or the other of them as the cause, as Justice Browne does. We will see in a moment how the law approaches such issues in a well-known but different kind of case where they arise, and then ask whether such an approach can help us deal with the kinds of case we are interested in.

If we adopt Hume's second, counter-factual analysis of causal statements, that corresponds to the legal notion of a cause in fact, does that help us to understand whether the removal of life support was a cause of Tony Bland's death? Legally, can we say that the removal of his life support was a 'cause in fact' of his death? If it was, then it seems that the following counter-factual statement is true:

CF1 : If Tony Bland's life support had not been removed, he would not have died.

Of course, a good deal will depend on what we think CF1 means. Following David Lewis's analysis of such counter-factual statements we can venture that it means something like : in the closest possible world in which a medical professional does not remove Tony Bland's life support, and which resembles our actual state of affairs as much as this permits it to, Tony Bland would not have died.[ix] If this is what CF1 means then we might plausibly argue that it is true. Initially, we might have been tempted to think that CF1 was not true. After all, we can imagine situations in which Tony Bland's life support was not removed but he died anyway, from pneumonia or, more likely, from his brain damage. As we have said, patients in a persistent vegetative state may survive for years with artificial nutrition and medical interventions to manage their general health. Tony Bland had been four years in a persistent vegetative state; Karen Ann Quinlan survived in one for ten years. Normally, patients in a persistent vegetative state die only from infections and the withdrawal of their artificial nutrition. Thus, in the closest world that differs from the actual world in that Tony Bland's artificial nutrition is not withdrawn, Tony Bland does not typically die. In this world, he continues to live in a deep state of unconsciousness, maintained by medical interventions. And this makes CF1 true. And, on the

counter-factual analysis of causation, it makes the withdrawal of his life support a cause of his death.

It is interesting in this respect to compare Tony Bland's situation with that of Archie Battersbee. Is the following counter-factual true?

CF2 : If Archie Battersbee's had not been withdrawn, Archie Battersbee would not have died.

It is very relevant in this regard that patients with the degree of brain damage suffered by Archie Battersbee are very likely to die even with ventilation. So, a world in which his ventilation is not withdrawn, and he dies from his brain injuries anyway, is close enough to the actual world to be pertinent to the truth of CF2. If this is so, then we will be inclined to argue – if we accept the counter-factual analysis of the causal relation – that the removal of Archie Battersbee's ventilation is not the cause of Archie Battersbee's death, because CF2 is false.

But should the truth of CF1 make us accept that a medical professional was a cause of Tony Bland's death? This will depend to a large extent on whether we think statements like CF1 capture the full meaning of the causal relation.

We have noted that the kinds of case that interest us are ones of what is called concurrent causation, ones where more than one of the minimally sufficient conditions of an effect might be appropriately considered as the cause of an event, perhaps depending on one's interests. Cases of this kind regularly occur. A very interesting one, *R v Hughes*, was considered by the UK Supreme Court in 2013. Here the Supreme Court was effectively asked to decide which of two contributory factors was the cause of a death, and their reasoning may throw some light on cases like those of Archie Battersbee and Tony Bland.

In October, 2009, Mr Hughes was driving correctly and under the speed limit towards Carlisle when another vehicle, driven by a Mr Dickinson, veered towards him on his side of the road. It turned out that Mr Dickinson was under the influence of heroin. The two cars collided and Mr Dickinson later died from his injuries. Unfortunately for Mr Hughes, it turned out that he was both uninsured and not in possession of a correct licence. It seemed therefore that his own actions fell under Sections 87 and 143 of the Road Traffic Act, 1988 and that he was ostensibly a cause of death while driving unlicensed and uninsured. Mr Hughes was prosecuted for these two offences, but in his defence it was argued that he had not, strictly speaking, caused the death of Mr Dickinson, the implication being that Mr Dickinson had largely caused his own death. Initially, this defence

was accepted but was then overruled on appeal. The Court of Appeal had been influenced in this decision by a previous similar case, *R v Williams (2010)* in which it had been decided that it was no element in the offences allegedly committed by the defendant that he was at fault for the accident. He was guilty simply because he had driven unlicensed and uninsured. The Supreme Court's task was to consider Mr Hughes appeal against the judgement of the Appeal Court.

The Supreme Court saw itself as faced with the question of whether Mr Hughes should be regarded as criminally responsible for the death of Mr Dickinson, on the assumption that he had indeed been a cause of Mr Dickinson's death. Initially, they considered the position that would seem to be implied by what they called an 'ordinary' view of causation. This was that Mr Hughes, while he had been driving uninsured and unlicensed, had not driven badly. Mr Dickinson on the other hand had driven in an uncontrolled way. Ordinarily, Mr Hughes might therefore not be regarded as the cause of Mr Dickinson's death. His involvement in Mr Dickinson's death was simply to be driving along in the car that Mr Dickinson happened to hit. The Court focused then on what it was thought the relevant legislation was designed to be relevant to. It was argued by counsel for the Crown that the legislation was intended to apply to anyone at all who, while unlicensed and uninsured, was involved in an accident that led to a

death. The idea was that such a person had no business being at the wheel of a car, and so should face criminal liability for causing death. The Court gained agreement on questioning, however, that this could not be the purpose of the legislation for this would suggest that if such a person were sitting in a stationary car and were deliberately hit by another driver who then died, or by another driver who was intent on committing suicide, it would seem mistaken to regard the unlicensed, uninsured person at the wheel as the cause of a death. And because such implications could not be pressed to their logical limit, the Court inclined to the view that a view of causation in keeping with common law was more appropriate here. But what was that?

The Court was moving slowly to a position on which it was felt not to clear that the intention of the legislation was to establish an aggravated form of an offence which would 'attach criminal responsibility for a death to those whose driving had nothing to do with that death beyond being available on the road to be struck.'[x] It was the Court's view that the primary purpose of the legislation was to require that all drivers contribute to the insurance funds that are necessary for the use of the roads by all drivers, rather than to put persons who had not paid for insurance at risk of being criminally liable for causing death when they had not actually driven badly. It made the general observation that where an aggravated form of an

offence exists, it is because the defendant is seen as causing greater harm, and this was not true in the case of Mr Hughes. It wanted to avoid a position where it was seen that the nature of the aggravated offence in Mr Hughes' case should attract some distinctive form of liability. It was also opposed to a view that Mr Hughes' driving should be regarded as negligent in any way. Its view was that the law generally regarded a driver as careless or dangerous only where the manner of their driving made them minimally responsible for a death. It was felt that consistency required a similar approach to someone driving without insurance or licence. It was thought that if Parliament had strictly intended that anyone driving uninsured or unlicensed should be strictly liable for causing death, even where their involvement in the death was not due to any fault in their actual driving, they would have made this explicitly clear. And then it would have followed that, for example, someone who is simply sitting in a stationery car must be regarded as the cause of a death if another driving decides to crash into them in order to commit suicide, and they would be regarded as a cause of death if a pedestrian carelessly stepped into the road in front of them. And it had clearly transpired in dialogue with counsel for the Crown that there was great reluctance to pursue the legislation this far.

Counsel for Mr Hughes had also tried to argue that he was not the cause of Mr Dickinson's death because the voluntary actions of Mr

Dickinson 'broke the chain of causation' connecting Mr Hughes's driving to the fatality. Counsel here had referred to a previous ruling in *R v Kennedy (2007)* in which Kennedy had prepared a fatal syringe for Bosque, which Bosque had then used. It was there argued, and upheld, that Kennedy was not the cause of Bosque's death, because Bosque's deliberate and voluntary action in injecting himself broke the chain of causation between Kennedy and himself, so that Kennedy was not deemed the cause of Bosque's death. Bosque's action there was regarded as what is called an 'intervening cause'. But the Supreme Court rejected this particular approach, for Dickinson was not regarded as killing himself voluntarily and deliberately, as Bosque was.. Their view was that the Hughes case was more a case of concurrent causes, where one or more causes of an effect can clearly be identified. It was then a question of which of the causes should attract greater, or any, liability. In this situation, the legal issue was whether either of the concurrent causes should be counted as *substantial* or *significant,* or either should be counted as *de minimis,* or minimal. It therefore had to decide whether Mr Hughes' driving was a 'substantial' cause of Mr Dickinson's death, or not.

While the court recognised the existence of a cause in the sense of a *sine qua non*, it stressed the difference between this an a legally effective cause. It noted that any condition of an effect may be

regarded as a sine qua non and the need to find some way of distinguishing legally effective causes from the mere conditions of an event, recognising that 'In the case law there is a well recognised distinction between conduct which sets the stage for an occurrence and conduct which on a common sense view is regarded as instrumental in bringing about the occurrence.' It warned against placing too much emphasis on the *sine qua non* test and advocated the 'common law' approach, while recognising that this 'is not susceptible to a formula'. We have already agreed that finding clear ways to distinguish the conditions of an effect from what might be regarded as 'the cause' are not easy. The suggestion that they are not susceptible to a formula may enforce the sense that they may be rather arbitrary and conditioned by one's particular form of enquiry. However, it is not clear that the Supreme Court wished to be that sceptical. Indeed, the Court took the view that the matter could be decided by 'common sense':

> By the test of common sense, whilst the driving by Mr Hughes created the opportunity for his car to be run into by Mr Dickinson, what brought about the latter's death was his own dangerous driving under the influence of drugs. It was a matter of the merest chance that what he hit when he veered onto the wrong side of the road for the last of several times was the oncoming vehicle which Mr Hughes was driving. He might just as easily have gone off the road and hit a tree, in which case nobody would suggest that his death was caused by the planting of the tree, although that too would have been a sine qua non.

Common sense here is deemed to be able to clarify what can be regarded as a significant or substantial cause of an effect. While Mr Hughes' driving was a *sine qua non* of the death of Mr Dickinson, and thus a cause in fact, it could not be regarded as a substantial or significant cause. The substantial or significant cause was Mr Dickinson's own driving, which might have led to his death whether he had crashed into Mr Hughes or not. For this reason, Mr Dickinson's driving should be picked out as the legally effective cause of his death. Mr Hughes should not be counted as the legally effective cause of Mr Dickinson's death.

The corollary between this case and the case of Tony Bland should be fairly clear. Both Mr Hughes and a medical professional can be seen as the *sine qua non* of a death. In this sense, they can be regarded as a cause of death. This is consistent with the main philosophical approaches to the notion of a cause. But neither might be seen as the substantial or significant causes of a death. This might be explained in terms of the existence of a further factor in each case without which the actions of Mr Hughes and the medical professional would not have led to a death. In Mr Hughes' case this was the driving of Mr Dickinson and in Tony Bland's case it was the presence of his brain injuries.

Just as the assessment of Mr Hughes' liability for the death of Mr Dickinson took account of what was seen as the purpose of the

legislation under which he was charged, it would also be necessary, in assessing whether a medical professional in the case of Archie Battersbee or Tony Bland was liable for the death in each case, to assess the purpose of the murder legislation. This would be a large issue, beyond the scope of this paper. It might well be the case that the current wording of the murder legislation remains as unclear on the question of whether a medical professional in such situation is liable to a charge of murder as the Road Traffic legislation seemed to be on the question of the liability of someone like Mr Hughes for a death.

There is no doubt, for example, that in the case of Tony Bland a medical professional was a cause in fact of his death. The legal view, though, would be that the doctor was not a legal cause of the death, but only a minimal condition of it, with the brain injury being the most significant factor. However, the position of the medical professional in this case was different to that of Hughes in relation to Dickinson. The key difference is that the medical professional intended an action that involved the virtual certainty that Tony Bland would die. Hughes did not do this. For Hughes to have acted in this way would have required him to manoeuvre his car in such a way that it would have been virtually certain that Dickinson would have died, even allowing for the fact that Dickinson was driving recklessly. In that case, it was arguable that the Supreme Court would have

upheld the view that he was a liable cause of Dickinson's death. As they put it in relation to Hughes, 'It must be proved that there was something which he did or omitted to do by way of driving it which contributed in a more than minimal way to the death.'. Had he acted in such a way that it became a virtual certainty that Dickinson would die, this requirement would have been satisfied.

What this seems to suggest is that there is at present no clear guideline which indicates why, in the case of someone like Tony Bland, a medical professional should not be regarded as a cause and, indeed, as a liable cause of his death. This situation is clearly very unsatisfactory, for there is no doubt that there is not the intention of the murder legislation to encompass medical professionals in such situations any more than it is the intention of the Road Traffic legislation to encompass fellows like Mr Hughes. It is clearly the view of the law that even if a medical professional acts intentionally in a way that carries a virtual certainty that it will lead to the death of a patient, the medical professional cannot be regarded as a legal cause of death in a way that supports a charge of murder.

The law's position here is that what the medical professional is doing is ending a pointless form of medical treatment that is not in the best interests of the patient. But while it is clear that the medical professional has no 'strict intention' to bring about the death of the patient, their purpose being rather to end pointless medical

treatment, there is no doubt that the medical professional acts in a way which involves a virtual certainty that the patient will die. The law clearly still wishes to take the view that the medical professional's causal role in the death remains minimal, like Hughes' involvement in the death of Dickinson. But clarification is needed here because of the obvious difference between the two cases. For, by the standards applied in Hughes, the medical professional would be regarded as a legal cause of a patient's death, and not simply as a *sine qua non.* The question remains why, if that is the case, they are not considered liable for the death.

End Notes

[i] https://christianconcern.com/comment/top-12-myths-of-archie-battersbees-case/
[ii]https://www.globalhealthrights.org/wp-content/uploads/2013/01/HL-1993-Airedale-NHS-Trust-v.-Bland.pdf
[iii] David Lewis, *Causation and Causes as Influence*, in John Collns, Ned Hall and L.A.Paul (eds.), *Causation and Counterfactuals,* MIT Press (2004), p.80
[iv] A System Of Logic, Ratiocinative And Inductive (p. 162). Kindle Edition.

[v] David Lewis, *Causation, p.*
[vi] John Mackie, *The Cement of the Universe,* Oxford (1974) p.64
[vii] H.L.A. Hart and A.M. Honoré, *Causation and the Law,* Oxford (1967), p.11
[viii] Mackie, p.34
[ix] David Lewis, *Counterfactuals,* Blackwell (1973), p.1
[x] Supreme Court Judgement, R v Hughes (2013), UKSC 56