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Tsilhqot'in Nation v *British Columbia*, 2014 SCC 44

On June 26, 2014, the Supreme Court of Canada rendered its decision in one of the most significant Aboriginal law cases in Canadian history. The decision in the Tsilhqot'in case marks *the first time in Canadian law that a declaration of Aboriginal title has been made*; prior cases had indicated that Aboriginal title as a legal concept existed, but no case had made an actual finding of Aboriginal title until now. In so doing, the Court clarified the test for establishing Aboriginal title, and the implications of such a finding for Aboriginal, provincial and federal governments. The Court also provided guidance as to the circumstances under which provincial or federal governments can infringe an Aboriginal title right, and the province's role in regulating lands subject to Aboriginal title. This case is expected to have significant ramifications, particularly in British Columbia, given the relative paucity of Aboriginal treaties across that province.

Corruption of Pharmaceuticals

Sally Ramage

Introduction

Over several decades now, patients have suffered from a largely hidden epidemic of side effects from drugs that usually have few offsetting benefits. The pharmaceutical industry has corrupted the practice of medicine through its influence over what drugs are developed, how they are tested, and how medical knowledge is created.

Since 1906, heavy commercial influence has compromised Congressional legislation from properly protecting the patient from unsafe drugs. In the United States, when authorisation of user fees became law in 1992, drug companies have become the FDA's prime clients. The

pharmaceutical industry has demanded shorter average review times and, with less time to thoroughly review evidence, increased hospitalizations and deaths have resulted, it has been alleged. Meeting the needs of the drug companies has taken priority over meeting the needs of patients. This can be called a corruption of regulatory intent and the situation is set to deteriorate further. The creation of a National Drug Safety Board has been suggested as one strategy to stem this corruption….

References

Donald W. Light , Joel Lexchin, and Jonathan J. Darrow, "Corruption of pharmaceuticals and the myth of safe and effective drugs", *Journal of Law, Medicine and Ethics*, Vol. 14, No. 3, 2013

Causation

Sally Ramage

Although it is possible to imagine factual scenarios in which two people could properly be regarded as acting together, in cases where the accused supplies the victim with drugs, the defendant will not be guilty where the victim is a fully-informed and responsible adult and had freely and voluntarily self -administered himself with a fatal dose, as in the case *R v Kennedy* (No 2) [2007] UKHL 38, [2007] 4 All ER 1083, [2007] 3 WLR 612, [2008] Crim LR 3, 222).

The House of Lords decision in *Kennedy* resolved a difficult issue in criminal law regarding participation, assisted drug-abuse injection and causation. The facts in Kennedy were that Kennedy handed a prepared syringe of heroin over to his friend Bosque and Bosque injected

himself but later died. Kennedy was convicted of unlawful act manslaughter on the premise that by handing over a prepared syringe he was acting in concert with the victim in administering a noxious thing contrary to section 23 of the Offences against the Person Act 1861.

Similar facts

The House of Lords reviews several cases with similar facts. The House of Lords ruled firstly, that *Finlay* was wrongly decided. There is a well-established principle of English law that the free and voluntary act of a person with full capacity is not regarded as having been caused by another and therefore the defendant is not to be treated as causing the victim to act in a certain way if the victim makes a voluntary and informed decision to act in that way rather than another. So in self-injecting cases, it is not appropriate to regard the supplier of the drug as having caused the drug to be administered. The prosecution were therefore restricted to arguing that Kennedy administered the drug. The logical conclusion of the fact that the deceased's decision to self- inject was free and voluntary was that the heroin was not administered by the defendant. The defendant may have encouraged or assisted the deceased to inject himself but he did not administer the drug. The House therefore rejected the analysis of the Court of Appeal in Kennedy's second appeal. This was not a case of a 'combined operation' for which Kennedy and the deceased were jointly responsible.

The House of Lords said:

'The deceased… had a choice, knowing the facts, whether to inject himself or not. The heroin was, as the certified question correctly recognises, self-administered, not jointly administered.'

The House remarked that the failure to clearly specify the unlawful act upon which liability for manslaughter was based had contributed to the uncertainty in the law under consideration and urged prosecutors to formulate precise counts.

Kennedy now falls in line with similar authorities such as *R v Dalby* [1982] 1 W.L.R. 425 and *R v Dias* [2002] 2 Cr.App.R. 96 in which the defendants, who supplied readily prepared drugs to their victims, were absolved from liability for unlawful act manslaughter because the victims were found to have freely decided to inject themselves with the noxious substance.

Causation

However, the House of Lords did not review the application of causation as seen in the earlier case of *Rafferty (Andrew Paul) v R* [2007] EWCA Crim 1846 when a teenager, who had been imprisoned indefinitely, had won an appeal against conviction of the killing of a 17-year-old who was beaten and left to drown in the sea. In *Rafferty,* the appellant was found to have withdrawn from a joint enterprise to rob a man when, after he elbowed the victim to keep him down, stole his wallet and exited the scene. His co-defendants continued to attack the man by dragging him into the sea where he drowned. Lord Justice Hooper in the Court of Appeal claimed that no jury could properly conclude that the drowning of the victim was other than of a fundamentally different nature to the other harm inflicted upon the victim by the defendant.[1]

Joint enterprise has no distinction of degree

Where several persons inflict injuries on a victim, it is the totality of the injuries which are to be considered in relation to a charge of causing grievous bodily harm with intent contrary to section 18 Offences against the Person Act. It is immaterial that one person joins in the attack

[1] At paragraph 50.

slightly after the others have begun to inflict injuries, which may have included the most serious single injury. He is aiding the commission of the offence and participating in it as soon as he joins in[2]. In *Rafferty*, the defendant did participate in the beating up of the teenager but the drowning of the teenager was a new act.

Unlawful act manslaughter

The main issue in *Kennedy* was the liability for manslaughter of a person who supplies drugs to a person who injects himself with a fatal dose. Where the victim is a fully informed and responsible adult who freely and voluntarily self-administered himself a fatal dose, the defendant will not be guilty of manslaughter. In addition, the judgments of their Lordships provide a helpful analysis of the offences under ss 23 and 24 of the Offences against the Person Act 1861 which relate to the malicious administration of poison etc. Administering the noxious thing; causing a noxious thing to be administered; and causing a noxious thing to be taken may commit these offences. Their Lordships provided helpful examples of the type of activity which would fall within each of the differing ways of committing the offence of s 24 of the Act.

The 'Empress' case

There is a significant anomaly surrounding *Kennedy's* judgment in relation to foreseeability. Previous case law has not been followed, leading to a similarity to the most controversial

[2] *R. v. Grundy*, 89 Cr.App.R. 333, CA. See also *R. v. Percival*, in relation to wounding.

causation case of all – *Environment Agency (formerly National Rivers Authority) v Empress Car Co (Abertillery) Ltd* .[3]

Lord Bingham stated in *Kennedy* that Lord Hoffman's comments relating to causation in *Empress* could not be compared to cases under section 23 of the Offences Against the Person Act 1861 of 'causing a noxious thing to be administered' because the latter were of a wholly different *context* to strict liability pollution offences.[4] In *Empress,* the appellant had been convicted of the strict liability offence of 'causing' a river to be polluted under the Water Resources Act 1991, s85 (1). An unknown trespasser had entered the appellant's premises and drained a tank of diesel into a river. The House of Lords held that it had to be proved that the defendant caused the pollution. Where the defendant had created a situation in which the polluting matter could escape (but a necessary condition of the actual escape which happened was the act of a third party or a natural event), the question was whether that act or event should be regarded as a normal fact of life or something extraordinary.

Lord Hoffman also submitted in *Empress* that the act of the defendant could properly be held to have caused the pollution even though an ordinary act of a third party was the immediate cause of the diesel oil flowing into the river.[5] It is submitted that although Lord Hoffman's suggestion that only an unforeseeable and extraordinary act should break the chain of causation is completely correct.

The diesel-oil act in *Empress* was held not to have broken the chain of causation because the company who installed the waste pipe (not the third party) caused the pollution to the river.

Lord Hoffman in *Empress* was looking for the *source* of the pollution as opposed to other elements, which merely hurried the source along? For example, the third party in *Empress*

[3] [1999] 2 A.C. 22.
[4] See [2007] 3 W.L.R. 612, at page 617.
[5] At pages 29, 31-32, and 36.

may have *allowed* the diesel to flow a certain way, but the company who placed the diesel and the waste pipe on the site were the 'key players' in ensuring that the diesel contacted the river. This rationale is interesting, as it ensures that the fault of the facilitator is taken into account as opposed to the independent party who merely took advantage of the facilitator's thoughtless act.

If *Kennedy* had followed the same unorthodox lines as *Empress*, an interesting question would occur: should the cause of death be the heroin itself from the facilitator (akin to the pollution in *Empress*), or the act of injection (akin to the turning of the tap)? Perhaps Lord Bingham in *Kennedy* could have applied Lord Hoffman's rationale in *Empress* and considered the *cause* of death (i.e. the poison) as opposed to how it got into the victim? Applying the *Empress* rationale to *Kennedy* reaches a logical outcome. The victim independently installed the noxious substance into himself, but the source of the substance was Kennedy. Kennedy foresaw and expected this act. Could he bear some responsibility for the outcome?

Working together with the victim

Was Kennedy working with his victim, thus making an 'independent act' unlikely? It was correctly decided that there was no joint enterprise in this case[6] and that self-injection is not a criminal offence,[7] but it can easily be argued that Kennedy and his victim were working together for a short space of time as acquaintances to ensure that the victim acquired his 'hit' of heroin. It is difficult to argue that the victim's act of self-injection was 'completely independent' of Kennedy's preparation and supply of the drug he injected. Because the victim's actions were foreseeable, it is more logical that his and Kennedys' acts could be *combined* as causes rather than played off against one another to compete for the 'main

[6] Per Lord Bingham, [2007] 3 W.L.R. 612, at pages 619-620.
[7] See *R v Dias* [2002] 2 Cr.App.R. 5.

cause'. In *R v Cheshire*,[8] Beldam L.J. supports this idea by stating that it is not the function of the jury to evaluate competing causes or to choose which is dominant, provided they are satisfied that the accused's acts can fairly be said to have made a significant contribution to the victim's death.

Unlawful act manslaughter

The problem, of course, would be finding an appropriate offence to pin upon Kennedy for his more-than-minimal contribution.[9] If supply was taken as the unlawful act to establish a conviction for unlawful act manslaughter (based on the theory that Kennedy was working with the victim thus diminishing the 'independent act'), the test could logically be applied quite easily.

(1) There was an unlawful act;

(2) That act was dangerous.

(3) That act was a significant cause of death.

Firstly, supply of heroin is an unlawful act under section 4(1) of the Misuse of Drugs Act 1971.[10] 'Dangerousness' was explained in *R v Church*[11] as an unlawful act which must be such as all sober and reasonable people would inevitably recognise subject the other person to, at least, the risk of some harm resulting there from, albeit not serious harm.[12] Would a sober and reasonable man recognise that the victim would inject the prepared syringe, which contained the dangerous substance? The House of Lords in *Kennedy* rejected the idea that an

[8] [1991] 3 All.E.R. 670

[9] 'The connection between fault and death is too tenuous.' CMV Clarkson 'Context and culpability in involuntary manslaughter' in A. Ashworth and B. Mitchell (eds) *Rethinking English Homicide Law* (Oxford, Oxford University Press, 2000) pp 133-165 at p 160.

[10] In *R v Dias* [2002] 2 Cr.App.R. 5 Keene L.J. noted that to rely on the supply of heroin as an alternative unlawful act would raise difficulties on causation (paragraph 8): '[The victim] was an adult and able to decide for himself whether or not to inject the heroin. His own action in injecting himself might well have been seen as an intervening act between the supply of the drug by the defendant and the death of [the victim].'

[11] *Church* [1966] 1 Q.B. 59.

[12] Per Edmund Davies J, at page 70

offence such as possession or supply is applicable in assisting drug-abuse injection cases because, as the Court of Appeal observed in *R v Dalby*[13] the supply of drugs would itself have caused no harm unless the deceased had subsequently used the drugs in a form and quantity which was dangerous.[14] Applying the unlawful act manslaughter test, it is submitted with caution that the deceased in *Kennedy* used a drug which was dangerous in not only its form but in its quantity. This leaves the difficult and familiar question. Was the supply a significant cause of the victims' death? Keene L.J. in *Dias*[15] gave some guidance which points towards a more generous application of the doctrine of causation (at para. 26). The trial judge, in a case such as this, after identifying the unlawful act on the part of the defendant relied upon, must direct the jury to ask whether they are sure that that act was at least a substantive cause of the victim's death, as well as being dangerous. It is submitted cautiously – applying some of the rationale in *Empress* – that it was not the act of self-injection that killed the victim. It was the heroin that killed the victim, and the heroin was sourced from Kennedy. Since heroin was the operating cause of death, this would logically be a significant cause of death. Besides, is not the victim's voluntary decision to inject the heroin simply a foreseeable continuation of the supply of a ready-to-inject syringe?

Conclusion

[13] [1982] 1 WLR 425,
[14] Per Waller L.J., at page 429.
[15] [2002] 2 Cr.App.R. 5.

As noted earlier, a substantial cause may contribute to the end result to a 'significant extent'[16] and must be 'more than insubstantial or insignificant' contribution.[17] Goff L.J. in *Pagett*[18] also stated that in law the accused's act need not be the sole cause, or even the main cause of the victim's death, it being enough that his act contributed significantly to that result.[19] This is difficult to apply to the facts of *Kennedy* because even though factual causation is clearly met, the victim did inject *himself* in the end, and it would be unfair to say that Kennedy was the operating cause of the victims' death as a result of this fact. The main thought to be taken from this article is that the victim may not have acted as 'independently' as has been claimed, and *Kennedy* did not follow the lucid guidance in *Rafferty* that *only* an act of a 'fundamentally different nature' breaks the chain of causation.

[16] See Lord Justice Beldam in *R v Cheshire* [1991] 3 All.E.R. 670.
[17] Per Lord Widgery C.J. in *R v Cato* [1976] 1 All.E.R. 260.
[18] (1983) 76 Cr.App.R. 279.
[19] At page 291.

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