from sexual exploitation by predatory adults. In its present form, however, it applies equally to sexual acts – even the most trivial ones – when done by juveniles with other juveniles; and this is so even where, unlike in the present gruesome case, the persons are of the same age and willingly consent. Nine years ago, when what is now the Sexual Offences Act 2003 was before Parliament, the Government was invited to support the decriminalisation of sexual acts between consenting juveniles, and resisted. No such exemption was required, it said, because the CPS would publish guidelines to regulate its prosecution policy in such cases, and these would prevent needless or oppressive prosecutions being brought. Sceptics were dissatisfied with this response. What recourse would there be, they asked, if the guidelines are not applied? This new and welcome decision suggests at least a partial answer.

J.R. SPENCER

BEING THERE

SUPPOSE that Jim is walking to the shops. It is nine o'clock in the morning. Nearby is Kevin, driving home from an all-night bender and still thoroughly intoxicated. At two minutes past nine, Kevin mounts the pavement and collides with Jim, killing them both. Does Jim's walking cause Kevin's death? Surely not. But how do we distinguish this example from two recent causation decisions, *Williams* [2010] EWCA Crim 2552, [2011] 1 W.L.R. 588 and *MH* [2011] EWCA Crim 1508?

Both cases concerned the notorious offence of causing death by driving when unlicensed, disqualified, or uninsured; contrary to section 3ZB of the Road Traffic Act 1988. The Act makes it a crime, imprisonable for up to two years, if D "causes the death of another person by driving a motor vehicle on a road" when, at the time, D is committing any one of three predicate offences: driving without a licence, driving whilst disqualified, or driving while uninsured.

This is a highly problematic example of constructive liability. By committing one of the predicate offences, D becomes a strict-liability risk taker. Should anyone die while he is doing so, he commits a very serious crime. But the aggravating circumstance, the very feature that makes the crime so serious, is a matter of strict liability. Indeed, so are the predicate offences. That is neither right nor fair. *Williams* and *MH* confirm that D need not be at fault in any way for the death. Yet he is specifically punished for causing that death.

Not only is there no fault requirement, but traditional causation requirements are also attenuated by the statute. There is no criterion of causal salience, that the death be in some way related to the

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wrongfulness of D's conduct – a requirement articulated clearly by *Dalloway* (1847) 2 Cox C.C. 273. In that case, D was driving a cart without retaining a proper grip on the reins. A child ran in front of the cart and was killed. It was ruled that D might be convicted of manslaughter only if it were proved that, had D been using the reins correctly, the child would have been saved. Otherwise the predicate wrong, D's negligence, was not a cause of death.

As *Williams* and *MH* accept, section 3ZB abrogates this need for causal salience. It demands only that D must cause death *by driving a motor vehicle on a road*. The predicate offence (driving without a licence, etc.) is merely an accompanying circumstance. The core of the crime, what generates the real opprobrium, is just that somebody dies.

So far, one might be disappointed that *Williams* and *MH* did not try harder to interpret section 3ZB creatively. The ringing interpretive pronouncements of *B v DPP* [2000] 2 A.C. 428 are nowadays well behind us. But fair enough. The statutory wording is clear. Where these cases really give rise to concern is in their handling of the key remaining element: that D's driving be a cause of death.

In *Williams*, W lacked both insurance and a licence. He was otherwise driving lawfully and within the speed limit when the victim, L, suddenly stepped in front of his car, about three feet away. W was unable to stop in time, and L was killed.

The circumstances of *MH* were perhaps even more extreme. MH, without insurance, was driving at a safe speed on the correct side of the road. V was driving in the opposite direction. V was a vehicular time bomb, exhausted from overwork, disoriented by a cocktail of drugs, and weaving erratically across both sides of the road. Finally, he veered across the carriageway, collided with MH, and died. "In terms of civil law," the court said, V "was 100% responsible for causing the accident and the respondent was not in any way at fault for the death," at [22].

Nonetheless, W was convicted and the Court of Appeal ruled that proceedings against MH should be resumed. Indeed, W was sentenced to imprisonment for nine months, reduced on appeal to 24 weeks. W and MH were both culpably guilty of the predicate motoring offence. They knowingly drove without insurance. Yet they were not culpable for causing death.

In terms of legal doctrine, however, all that mattered was whether they caused another person's death *by driving*. Section 3ZB doesn't require a lot. But it does ask that much. Even so, as the courts observed (citing *Hennigan* (1971) 55 Cr. App. R. 262), the "cause" does not have to be primary. It simply has to be non-negligible, more than *de minimis*. Indeed, the court in *Williams* thought this a better way of putting things than a requirement that the cause be "significant" or "substantial", agreeing with Lord Hoffmann in *Environment Agency (Formerly*

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National Rivers Authority) Respondent v Empress Car Co. (Abertillery) Ltd. [1999] 2 A.C. 22, 29 that "one cannot give a common sense answer to a question of causation for the purpose of attributing responsibility under some rule without knowing the purpose and scope of the rule."

In what way, then, was the defendants' driving *per se* more than a negligible contribution to the deaths? The decision in *Williams* never tells us. It seems that merely by being there, W helped to cause L's death. This is confirmed by the court in *MH*: "if [V] had ploughed into the respondent's van whilst stationary in a queue of traffic or at a traffic light, the respondent, it could be said, would have caused the death of [V] by driving a motor vehicle," at [44].

That is not right. It means that Jim's walking to the shop causes Kevin's death. Suppose, alternatively, that Jim had been walking toward Lisa, having commenced an attempt to kill her, when Kevin ploughed into him and died. The accident should not make Jim a murderer. And it does not help to say, as the Court of Appeal might suggest, that driving is not like killing. The requirements of causation may differ somewhat across legal contexts, but causation must have *some* basic foundation, some common element. Or it is not causation.

The problem lies, as so often, with the mirage of *sine qua non* causation. If W and MH had not been driving on the road, L and V would not have died. But that does not mean their driving caused death. Except in the special case of omissions, the so-called "but for" relationship *is not a variety of causation at all.* It is just an *indicium* of causal relationships, no more than a convenient proxy. If A shoots B, killing him instantly, it is no answer that C also shot B a half-second later and would also have killed him. A causes B's death, not C. Conversely, suppose that B was walking slowly. Had B been running, A would have missed. That does not make B's walking a cause of death. Being there is not, by itself, causative. The court in *MH* explicitly declined to address this argument: "As to the fifth point (arguably there has to be a causal link between the *driving* and not just the fact that the car was on the road at that time and the death), whilst seeing some force in the argument we are constrained by the decision in *Williams* not to accept it, even though it does not seem specifically to have been argued in that case," at [46]. But the point was not merely "arguable". It is a clear requirement of the statute.

It is not as if the point was *un*arguable. On the facts, there was debatably more than mere presence. Driving a car, even at lawful speeds, sets in motion forces of considerable destructive power. It was those very kinds of forces that helped to kill L and V. *This* is what differentiates *Williams* and *MH* from Jim the shopper, and indeed from the driver waiting at a traffic light. Unfortunately the Court of Appeal saw no need to develop this line of reasoning. Even if it had, of course,

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such analysis cannot make the convictions morally satisfactory. But the blame for that would then lie with the framing of the statute.

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THE FAIRCHILD DOCTINE: ARGUMENTS ON BREACH AND MATERIALITY

IN *Williams v University of Birmingham* [2011] EWCA Civ 1242 the Court of Appeal reiterated that, though claimants are assisted with proof of causation in mesothelioma cases by the doctrine in *Fairchild v Glenhaven Funeral Services Ltd.* [2003] 1 A.C. 32, they must establish the other elements of the claim in the orthodox way.

Michael Williams died of mesothelioma aged 54. The University of Birmingham admitted it had exposed him to asbestos lagged pipes while he was carrying out experiments as an undergraduate in 1974. The trial judge found that this exposure lasted only between 52 and 78 hours and noted that the high level of asbestos present in Williams' lungs post-mortem suggested he had been exposed to substantial amounts of asbestos elsewhere.

The *Fairchild* doctrine allows a claimant to prove that the tortious exposure to asbestos due to the defendant made a material causal contribution to the victim's mesothelioma merely by showing that the exposure had materially increased the risk of the victim contracting that disease. The trial judge had imported the latter terminology into her statement of the University's common law obligation of care to Mr. Williams, namely as one "to take all reasonable measures to ensure that [he] was not exposed to a material increase in the risk of mesothelioma" (quoted at [39]).

In contrast, Aikens L.J., who gave the main judgment of the court, stated the obligation as one to take reasonable care (including precautions if necessary) to ensure that Mr. Williams was not exposed to a reasonably foreseeable and unacceptable risk of asbestos-related injury (at [40]) and that, accordingly, a number of detailed findings were necessary before the University could be found to have been in breach. First, a finding had to be made as to the actual level of asbestos fibres in the environment to which Mr. Williams had been exposed. This is because if that quantity was not material but only *de minimis*, no question of breach could arise: presumably on the basis that, like the law, the reasonable person does not concern himself or herself with trifles. Findings also had to be made concerning: what knowledge the University ought to have had in 1974 about the risks posed by that quantity of fibre; whether, with such knowledge, it should have been reasonably foreseeable to the University that Mr. Williams was likely to be exposed to a risk of asbestos related injury; and whether there had

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