CHAPTER 3
CONDUCT ELEMENTS

3.1 The conduct elements of offences are mainly found in the sections of the Penal Code creating particular offences. There are, however, some issues respecting conduct elements that are covered by general provisions of the Code. This chapter examines these general provisions.

Omissions

3.2 The Penal Code reflects the common law in generally basing criminal liability on positive acts, with restricted liability for omitting to prevent harm occurring. However, the treatment of omissions in the Penal Code departs in some respects from common law principles.

3.3 The distinction between an act and an omission is usually clear-cut but can sometimes cause difficulty. There has been some debate about the proper classification of cases where life support systems have been terminated. In *Airedale National Health Service Trust v Bland* [1993] AC 789 at 866, [1993] 1 All ER 82 (HL), the House of Lords held that the conduct of a doctor who terminates a life support system should be characterised as an omission to maintain life. In contrast, it was said that the same conduct by an interloper would amount to an act of interference in the treatment.

3.4 There are several provisions in the Penal Code that establish liability for omitting to prevent harm occurring rather than causing harm in a positive way:

- It is an offence to abandon a person physically or mentally incapable of protecting themselves, with liability to imprisonment for five years: Code s 103.
- Everyone having charge of a helpless person (a person who unable to withdraw from the charge and unable to provide their own necessaries of life) has a duty to provide that person with the 'necessaries of life': s 104(1). Breach of this duty of care can give rise to criminal liability for resulting harm. Offences that may be committed include intentional homicide and unintentional harm causing damage or death.
- It is also an offence for a person who has charge of a helpless person to fail to provide necessaries of life to that person and thereby to endanger life or injure health permanently: s 104(2). This offence carries liability to imprisonment for seven years.

- The offence of 'criminal nuisance under the Code s 114 can be committed not only through an unlawful act but also through the omission 'to fulfil any legal duty', where the offender knows that this 'may endanger the lives, safety or health of the public or any individual'. The offence carries liability to 5 years' imprisonment. The scope of liability for an omission depends on the interpretation of 'legal duty'. The only express legal duty in the Code is the duty respecting helpless persons under s 104, and liability for breach of that duty is covered by s 104 itself. There are, however, duties under other statutes, such as the duty to provide a safe workplace under the Employment Act s 45(1): 'Every employer shall take appropriate steps as soon as possible to remedy any working conditions which may be dangerous for the health or welfare of his employees.'

A difference between s 103 and s 104 is that liability under s 104 but not s 103 requires breach of a duty of care arising from being 'in charge' of the other person. A s 103 offence can be committed by anyone who abandons a helpless person. The term 'abandons' suggest some kind of prior relationship but does not necessarily imply this this involve being 'in charge' of the helpless person. There is no liability under s 103 for merely failing to provide needed care.

3.5 The offence of abandonment under s 103 represents a limited departure from the general principle of criminal responsibility at common law that there is no liability for omitting to prevent harm occurring. Criminal liability at common law ordinarily requires some positive act. In *R v Coney* (1882) 8 QBD 534 at 557–8, it was said: 'It is no criminal offence to stand by, a mere passive spectator of a crime, even of murder.' The common law has not subscribed to any 'good Samaritan' principle that imposes a general duty to take positive action to prevent harm from occurring. Nevertheless, although s 103 relaxes the rigidity of this principle, it does so only in cases where a helpless person is abandoned.

3.6 At common law, there are a range of exceptions to the principle of no liability for omitting to prevent harm. Common law has recognised a series of specific duties to act based on prior relationships or understandings between the parties or upon responsibility for the creation of a dangerous situation: see the discussion in *Burns v The Queen* [2012] HCA 35; (2012) 246 CLR 334, [22] and [97]. The Penal Code s 104 has adopted one of these duties: the duty of a person having charge of a helpless person to provide necessaries of life. However, there is no mention in s 104 of other duties that have been widely recognized elsewhere, at the common law and in the legislation of many other jurisdictions. For example, many jurisdictions impose a duty on parents to provide necessaries for children under a certain age, regardless of whether the children are actually helpless. Under the Vanuatu Code, however, it

would have to be proved that the child was helpless. Moreover, there is no mention in the Code of a duty of a person in charge or control of a dangerous thing to use reasonable care and to take reasonable precautions to ensure that it does not endanger life or health. There is also no mention of a duty to perform an undertaking if failure to do so might be dangerous to life.

3.7 In view of the limited coverage of duties of care in the Code, an important question is whether Vanuatu courts would be willing to recognize additional duties as a matter of common law. Precedents from elsewhere have varied. A Samoan court has declined to imply common law duties: *Police v Uolo* [2003] WSSC 11. However, Canadian courts have invoked common law duties to supplement those in Canada's Criminal Code: see, for example, *R v Moore* [1979] 1 SCR 195. Unless the Vanuatu courts are willing to take a similar steps, the offence of unintentional harm under s 108 of the Penal Code will have severely limited application. Charges under this section will usually be based on negligence. Yet s 6(4) provides: 'A person shall not be guilty of a criminal offence if he is merely negligent, unless the crime consists of an omission.' The kind of omission which is most commonly in issue is an omission to take due care with a dangerous thing such as a motor vehicle: see, for example, *Morrison v Public Prosecutor* [2020] VUCA 29 at [21], where the conduct of the defendant was described as 'momentary carelessness'. There was no discussion of the doctrinal issues in the *Morrison* case but the simplest explanation of the decision may be that a common law duty respecting dangerous things was implied into the Penal Code.

3.8 Necessaries of life in s 104 are not defined but extend at least as far as medical aid, food, shelter and clothing, and protection from the infliction of harm by third parties: see *R v Macdonald and Macdonald* [1904] St R Qd 151 at 170; *R v Russell* [1933] VLR 59. The duty may be imposed by law or may be assumed by the person under a contract or through their conduct. The duty can be avoided by not taking charge in the first place. Once charge has been taken, however, there is potential liability if the duty is not fulfilled. The rationale is that when a person takes charge of a helpless other person, that other person may be deprived of the opportunity to obtain assistance elsewhere.

3.9 In order for criminal liability to be imposed for an omission, there must be not only a specific duty to act but also a breach of that duty. A duty to act is not a duty to do everything conceivable in order to prevent harm occurring. The duty is to do whatever would be reasonable under the circumstances. In *R v Macdonald and Macdonald* [1904] St R Qd 151 at 170, it was said that the scope of a duty to act was to be assessed 'not according to any exaggerated opinion of supersensitive or over-refined persons, but according to the plain commonsense ideas of ordinary English people'. Undoubtedly, a local test would now refer to ordinary people of Vanuatu.

3.10 In *Airedale National Health Service Trust v Bland* [1993] AC 789 at 863-5, [1993] 1 All ER 82, the House of Lords discussed the principles governing decisions by health providers to discontinue care and treatment. Lord Goff said that in cases where a patient is capable of expressing his or her wishes, the principle of self-determination should prevail over the principle of the sanctity of human life. In cases where the patient is not capable of expressing his or her wishes, the operative principle should be the principle of the patient's best interests, taking into account medical opinion.

3.11 In *Bland* itself, a declaration was issued that it would be lawful to discontinue care and treatment in a case of irreversibly severe brain damage where the patient was in a 'persistent vegetative state' and could not benefit from care. In such cases, *Bland* is authority supporting decisions to discontinue measures such as medication and artificial ventilation, and even hydration or nourishment. The decision did not, however, provide any precise guidance for handling less extreme cases.

3.12 Some jurisdictions have enacted statutory schemes enabling individuals to direct that life-sustaining measures be withheld or withdrawn from them in the event that certain specified circumstances eventuate and they lose the capacity to express their own wishes. This has not yet occurred in Vanuatu.

Causation

3.13 The conduct elements of offences can include causing a result, such as causing damage or death to a person in the offences under Penal Code ss 106-108. Causation can create medical problems in cases where there is difficulty in identifying the operative cause of a death or injury. Causation can also create legal problems in cases where there are multiple causal factors and a chain of events leads to the result. To find that a person has committed an offence in this kind of case, the contribution of this person must be held to have caused the result despite the presence of other causal factors.

3.14 It is well established as a matter of common law that there can be multiple causal factors in a result and that the causal responsibility can be attributed to a person whose contribution was neither the only nor the immediate factor. A leading English case is *Pagett* (1983), 76 Cr. App. R. 279 at 288 (CA). In that case, the court upheld a manslaughter conviction where the appellant had shot at armed police in a dark area, while using a girl as a shield, and the girl had been killed by shots fired by the police in self-defence instinctively and without taking particular aim.

3.15 In handling cases of complex causation, a distinction is often drawn between issues of *causal connection* (or *factual causation*) and *causal responsibility* (or *legal causation*): see *Krakouer v State of Western Australia* (2006) 161 A Crim R 347; [2006] WASCA 81 at [21]–[23]. The question in relation to causal connection is whether the accused was connected with the death or injury in a way which is recognised by the law: certain kinds of causal factors are excluded from consideration. If this question is answered positively, the matter of causal responsibility still needs to be addressed. The question in relation to causal responsibility is whether the connection to the accused is sufficiently strong in light of any other contributing factors to justify attributing causal responsibility for the death to the accused. Certain principles and rules are used in determining when a person is causally responsible for a result despite not having been the immediate or sole cause of this result.

3.16 Causal connection is usually established by applying the 'but for' test: see *Krakouer v State of Western Australia* (2006) 161 A Crim R 347; [2006] WASCA 81 at [21]–[23]. The question is asked: 'Would the death have occurred but for (that is, without) the contribution of the accused?' A negative answer establishes causal connection.

3.17 It is immaterial that a deceased person would soon have died in any event. The Penal Code s 109(d) states that a person is deemed to have caused a death 'if by any act or omission he hastened the death of a person suffering under any disease or injury which apart from such act or omission would have caused the death'.

3.18 There are some causal connections which the law does not recognise:

- Causal contributions to deaths which do not occur within a year and a day of the contribution are excluded under Code s 111. The year-and-a-day rule is an old common law rule which has now been repealed in most jurisdictions but still operates in much of the Pacific region.
- There is generally no criminal responsibility for killing by influence on the mind alone or by a disorder or disease arising from such influence: Code s 112. However, there are exceptions for willfully frightening a child under the age or 14 or a sick person. The general exclusion may be designed to forestall prosecutions for homicide by witchcraft.
- Omissions are excluded in the absence of express provisions or breach of a duty to act: see the discussion above.
- Coincidental results of acts or omissions are excluded at common law, even though the acts or omissions exposed the victim to the coincidental harm. See, for example, *Bush v. Commonwealth* 78 Ky 268 (1880) (Ky CA), where the deceased had been hospitalised as a result of a wound and had contracted

scarlet fever from a surgeon who was operating on him. The death was held to be due to a 'visitation of Providence' and not the act of the assailant.

- Deaths or injuries brought about through using an innocent agent, such as a postal officer who delivers a bomb, are usually considered to be caused not by the agent but by the manipulator of the agent. On the doctrine of innocent agency at common law, see *White v Ridley* (1978) 140 CLR 342.

3.19 Causal responsibility in cases of complex causation is assessed through the 'substantial contribution' test: see, for example, *Swan v The Queen* [2020] HCA 11; *Krakouer v State of Western Australia* (2006) 161 A Crim R 347; [2006] WASCA 81 at [21]–[23]. The 'substantial contribution' test is retrospective. It looks backwards from a death or harm to ascertain whether, in light of all that happened, the contribution of the accused was a substantial one. The teat is inherently vague and susceptible to differences in application.

3.20 If a 'substantial contribution' is identified, the relative weight of other contributions is immaterial. *Swan v The Queen* [2020] HCA 11 provides an example of a complex chain of causation with multiple factors. The defendant had attacked the victim intending to cause grievous bodily harm; the victim had had suffered severe injuries as a result of the attack and was in poor mental and physical condition; the victim later fell from his bed and suffered a fractured femur; it was decided not to undertake surgery at least in part because of the victim's low quality of life; the lack of surgery permitted fat emboli to be released into the blood stream and then the lungs, with the result that the victim died. On an appeal from a murder conviction, it was argued that there were five factors that influenced the decision not to operate. The High Court of Australia at [46] dismissed the argument in this way:

> It was never suggested that the jury should, or could, have filleted the factors within the decision-making process to attempt to isolate the relative contribution of some or all of the five matters above upon which the appellant relied. Instead, on the undisputed direction given by the trial judge, it was sufficient that the effects of the assault substantially or significantly contributed to the decision which, in turn…prevented the surgery that was reasonably expected to save Mr Kormilets' life.

3.21 The courts have sometimes referred to a special doctrine whereby a causal chain can be broken by a *novus actus interveniens*. A *novus actus interveniens* is a new act performed by someone else which relieves the original actor of causal responsibility. The term has often been used loosely, but the doctrine appears most useful in cases where two or more independent actors would each be causally responsible on general principles. The application of this doctrine results in the law choosing to assign responsibility to the later actor.

3.22 In *Pagett* (1983) 76 Cr App R 279, 289, it was suggested by the English Court of Appeal that in order to constitute a *novus actus interveniens* the act would have to be 'free, deliberate and informed'. If this is right, inadvertently negligent conduct could never constitute a *novus actus interveniens*, no matter how wide the departure from the standard of reasonable conduct. It may be questioned whether this conclusion is correct as a matter of general principle. The causal chain from the first actor should surely be regarded as broken when there is gross negligence, to a degree sufficient for criminal responsibility, on the part of a subsequent actor. See, for example, *Thomas* [2002] QCA 23, where the Queensland Court of Appeal appeared to assume that negligent conduct could sometimes constitute a *novus actus interveniens*. The case involved an appeal from a manslaughter conviction by the owner of a vehicle who had been present as a passenger when a young unlicensed driver crashed the vehicle and died as a result. The basis for the conviction was that he had been criminally negligent in allowing her to drive the vehicle. Immediately prior to the crash, however, the steering wheel had been grabbed and pulled by another passenger. The Court quashed the conviction on the ground that the trial judge had not instructed the jury that it could conclude that the cause of the driver's death was the negligence of the other passenger. See also the special provision dealing with cases of death resulting from medical treatment in the Code s 109(a), discussed below at **3.23**.

3.23 Some problems relating to causal responsibility in homicide cases can be resolved definitively by reference to the Code s 109. This provides that a person is deemed to have caused the death of another person in certain cases where their act was not the immediate or sole cause of the death:

- Section 109(a) provides that if one person inflicts bodily injury upon another, but the victim dies directly from medical treatment rather than the injury, the original assailant causes the death. The quality of the treatment is said to be immaterial unless it was 'not employed in good faith' or 'was so employed without common knowledge or skill'. By implication in these latter instances, the doctor can be held to have caused the death.
- Section 109(b) makes it immaterial that death from some injury might have been prevented by taking precautions to prevent the injury occurring, or by its care or treatment. The original assailant is deemed to have caused the death. Thus, in cases where doctors have omitted to provide proper treatment, the original assailant causes the resulting death as long as the injury itself provides the operative cause of death. It is immaterial that the doctors might otherwise meet the general criteria for causal responsibility. Moreover, a victim is under no duty to save her or his own life. See the case of *Blaue* [1975] 3 All ER 446, where a Jehovah's Witness who had been stabbed died after refusing a blood transfusion because of her religious

convictions. Her assailant was held to have caused the death. The result would have been the same under s 109(b).

- Section 109(c) provides that one person is deemed to kill another if actual or threatened violence causes the other person to do something which results in her or his own death, if the victim's action 'in the circumstances would appear natural to the person whose death is so caused'. The main application of this provision is in cases where a victim attempts to escape their assailant by dangerous means such as jumping into a river or from a moving vehicle or from a window. See, for example, *Royall v R* [1991] HCA 27; (1991) 172 CLR 378.
- Section 109(d) provides that a person causes a death even where they hasten the death of a person suffering from a disease or injury that would eventually have caused death in any event. The death would not have occurred when it did but for the action taken. This would apply, for example, to cases of 'mercy-killing'.
- Section 109(e) provides that a person causes a death even though their act or omission would not have caused death without the contribution of an act or omission of the victim or another person. This would apply to a case where a victim died from the cumulative effect of injuries inflicted by two assailants.

3.24 The rules in the Code s 109 apply expressly just to causing death. However, they reflect similar rules at common law which are likely to be applied in cases of causing injury.

Voluntariness

3.25 Although it is not stated in the Penal Code, the principle of voluntariness is a fundamental principle of criminal responsibility. In the Canadian case of *R v Daviault* [1994] 3 SCR 52 at [7], Cory J said:

> [F]or a great many years it has been understood that, unless the legislator provides otherwise, a crime must consist of the following elements. First, a physical element which consists of committing a prohibited act, creating a prohibited state of affairs, or omitting to do that which is required by the law. Second, the conduct in question must be willed; this is usually referred to as voluntariness.

3.26 The requirement for voluntariness (or 'will') is a requirement for the conduct to be under the mental control of the person. This means that the conscious mind of a

person must have directed the conduct or, in the case of an omission, must have been able to direct the required conduct. Otherwise it cannot be said that the person could have chosen differently and therefore the person cannot be held at fault. The common law principle was explained in the New Zealand case of *Kilbride v Lake* [1962] NZLR 590 at 593 (SC), where it was said:

> [I]t is a cardinal principle that, altogether apart from the mental element of intention or knowledge of the circumstances, a person cannot be made criminally responsible for an act or omission unless it was done or omitted in circumstances where there was some other course open to him. If this condition is absent, any act or omission must be involuntary, or unconscious, or unrelated to the forbidden event in a causal sense regarded by the law as involving responsibility….
>
> Naturally the condition that there must be freedom to take one course or another involves free and conscious exercise of will in the case of an act, or the opportunity to choose to behave differently in the case of omissions.

3.27 The requirement for voluntariness has traditionally been treated as part of the conduct elements of an offence. Thus the Fiji Crimes Act s 16(1) states: 'Conduct can only be a conduct element if it is voluntary.' This categorisation has significance in some jurisdictions. However, whether the exercise of will is treated as part of the conduct elements or the fault elements makes no difference under the scheme of criminal responsibility in the Vanuatu Penal Code.

3.28 Unwilled or involuntary conduct can occur in various ways. One of the simplest ways is through external force or circumstances. If A pushes B against C, the assault upon C is committed by A and not B. The application of force to C is not under the mental control of B. See *Ugle v R* (2002) 211 CLR 171; 189 ALR 22; [2002] HCA 25, where a murder conviction arising from a fight was quashed because the trial judge had not directed the jury to consider a defence of lack of will, based on the possibility that the deceased had impaled himself on the knife held by the accused. See also *O'Sullivan v Fisher* [1954] SASR 33, where it was held that a person who was forcibly and unlawfully taken to a public place could not be convicted of an offence of being intoxicated in that place.

3.29 External factors can also make an omission unwilled. For example, in *Kilbride v Lake* [1962] NZLR 590, a conviction for an offence of not displaying a warrant of fitness on a vehicle was quashed. The case was decided on the basis that the appellant had displayed the warrant but it had become detached while he was away from the vehicle. The conduct element of the offence was essentially omitting to

display a warrant. The omission was held to be beyond the control of the appellant since there was no opportunity for him to replace the warrant.

3.30 Reflex action has sometimes been treated as unwilled: see, for example, the observations of Kirby J in *Murray v R* (2002) 211 CLR 193; [2002] HCA 26 at [89]; see also *R v Falconer* (1990) 171 CLR 30 at 43; 96 ALR 54, where reflex action was offered as an 'obvious' example of lack of will. However, reflex action must be distinguished from spontaneous action. Action is not unwilled merely because it is directed by a mind working quickly and impulsively: see *Ryan v R* (1967) 121 CLR 205 at 246 per Windeyer J, discussed by Gaudron J in *Murray* at [11]**.**

3.31 A third way in which unwilled conduct can occur is where some mental disorder produces a state of 'automatism' under which the accused's conduct is directed by the mind but not by the conscious mind: see, for example, *Cooper v McKenna* [1960] Qd R 406, where the automatism was caused by a conduct blow and concussion, and *Falconer*, where it was alleged to have been caused by a psychological blow.

3.32 The common law requirement for voluntariness must be read together with the Code provision on insanity: Code s 20. Automatism will only provide a complete defence if the condition is caused by an external factor rather than an abnormal mind. Where involuntariness is caused by a mental abnormality, the person will receive the special verdict of not guilty on account of unsoundness of mind and be liable to detention: see **Chapter 11**.

3.33 Criminal law recognises a presumption of normal mental capacity, including the capacity to control one's actions: see, for example, *Bratty v A-G for Northern Ireland* [1963] AC 386 at 407, 413-14, [1961] 3 All ER 523. The effect of this presumption is that an accused who claims automatism carries an evidential burden to put his or her mental capacity in issue: see, for example *R v Falconer* [1990] HCA 49; (1990) 171 CLR 30. The prosecution ultimately carries the persuasive burden to prove voluntariness (with the exception of cases of insanity, where the burden of proof is reversed). Yet, the persuasive burden need only be discharged if the accused has first discharged the evidential burden.

3.34 The requirement for voluntariness is distinct from any requirement for fault elements of an offence such as intention or recklessness. A person may act voluntarily without appreciating the nature or consequences of the conduct. Suppose someone shot and killed a person having deliberately pulled the trigger but believing the gun was unloaded. The action would be voluntary but the shooter would not be guilty of intentional homicide because the fault element of the offence would be lacking: the

shooter would not have caused the death 'intentionally' as required by the Code s 106.

3.35 Nevertheless, a person who acts involuntarily will not act with any subjective fault elements of an offence such as intention or recklessness. An accused who acted involuntarily may therefore be entitled to a defence on more than one mental ground: lack of will and lack of a fault element. The High Court of Australia has held, in relation to offences with fault elements, that both grounds must be considered separately: see *Murray v R* [2002] HCA 26; (2002) 211 CLR 193