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Causation and Legal Responsibility: ‘Take Your Victim as You Find Him’?

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1. Introduction

The legal maxim ‘take your victim as you find him’² is well-known in both English criminal and tort law, as well as in many other legal systems.³ However, is it appropriate, and, if so, what should be its limits? When should D be able to argue that unforeseeable conduct by V broke the chain of causation? In *R v Roberts*, the English Court of Appeal suggested that reactions to the defendant’s conduct should break the chain of causation in criminal law where they are so ‘daft’ as to be unforeseeable.⁴ However, in *R v Blaue*, the same court implied that it was irrelevant in criminal law whether V’s reaction was reasonably foreseeable, and held that ‘it does not lie in the mouth of the assailant to say that his victim’s religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable’.⁵ Prima facie, it is unclear whether it is possible to reconcile these two apparently contradictory authorities. The English criminal law rules pertaining to causation are lacking in clarity here, and the relevant Jersey and Guernsey criminal law is even more shrouded in mystery: indeed, there do not appear to be any reported Jersey or Guernsey cases at all on this issue.⁶ Moreover, it is not obvious what approach the law should take in this context.

Difficult issues of causation sometimes arise in relation to ‘result’ crimes such as murder.⁷ The ‘but for’ test is the standard test employed in relation to ‘factual’ causation: in criminal law cases involving primary liability for harm arising from wrongful acts or omissions, this test stipulates that the law should not impose liability unless the harm specified in the actus reus of the crime would not have happened ‘but for’ the defendant’s wrongful conduct.⁸ In criminal law, the focus in ‘factual’ causation is typically on the scientific relationship between the defendant’s conduct and the alleged effect or consequence in question.⁹ However, ‘but for’ causation is not necessarily enough to establish causation in law:

‘The law has frequently to confront the distinction between ‘cause’ in the sense of a sine qua non without which the consequence would not have occurred, and ‘cause’ in the sense of something which was a legally effective cause of that consequence.

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² This article expresses the maxim in the conventional gender-specific way because the reader is more likely to be familiar with this formulation. Whether the law should use gender-specific terminology in this context is a separate matter.

³ See e.g. C. Nelson, ‘Of Eggshells and Thin-skulls: A consideration of Racism-Related Mental Illness Impacting Black Women’ (2006) 29 *International Journal of Law and Psychiatry* 112 at 115, noting ‘the proliferation of the Eggshell and Thin-Skull rules throughout Europe’, including in France, Ireland, Greece and Austria.

⁴ (1972) 56 Cr App R 95.

⁵ [1975] 1 WLR 1411.

⁶ A search of the Jersey Legal Information Board database using the term ‘causation’ did not reveal any relevant cases (Jerseylaw.je, available at: <www.jerseylaw.je/> (last viewed 21 March 2016)). A search of the equivalent Guernsey legal resource using the same term produced no results at all (Guernsey Legal Resources, available at: <www.guernseylegalresources.gg/> (last viewed 21 March 2016)). There is no relevant legislation in either jurisdiction, and there are no relevant Privy Council decisions.

⁷ It is arguable that causation is generally relevant throughout criminal law: see M. Moore, *Causation and Legal Responsibility: An Essay in Law, Morals and Metaphysics* (2009, OUP, Oxford) at 15-19. For discussion of the reason why causation issues are rarely problematic in practice in criminal cases, see J. Stannard, ‘Criminal Causation and the Careless Doctor’ (1992) 52 *MLR* 577.

⁸ *R v White* [1910] 2 KB 124; *Dalloway* (1847) 2 Cox 273.

⁹ See e.g. V. Tadros, *Criminal Responsibility* (2007, OUP, Oxford) at 160, arguing that ‘[s]cience is at least relevant in determining the first stage of a causal investigation’ in criminal law.

The former, which is often conveniently referred to as a 'but for' event, is not necessarily enough to be a legally effective cause.'¹⁰

Normative considerations are relevant with causation in criminal law. The issue here is whether the defendant *may* be held liable for the alleged effect or consequence in question.¹¹ A court may feel that it would not be appropriate to hold the defendant liable for damage even where this harm would not have occurred 'but for' D's misconduct: e.g. because there was a 'free, deliberate and informed' intervention by a third party.¹² If so, the court may hold that the defendant is not a 'legal' cause of the damage. The law on causation give courts the flexibility needed to reach a 'just' decision:

'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 [I]t is wrong to place too much weight on the 'but for' test to the exclusion of the 'common sense' approach which the common law has always favoured ... ultimately the common law approach is not susceptible to a formula.'¹³

In both tort law and criminal law, issues of causation can be notoriously difficult, and the legal concepts employed to deal with them are equally notoriously 'afflicted with linguistic ambiguity',¹⁴ which means that the legal reasoning behind the case law is often unclear.¹⁵ The courts sometimes refer to 'common sense' notions of causation, but these references to 'common sense' frequently lack precision. As Lord Hoffmann put it in a leading English tort law case, 'there is sometimes a tendency to appeal to common sense in order to avoid having to explain one's reasons. It suggests that causal requirements are a matter of incommunicable judicial instinct'.¹⁶

This article seeks to make major advances in knowledge and understanding in three main respects. First, it starts with an overview of the approach that English criminal law currently takes to the 'thin skull' rule, and thereby attempts to provide much-needed clarification to the scope of the 'thin skull' rule as it is currently interpreted in English case law. Secondly, it considers whether English criminal law and similar legal jurisdictions should contain such a rule. Thirdly, on the basis that there might be convincing justifications for having a 'thin skull' rule, it considers the potentially appropriate parameters of this rule as it relates to moral convictions. In particular, it considers matters such as whether the relevant law should distinguish between religious and non-religious ethical convictions, or between 'acceptable' and 'unacceptable' ethical beliefs. It also argues that bringing V's moral convictions within the scope of the 'thin skull' rule and retaining this rule does not inevitably mean that all actions based upon such moral or ethical convictions should fall within the parameters of this rule. The aim here is not to produce a draft piece of legislation, but rather to make a significant contribution to the debate on the criminal law on causation.¹⁷

¹⁰ *R v Hughes (Michael)* [2013] UKSC 56 at paragraph 23 (*per* Lords Hughes and Toulson).

¹¹ A finding of legal causation will not necessarily lead to liability for various reasons, such as a lack of mens rea or fault on the defendant's part.

¹² *Page* (1983) 76 Cr App R 279 at 289.

¹³ *Hughes*, *op. cit.* n 10.

¹⁴ *Fairchild v Glenhaven Funeral Services Ltd and Others* [2002] UKHL 22 at paragraph 45 (*per* Lord Nicholls).

¹⁵ J. Stapleton, 'Cause in Fact and the Scope of Liability for Consequences' (2003) 119 LQR 388.

¹⁶ *Fairchild*, *op. cit.* n 14 at paragraph 53 (*per* Lord Hoffmann).

¹⁷ This article is written on the basis that the existence of 'result' crimes is legitimate; i.e. that it is appropriate for the criminal law to take account of the result of D's conduct in determining liability. Whether 'result' crimes are appropriate is a matter of academic debate, but one which beyond the scope of this paper.

2. The Current English Criminal Law approach to the ‘Thin Skull’ Rule

In *R v Roberts*, the England and Wales Court of Appeal suggested that reactions to the defendant’s conduct should break the chain of causation where they are so ‘daft’ as to be unforeseeable.¹⁸ However, in *R v Blaue*, the same court implied that it was irrelevant whether the victim’s reaction was reasonably foreseeable, and held that ‘It does not lie in the mouth of the assailant to say that his victim’s religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable’.¹⁹ Is it possible to reconcile these two apparently contradictory authorities?

The principle that the defendant must ‘take his victim as he finds him’ is vague, although it is at least clear that it applies to V’s physical vulnerabilities.²⁰ *Blaue* is the best-known case in English criminal law on the application of this so-called ‘thin skull’ rule, but the correct interpretation of this case is a matter of debate. D stabbed V, a Jehovah’s Witness, who subsequently refused a blood transfusion on religious grounds; that is, who chose to observe her religion and follow her conscience.²¹ This operation would have saved her life. The Court of Appeal held that the victim’s refusal to have the life-saving treatment did not ‘break the chain of causation’, and that the defendant was therefore liable for manslaughter. There are three main possible interpretations of the ratio of this decision. One interpretation is to say that *Blaue* is a case concerning an omission by a victim (a failure to consent to medical treatment), that a victim’s omission will never break the chain of causation in criminal law, and that the decision is correct because ‘the original wound inflicted by D was still an operating cause of death’.²² This interpretation attaches no special importance to the religious beliefs of the victim, and suggests that an act by the victim based on such beliefs could break the chain of causation in criminal law where it was not reasonably foreseeable; for example, that it could have made a difference if *Blaue*’s victim had been given a transfusion while unconscious and then died because she opened an artery to remove the blood for religious reasons once she awoke. Adopting this interpretation, one can reconcile *Roberts* with *Blaue* by claiming that unforeseeable acts, as opposed to omissions, by the defendant will break the chain of causation in criminal law. However, this interpretation is not convincing: as Jonathan Herring puts it, ‘Although there is much to be said in favour of this argument ... it must be admitted that it is not one that is made explicit by the courts themselves’.²³ On the contrary, it seems to overlook the words used by Lawton LJ in *Blaue*, who stated that ‘those who use violence on other people must take their victims as they find them’,²⁴ not that omissions by victims never break the chain of causation in criminal law.

A second, contrasting interpretation of *Blaue* attaches significance to the religious beliefs of the victim in *Blaue*, and characterises the decision as being about the freedom of a victim to follow her religion.²⁵ Cases such as *Roberts* suggest that responses from V that are so ‘daft’ as to be ‘unforeseeable’ may break the chain of causation.²⁶ Commentators have observed that it is not easy to reconcile this set of cases with the principle in *Blaue*,²⁷ but it is possible

¹⁸ *Op. cit.* n 4.

¹⁹ *Op. cit.* n 5 at 1415.

²⁰ See e.g. *Hayward* (1908) 21 Cox CC 692.

²¹ Most, if not all, commentators would accept that she was following ‘religious’ beliefs, but the definition of ‘religion’ is problematic. For consideration of this definition in a legal context, see e.g. N. Addison, *Religious Discrimination and Hatred Law* (2007, Routledge-Cavendish, Abingdon), Ch. 1.

²² A. Simester and G. Sullivan, *Criminal Law: Theory and Doctrine* (2010, Hart, Oxford) at 100.

²³ J. Herring, *Criminal Law: Text, Cases, and Materials* (2011, OUP, Oxford) at 100.

²⁴ *Op. cit.* n 5 at 1415.

²⁵ See J. Herring, *op. cit.* n 23 at 101, stating that ‘It may be argued that *Blaue* was a special case which was in fact about freedom of religion’.

²⁶ *Roberts*, *op. cit.* n 4. See too *Williams* [1992] 1 WLR 380 and *Corbett* [1996] Crim LR 594.

²⁷ K. O’Hanlon, ‘*R v Dear (Patrick)*’ [1996] Crim LR 595 at 596; A. Reed and B. Fitzpatrick, *Criminal Law* (2009, Sweet & Maxwell, London) at 56.

that the 'thin skull' rule in *Blaue* extends to religious convictions of the victim and thereby qualifies the test of reasonable foresight adopted in criminal law cases such as *Roberts*. This interpretation provides a plausible way of reconciling *Roberts* with *Blaue*. The former case concerned a victim who jumped out of a moving car in order to avoid sexual advances from the driver. There is no suggestion that the victim did so in order to comply with a religious conviction; therefore, the principle in *Blaue* has no application to the facts of *Roberts* if one interprets this principle as one concerning religious convictions, and the issue for the jury in a case like *Roberts* is whether the victim's injury was 'the natural result of what the alleged assailant said and did, in the sense that it was something that could have been foreseen as the consequence of what he was saying or doing'.²⁸ Had *Blaue* applied, then the issue might have been whether the victim's injury was reasonably foreseeable as a consequence of the defendant's conduct in the light of the victim's religious convictions. This second interpretation of *Blaue* is supported by the fact that Lawton LJ stated that 'It does not lie in the mouth of the assailant to say that his victim's religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable'.²⁹ However, there is a third possible interpretation of *Blaue*.

It might be argued that *Blaue* is authority for a wider principle concerning the freedom of a victim to follow his or her conscience. One can plausibly claim that the decision in *Blaue* is about the importance of moral or ethical convictions held by the victim, and that it would have not have made a difference if the victim had been following a non-religious ethical conviction. Lawton LJ's judgment can be plausibly interpreted in this way because he stated that the 'thin skull' rule applies to 'the whole man, not just the physical man',³⁰ and did not explicitly or implicitly limit the application of that statement about 'the whole man' to the religious characteristics of the victim. The second and third interpretations of *Blaue* are consistent with each other in the sense that they both characterise it as a case about the application of the 'thin skull' rule to moral or ethical beliefs of the victim, but the second interpretation limits the principle in *Blaue* to religious moral beliefs, whereas the third interpretation allows it to include non-religious moral or ethical convictions as well.

3. Is a 'Thin Skull' Rule appropriate?

Before proceeding any further, it is wise to consider the rationale for the 'thin skull' rule; this is relevant in considering whether English criminal law and similar legal jurisdictions should contain such a rule, but also in relation to determining the potential scope of this rule if its existence is valid. The 'thin skull' rule has existed in English criminal for centuries,³¹ but this does not mean that its retention is appropriate. 'The task is to explain precisely why a defendant is assigned [potential] liability for these kinds of unexpected consequence'.³² The central argument against the 'thin skull' rule is that 'to hold a person responsible for a bizarre outcome which was not reasonably foreseeable appears to be unfair'.³³ According to the authors of *Smith and Hogan's Criminal Law*, a justification for the 'thin skull' rule as it applies to V's physical characteristics is that 'It seems unnatural to describe V's body's 'response' to D's act as an intervening 'act' between D's infliction of injury and V's death. It is correct, therefore, that D takes V as he finds him with all V's subsisting physical conditions being taken into account'.³⁴ A problem with this analysis is that is an appeal to the common usage of the phrase 'an intervening act', 'Yet few today would subscribe to the idea that the

²⁸ *Roberts*, *op. cit.* n 2 at 102.

²⁹ *Blaue*, *op. cit.* n 5 at 1415.

³⁰ *Ibid.*

³¹ See G. Bahr, 'The Thin Skull Plaintiff Concept: Evasive or Persuasive' (1982) 15 *Loyola of Los Angeles Law Review* 409 at 418-19, tracing the origins of this rule.

³² *Ibid.* at 417, discussing tort law but making a point that is equally applicable to criminal law.

³³ J. Herring, *Great Debates in Criminal Law* (2015, Palgrave Macmillan, London) at 36, outlining this argument but not endorsing it.

³⁴ D. Ormerod, *Smith and Hogan's Criminal Law* (2011, OUP, Oxford) at 96.

thing, causation, has no nature save that reflected in ordinary usage of the word, causation”.³⁵ The issue is what approach the law should take in relation to particular matters: this cannot be determined by the ordinary usage of words such as ‘act’.

The authors of *Smith and Hogan’s Criminal Law* suggest that the court may have reached the wrong decision in *Blaue*, since they believe that this case establishes that ‘D takes the victim as found in a more holistic sense – taking the victim’s *mind* as well as his body as found’.³⁶ Their concern is that the ‘thin skull’ rule may operate unduly harshly in a case like *Blaue*, bearing in mind that ‘D would [in any case] be liable for wounding or attempted murder’, but they admit that ‘the same harshness would apply where the victim has an egg-shell skull, and that rule is not commonly criticised’.³⁷ Their point here is that is arguably unfair to hold D liable for a result which was not reasonably foreseeable.³⁸ While they may be correct to say that the ‘thin skull’ rule is not commonly criticised as it applies to V’s physical characteristics, they would presumably accept that this does not mean that it is valid. Indeed, they acknowledge that it is arguable that criminal should always focus upon the blameworthiness of conduct rather than place emphasis on the result:³⁹ i.e. that ‘A case can be made that the law should always have regard only to the conduct and not to the result’.⁴⁰

An alternative argument in favour of the ‘thin skull’ rule is that it is necessary in order for the law to be fair to V.⁴¹ The argument here is that it is unfair to V to say that he or she has caused the harm that would not have occurred but for V’s ‘thin skull’. ‘The victim in a case like *Blaue* has a right to hold religious views, and as long as they do not harm others she was entitled to exercise her beliefs. Indeed, under the European Convention on Human Rights, not only is she is permitted to exercise her beliefs, but she has a right to do so’.⁴² The difficulty with this analysis is pinning down in what sense the ‘thin skull’ rule is necessary in order for the law to be fair to V. After all, not applying it in a case like *Blaue* would not have prevented the victim from exercising her beliefs: the issue was whether D could be liable for V’s death, not whether D had the right to refuse the treatment. Nonetheless, it could be argued that the ‘thin skull’ rule is necessary to avoid what might seem like unfair victim blaming. Without such a rule, the law could be interpreted as inappropriately holding the harmed individual as at least partially responsible for his or her own injury, at least where V’s conduct would break the chain of causation on the basis that it was so ‘daft’ as to be unforeseeable. It is true that a court in a case like *Blaue* could reach a decision about causation without resorting to the concept of ‘daftness’ by determining the issue on the basis of the prevalence of the religious beliefs in question. However, it would then leave itself open to the criticism that it would be drawing inappropriate distinctions between religions based upon their popularity, with injuries inflicted on members of a popular religion more likely to lead to liability for serious harm. This is an issue to which we shall return below.

One view is that the ‘thin skull’ rule is valid, but that its application should be limited to cases where ‘victims simply failed to do anything at all’.⁴³ This is Jonathan Herring’s opinion: he argues that it is appropriate to hold D liable for a death in a case like *Blaue* because ‘Nothing else happened to the victim, apart from the wound progressing naturally’.⁴⁴ According to

³⁵ M. Moore, *op. cit.* n 7 at 256, arguing that the appropriate legal approach in this area cannot be determined by discovering the ordinary meaning of the legal words involved.

³⁶ D. Ormerod, *op. cit.* n 34.

³⁷ *Ibid.*

³⁸ See J. Herring, *op. cit.* n 33, making the same point.

³⁹ D. Ormerod, *op. cit.* n 34 at 97.

⁴⁰ *Ibid.* at 50, making a point which, as previously stated, is beyond the scope of this paper.

⁴¹ J. Herring, *op. cit.* n 33 at 37.

⁴² *Ibid.*

⁴³ *Ibid.* at 39.

⁴⁴ *Ibid.*

him, 'The crucial point is that ... in all thin skull cases the victims simply fail to do anything. The wound progresses naturally. The victim has not introduced a new kind of risk for which the defendant should not be liable'.⁴⁵ Herring seems to be making two points here. First, the 'thin skull' rule has no application where V acted rather than omitted to do something. As a description, this is over-simplistic if it supposed to apply to all jurisdictions and all areas of law which use this rule.⁴⁶ Secondly, Herring seems to be saying that the justification for the 'thin skull' rule lies in a theory about the scope of the risk which D has created. Unfortunately, the precise nature of this theory is unclear.⁴⁷ The idea might be that 'a behaviour should create a legally relevant risk ... [and that in finding causation] we must be able to associate the actual result to the legally relevant risk'.⁴⁸ However, this simply raises the question of how to characterise the scope of the risk. Michael Moore rightly points out that risks can be characterised in various ways.⁴⁹ As he puts it, where D cut V's finger and this led to V's death by blood poisoning because of a rare blood condition, 'Was the victim's death by blood poisoning the same type of injury as the cutting of her finger, only to a greater extent? Or was the death a different type of injury from the cutting?'⁵⁰ It could be argued that the scope of the risk includes harm that was intended, foreseen, or foreseeable by D, and that D should be potentially responsible for such harm.⁵¹ However, as Moore says, the issue is not this straightforward: 'A defendant may intend to kill his victim by burns or poison, yet if another intervenes, killing the victim by shots or blows to the head, the defendant has not caused the death of the victim'.⁵² Another weakness with Herring's approach to causation is that it is not clear why the 'thin skull' rule should be limited to cases where V simply failed to do anything if the issue is whether the harm which occurred was within the scope of the risk created by D.

The 'thin skull' principle is clearly an established part of English criminal law. However, its existence, its precise scope, and its underlying rationale are a matter of controversy. What is clear is that the 'fairness to V' approach is different to the 'scope of the risk' approach endorsed by Herring, and that these different approaches have different implications as far as the appropriate scope of the 'thin skull' is concerned. For example, the reason why V behaved in a particular way may be relevant in determining the issue of causation under the 'fairness to the victim' approach, whereas it is irrelevant under Herring's 'scope of the risk' rationale.

4. Should the Victim's moral convictions be relevant in determining the issue of 'Legal' causation?

The central issue in this article is one that has received little attention by the courts and academic commentators: should the victim's moral convictions be relevant in determining the issue of 'legal' causation, and, if so, in what way? For the purposes of this article, 'moral' convictions are beliefs about what is morally or ethically permissible or required. Many religious beliefs are moral ones in this sense (for example, the belief that it is generally wrong to kill), but moral or ethical beliefs are not necessarily religious in nature, and vice versa, however 'religion' is precisely defined. In considering the main issue at hand, it is useful to

⁴⁵ *Ibid.*

⁴⁶ See e.g. *Friedman v New York* 282 N.Y.S2d.858 (C. Cl. 1967), 54 Misc.2d 448, a New York tort case where V's religious beliefs lead her to act in a particular way.

⁴⁷ J. Herring, *op. cit.* n 33 at 39, indicates that it is based upon an article by another author: M. Meliá, 'Victim Behavior and Offender Liability: A European Perspective' (2003-4) 7 Buffalo Criminal Law Review 513. However, Herring does not otherwise elaborate on this point.

⁴⁸ M. Meliá, *ibid.* at 529.

⁴⁹ M. Moore, *op. cit.* n 7 at 223.

⁵⁰ *Ibid.*

⁵¹ *Ibid.* at 249.

⁵² *Ibid.*

start by elaborating on the philosophical arguments in favour of applying the ‘thin skull’ rule to include V’s moral convictions.

Addressing this matter as a question of applied moral philosophy, Dennis Klimchuk argues that the principle that the law must treat all persons as equals ‘conjoined with the principle that persons are free to hold whatever religious beliefs they wish to and manifest them in any manner which does not violate the rights of others entails two things’.⁵³ According to him, the first of these is that ‘actions taken on the basis of such belief do not constitute breaks in the causal chain [in cases like *Blaue*],’⁵⁴ and the second is that ‘these beliefs must be taken as found by the wrongdoer’.⁵⁵ He claims that respecting the right to hold and manifest any religious belief, subject to the limitation that one may not manifest them in a way that violates the rights of others, demands that we conclude that the victim’s decision to observe her religion in *Blaue* did not break the ‘chain of causation’.⁵⁶ Klimchuk argues that criminal law should contain a ‘thin skull’ rule that holds ‘that the wrongdoer must take his victim as he finds her’,⁵⁷ and that certain beliefs of victims should constitute a ‘thin skull’. Asserting that ‘The thin skull rule is established doctrine in tort law’⁵⁸ and ‘less settled’ in criminal law,⁵⁹ he states: ‘legal thin skulls consist in those qualities – whether conditions or beliefs – which a person has (1) which in some sense cause her to embody a greater risk of injury than the average person, but (2) for which considerations of equality require us to absolve her of any responsibility’.⁶⁰ Is Klimchuk right?

The main issue here is a normative one concerning the correct approach to the ‘thin skull’ rule.⁶¹ It is important to clarify Klimchuk’s normative arguments, and to consider their persuasiveness. First, Klimchuk discusses what he calls the ‘principle of equality’, explains that this principle requires the law to treat all persons as equals, and claims that ‘insofar as the principle of equality forbids us from evaluating the reasonableness of ... [a victim’s moral convictions] – and thus any actions she takes upon them that do not infringe the rights of others – they must be taken as found in her by her assailant’.⁶² Why exactly does Klimchuk make this claim, and is it a sensible one? Klimchuk accepts that ‘the principle of equality’ is a value-laden standard, and states that ‘What equality requires in a given context will be in part a function of the sorts of interests the law protects in that context.’⁶³ His claim is that the ‘thin skull’ principle should extend beyond physical conditions to moral convictions of the victim so that the defendant cannot argue that the victim broke the chain of causation in criminal law by following his or her moral beliefs. His view is that the ‘thin skull’ rule is a necessary qualification of the ‘reasonable foreseeability’ test used in cases such as *Roberts*.⁶⁴ He maintains that in cases such as *Blaue* ‘equality requires the criminal wrongdoer to take his victim as he finds her because to do otherwise is to permit him to avail himself of a defence akin to *volenti non fit injuria*, and to do *that* is precisely to ask the victim to take

⁵³ ‘Causation, Thin Skulls and Equality’ (1998) 11 Canadian Journal of Law and Jurisprudence 115 at 116.

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ibid.* at 134.

⁵⁷ *Ibid.* at 124.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ *Ibid.* at 135.

⁶¹ It is worth noting that Klimchuk also seems to make a descriptive claim about the current state of the law in common law jurisdictions such as Canada and England. As we have seen, his suggestion that the ‘thin skull’ rule is not settled in criminal law is incorrect as far as English law is concerned. However, this is not Klimchuk’s primary concern; his main argument is a moral philosophical one about the approach the law should take.

⁶² D. Klimchuk, *op. cit.* n 53 at 134.

⁶³ *Ibid.* at 129.

⁶⁴ *Ibid.* at 125.

legal responsibility for some condition which on considerations of equality we may not do'.⁶⁵ This is an attractive claim. Klimchuk's point is that not applying the 'thin skull' rule in a case like *Blaue* leads to indirect discrimination on the basis of the popularity (or otherwise) of religious beliefs. As he puts it:

'Freedom of religion is in a sense an equality right, for it not only permits persons the right to hold and manifest whatever religious beliefs they chose so far as such manifestations do not violate the rights of others, but (correlatively) it forbids us from discriminating on terms of religious belief in matters in the public realm. Thus to claim that *Blaue* may have been said to have killed ... [V] only if her beliefs ... were commonly held is to deny her equal status, for to treat her as equal is precisely to disregard the question of whether her beliefs were popular ones.'⁶⁶

Klimchuk's point here has nothing to do with deterrence: he is not arguing that people would be deterred from following unpopular religious beliefs without the existence of a 'thin skull' rule in a case like *Blaue*. Rather, he is arguing that considerations of equality require that the law take a particular approach in order to be fair to those who hold obscure religious beliefs, bearing in mind that the precise scope of the 'thin skull' rule makes a difference in relation to D's potential liability. The argument here is that people like the victim in *Blaue* can be interpreted as having 'moral thin skulls'; that is, as having 'a personal vulnerability that must be taken account of'⁶⁷ in a particular way in calculating D's liability. In Klimchuk's opinion, the criminal wrongdoer must take his victim 'as he finds him' in a case such as *Blaue*. This is not to say that the defendant should necessarily be legally responsible for the consequences of his actions; 'it is rather to say that the consequence is among the wrongdoer's doings, and so among the things for which he *may* be held criminally responsible'.⁶⁸ The criminal law may impose responsibility for the thin-skulled victim's greater injury on the defendant because 'both what offence one is convicted of ... and the amount of punishment one is given in some sense expresses a judgment as to the severity of the wrong committed'.⁶⁹ It may not always be clear when acting on a religious belief violates the rights of others,⁷⁰ but there is no danger of the criminal law infringing D's rights or freedoms in this context because the 'thin skull' rule only becomes relevant once there is wrongdoing.

Unlike Herbert Hart and Tony Honoré, who agree with the outcome of *Blaue* but state that V does not break the chain of causation in such a case because V is not free to abandon his or her chosen belief,⁷¹ Klimchuk believes that 'treating decisions made on deeply held religious beliefs as unfree is demeaning'.⁷² Whilst perhaps superficially appealing, this particular claim that Hart and Honoré's approach is 'demeaning' seems to be based upon a misunderstanding of their use of the concept of freedom here. The best reading of their analysis is that they are saying that the pressure of V's moral beliefs means that V 'had no real choice', not that religious people are literally incapable of making a choice in this

⁶⁵ *Ibid.* at 137.

⁶⁶ *Ibid.* at 134.

⁶⁷ M. Ramsay, 'The Religious Beliefs of Tort Victims: Religious Thin Skulls or Failures of Mitigation?' (2007) 20 Canadian Journal of Law and Equality 399, making a point in relation to tort law 'that the victim's status as a Jehovah's witness could be treated as a religious thin skull, a personal vulnerability that must be taken account of in a fair calculation of damages'.

⁶⁸ D. Klimchuk, *op. cit.* n 53 at 117.

⁶⁹ *Ibid.* at 138.

⁷⁰ See *Kokkinakis v Greece*, App No 14307/88; [1993] ECHR 20 on the distinction between acceptable and improper proselytism.

⁷¹ H.L.A. Hart and T. Honoré, *Causation and the Law* (1985, Clarendon Press, Oxford) at 361. Interestingly, Hart and Honoré reach a different conclusion in the context of tort law, stating, *ibid* at 73, that 'religious convictions can be modified or abandoned', and that it may be unreasonable to follow them if this means 'the refusal of treatment, etc'.

⁷² D. Klimchuk, *op. cit.* n 53 at 127.

respect.⁷³ Klimchuk's approach seems to be based upon this premise about a lack of a real choice, since his account suggests that it is the pressure of V's moral beliefs which renders V particularly vulnerable. However, Klimchuk sensibly notes that Hart and Honoré are incorrect to suggest that characterising V's moral beliefs as something which must be taken as found 'suggests that her belief is a psychological quirk'.⁷⁴ 'To say that religious beliefs can constitute a legal thin skull is not to say that they are akin to psychological quirks';⁷⁵ rather, the point is that there are 'morally compelling reasons'⁷⁶ for including them within the scope of the 'thin skull' rule'.

5. The precise scope of the 'Thin Skull' Rule as it applies to the victim's moral convictions

Since there are powerful arguments in favour of treating V's ethical beliefs as falling within the scope of the 'thin skull' rule in criminal law, the best approach might be for these ethical convictions to indeed at least generally fall within the scope of this rule. It is now time to consider the scope of the 'thin skull' rule in more detail as it should apply to such convictions or beliefs.

a) Should the law on causation distinguish between religious and non-religious moral convictions?

In dealing with this question, let us consider a hypothetical example. D deliberately and unlawfully stabs V, and a kidney transplant is consequently necessary to save V's life. V believes that such transplants are 'cannibalistic' because they involve sustaining human life by means of a part of the body of another human. If V rejects surgery in these circumstances, should her decision break the chain of causation if it is based on non-religious, as opposed to religious, moral grounds? In this context, it is important to note that Klimchuk's claim is not specifically limited to religious moral beliefs. Marc Ramsay makes a similar argument to Klimchuk about the 'thin skull' rule and the relevance of the beliefs of victims in tort law, but he appears to limit his argument to 'religious' beliefs.⁷⁷ Klimchuk's claim about the 'thin skull' rule does not seem to draw a distinction between religious moral convictions and other moral convictions. This lack of a distinction between religious and other moral beliefs is attractive because it recognises that all moral choices are worthy of respect in this context where they are sufficiently important to the victim and acting upon them does not possibly infringe the rights of others. Furthermore, it avoids the necessity of legally defining 'religion' for the purposes of this area of law. It can be argued that Klimchuk's equality principle forbids us from discriminating in terms of any moral beliefs in the public realm, even if these moral beliefs are not religious in nature, since there is no reason why this equality principle should be limited to matters of religious conscience rather than conscience in general.

We can look to human rights law for inspiration on this issue. The European Convention on Human Rights (ECHR) does not require a particular approach in relation to the 'thin skull' rule even in jurisdictions where this Convention is relevant. As Jonathan Rogers puts it, 'the purpose of the ECHR was never to shape or guide, let alone to unify, the doctrinal criminal law of Member States'.⁷⁸ It is true that the European Court of Human Rights has insisted that the state has a positive obligation 'to secure Convention rights by means of effective

⁷³ See H.L.A. Hart and T. Honoré, *op. cit.* n 71 at 41 and 141, on the concept of voluntary action.

⁷⁴ *Ibid.* at 361.

⁷⁵ D. Klimchuk, *op. cit.* n 53 at 127.

⁷⁶ *Ibid.*

⁷⁷ M. Ramsay, *op. cit.* n 67. Ramsay proposes a 'religious thin skull' rule, and defines freedom of religion 'as protecting actions carried out in accordance with beliefs or systems of belief, general ideas about what is appropriate in human life' (*ibid.* at 418).

⁷⁸ J. Rogers, 'Applying the Doctrine of Positive Obligations in the European Convention on Human Rights to Domestic Substantive Criminal law in Domestic Proceedings' [2003] Crim LR 690 at 692.

criminal laws and enforcement machinery',⁷⁹ but there is no reason to believe that the precise scope of the 'thin skull' rule makes a difference to the rate of offending in relation to Convention rights. Nonetheless, just as 'human rights law can provide a fresh perspective from which to evaluate private law doctrine',⁸⁰ so too can it provide a useful perspective from which to consider the appropriate scope of the criminal law on causation. There are two conventions rights which are instructive in this context: Article 9, which provides 'a right to freedom of thought, conscience and religion', and Article 14, which states that 'The enjoyment of the rights and freedoms set forth in this Convention shall be secured without discrimination on any ground such as ... religion, political or other opinion ... or other status'. It is clear that Article 9 is potentially engaged only where the belief is 'on a fundamental problem'⁸¹ as opposed to a trivial matter. However, it is also clear that 'The atheist, the agnostic, and the sceptic are as much entitled to freedom to hold and manifest their beliefs as the theist'.⁸² The ECHR does not allow unjustifiable discrimination in this respect. Under Article 14, 'A difference of treatment in the enjoyment of rights and freedoms protected by the Convention is discriminatory if it has no objective and reasonable justification, or if it does not pursue a legitimate aim, or if there is no reasonable relationship of proportionality between the means employed and the aim sought'.⁸³ The criminal law on causation should take a similar approach in this respect. Let us return to our hypothetical scenario involving a person who believes that organ transplants are 'cannibalistic'. In a case like this, V's belief that organ transplants are morally inappropriate is of fundamental importance to her if she is willing to reject a transplant, knowing that this treatment is necessary to save her life. Thus, it should not matter that her belief was not a religious one. There is no valid reason for the 'thin skull' rule to distinguish between religious moral convictions and other moral convictions, at least where the beliefs in question are of fundamental importance to V.

b) Should the law on causation distinguish between 'acceptable' and 'unacceptable' moral convictions?

In the context of tort law, Ramsay considers a hypothetical situation involving a racist victim who refuses a blood transfusion because he fears that the donor blood may derive from a member of an 'inferior' race and believes that accepting such blood would be contrary to the will of God.⁸⁴ Ramsay's conclusion is that such a refusal could break the chain of causation in tort law because of its unreasonableness, since the law on causation should evaluate such racist beliefs and declare them illegitimate. As he puts it, 'Because our constitutional rights are both grounded in, and answerable to, human equality, the racist victim cannot appeal to his constitutional right to block public evaluation of his racist belief'.⁸⁵ According to Ramsay, the tort law on causation should treat racist beliefs as unreasonable, and decisions taken on the basis of these beliefs therefore should not fall within the scope of the 'thin skull' rule. Ramsay claims: 'By asking us to treat racist beliefs as reasonable, the racist victim also asks us to set aside the principle that identifies him as a rights bearer of equal standing with other persons. His belief cannot be treated as reasonable because it cannot be reconciled with the basis of his own claim to consideration'.⁸⁶ Ramsay's argument might seem intuitively attractive, since it is hard to see why the law on causation should cater to racist beliefs.

⁷⁹ A. Ashworth, 'A Decade of Human Rights in Criminal Justice' [2014] Crim LR 325 at 334, using *MC v Bulgaria* (2005) 40 EHRR 20 to illustrate this point.

⁸⁰ D. Nolan, 'Negligence and Human Rights Law: The Case for Separate Development' (2013) 76 MLR 286 at 317.

⁸¹ *R (Williamson) v Secretary of State for Education and Employment* [2005] UKHL 15 at paragraph 23 (*per* Lord Hope).

⁸² *Ibid.* at paragraph 24.

⁸³ *Abdulaziz, Cabales and Balkandali v UK* (1985) 7 EHRR 471 at paragraph 71.

⁸⁴ M. Ramsay, *op. cit.* n 67 at 421.

⁸⁵ *Ibid.*

⁸⁶ *Ibid.*

However, it is premised on the false assumption that the racist victim would necessarily be asking the law to treat racist beliefs as reasonable. In fact, the criminal law on causation could avoid making determinations about the reasonableness of the victim's religious and other moral convictions.

Klimchuk does not state that the law on causation should declare that all religious and non-religious moral convictions are reasonable; his position is that it should declare that the victim's moral convictions are beyond evaluation in the determination of the correct application of the law on 'legal' causation.⁸⁷ However, it is not obvious that the state should always remain neutral in this context. Lawton LJ pointed out a serious difficulty with any attempt to draw a distinction between 'acceptable' and 'unacceptable' beliefs in this area: 'At once the question arises — reasonable by whose standards? Those of Jehovah's Witnesses? Humanists? Roman Catholics? Protestants of Anglo-Saxon descent? The man at the Clapham omnibus?'⁸⁸ In relation to Ramsay's scenario, the answer may be that whether beliefs are acceptable could be determined by reference to any laws against discrimination. In jurisdictions such as England and Jersey, there are laws prohibiting racial and certain other discrimination: these laws could be used as guidance as to what is acceptable in this context.⁸⁹ A difference in treatment between 'acceptable' and 'unacceptable' moral beliefs may be merited when questions of 'manifestation' of such beliefs arise, as the courts have acknowledged in the context of human rights law.

c) Should moral convictions that develop after the victim is harmed fall within the scope of the 'thin skull' rule?

What about moral convictions that develop after the victim is harmed? Klimchuk does not explicitly address this issue: he focuses on religious and other moral beliefs which existed prior to the wrongful conduct in question. The 'thin skull' rule has traditionally applied only to pre-existing conditions, at least in English law.⁹⁰ However, if Klimchuk's theory is valid, it is arguable that a victim's conduct should never break the 'chain of causation' simply because it was taken in response to moral convictions that developed after the wrongful conduct. Following Klimchuk's approach, there is no reason why it should matter when the victim developed the moral convictions. As Ramsay puts it in discussing the case for a religious thin skull rule in tort law, 'the religious thin skull rule should not be restricted by a simple appeal to the pre-existing condition requirement. The tortfeasor, who has created the plaintiff's current need for deliberation, should not be allowed to limit the reasons that the plaintiff may take into account'.⁹¹ The argument against D is particularly strong in this context where V's moral beliefs developed because of D's wrongdoing; for example, because the harm in question caused V to develop religious convictions after reflecting upon his or her situation. Where D's wrongdoing caused the development of the moral convictions in question, it is difficult to see why D should be able to argue that they were unforeseeable and that any actions taken in response to them therefore necessarily break the chain of causation by virtue of this unforeseeability. As the House of Lords pointed out in *Corr v IBC Vehicles Ltd*, an English tort law case concerned with liability for a suicide triggered by depression suffered

⁸⁷ D. Klimchuk, *op. cit.* n 53 at 134.

⁸⁸ *Blaue*, *op. cit.* n 5 at 1415.

⁸⁹ There are many pieces of English criminal law legislation which make it clear that racist conduct is unacceptable. For an overview, see the Crown Prosecution Service, 'Racist and Religious Crime - CPS Guidance', available at: <www.cps.gov.uk/legal/p_to_r/racist_and_religious_crime/#a21> (last viewed 21 March 2016). More broadly and in a civil law context in the UK, the Equality Act 2010 prohibits discrimination because of 'protected characteristics', including race. In Jersey, legislation similarly prohibits discrimination in an employment law context because of various protected characteristics, including race (the Discrimination (Jersey) Law 2013, as amended).

⁹⁰ H. L. A. Hart and T. Honoré summarise the rule in the following terms, *op. cit.* n 71 at 172: 'a *state of the person or thing affected*, existing at the time of the wrongful act ('a circumstance'), however, abnormal, does not negative causal connection'.

⁹¹ M. Ramsay, *op. cit.* n 67 at 414-415.

because of the defendant's breach of duty, 'The rationale of the principle that a novus actus interveniens breaks the chain of causation is fairness',⁹² and it may be fair to hold D liable in tort for the result of a decision made by V because of a psychological condition induced by D's wrongdoing.⁹³ Similarly, it may be appropriate to hold D criminally liable for the result of a decision made by V because of a mental state induced by D's wrongdoing.⁹⁴

This is not to say that the criminal law should never hold an individual responsible for conduct attributable to a condition induced by another person's wrongdoing; for instance, it might be acceptable to impose criminal liability on someone who attacks a third party as a result of a personality change induced by another person's negligence, since such an attack would infringe the rights of the third party in question.⁹⁵ Nor is it to say that criminal law should hold that conduct by V in response to a condition or a set of moral convictions induced by D should never break the chain of causation. It is rather to recognise that there are particularly strong reasons for concluding that V's conduct should not break the 'chain of causation' where it was in response to moral convictions which were induced by D's wrongdoing. Moore appears to endorse this idea when he says that 'To intervene between defendant's act and his victim's harm, an event must not itself be the product of defendant's act. If it is such a product, then the event is merely part of the mechanism or means by which the defendant's act caused the harm; it is not an intervention preventing such causation by defendant'.⁹⁶ As Moore puts it, if V acts on the basis of strong emotions induced by D, 'then the intervenor's choice lacks causal independence and cannot be an intervening cause on that ground alone'.⁹⁷ However, Moore's argument is contentious here, since he states his position so broadly: it would seem to suggest that cases such as *Roberts* are incorrect even though they are well-established in English law.⁹⁸

It would be better to state that there should be no pre-existing condition requirement in relation to V's moral convictions, and that the arguments against such a requirement are particularly compelling where D's wrongdoing induced such moral convictions.

d) Should all actions based upon moral convictions fall within the scope of the 'thin skull' rule?

Klimchuk may be correct to conclude that the principle of equality forbids us from evaluating the reasonableness or reasonable foreseeability of a person's moral convictions in considering the issue of causation, at least where such moral convictions are not contrary to basic values as established in laws against discrimination. However, he is incorrect to imply that this means that any actions taken upon such moral convictions that do not infringe the rights of others must also fall within the scope of the 'thin skull' rule.⁹⁹ A finding that the victim's moral convictions are beyond question does not entail that any action that this victim takes upon the basis of them must also be beyond question: it is possible to make an assessment of conduct without making an evaluation of the reasonableness or reasonable foreseeability of the belief to which it is a response. There is an analogy here with the English criminal law on self-defence. In English criminal law, defendants who plead self-defence are

⁹² [2008] UKHL 13 at paragraph 15 (*per* Lord Bingham).

⁹³ However, see *Gray v Thames Trains Ltd* [2009] UKHL 33, a tort law case where the House of Lords held that this is not always appropriate.

⁹⁴ See J. Horder and L. McGowan, 'Manslaughter by Causing another's Suicide' [2006] Crim LR 1035 at 1040-1043, making this argument in the context of suicide.

⁹⁵ For an example of such a case, see *Meah v McCreamer* [1985] 1 All ER 367, a tort law claim with a criminal law context. For critical analysis that could be applied to the outcome of the criminal law aspects underpinning this case, see A. Norrie, 'The Limits of Justice: Finding Fault in the Criminal Law' (1996) 59 MLR 540 at 553.

⁹⁶ M. Moore, *op. cit.* n 7 at 236.

⁹⁷ *Ibid.* at 244.

⁹⁸ See *Roberts op. cit.* n 4, *Williams op. cit.* n 26, *Corbett op. cit.* n 26, and *R v M (Richard) (A Juvenile)* [2000] Crim LR 372.

⁹⁹ He implies this by stating, *op. cit.* n 53 at 53, that 'actions taken on the basis of such belief do not constitute breaks in the causal chain'.

generally judged on the facts as they perceived them to be;¹⁰⁰ their beliefs in this respect merely have to be genuine, rather than reasonable.¹⁰¹ However, the court determines whether the force used was reasonable, given the circumstances as the defendant perceived them to be.¹⁰² Thus, the fact that the defendant's belief about the circumstances is beyond evaluation does not mean that the defendant's response to this belief is also beyond evaluation in the determination of the appropriate application of the law on self-defence. Similarly, a determination that a victim's moral convictions are beyond evaluation does not imply that responses to these moral convictions should also be beyond question in the determination of the correct application of the law on 'legal' causation. Actions based upon moral convictions may be so 'daft' as to be unforeseeable, even taking these moral convictions into account, and it is arguable that the law should recognise this in determining the issue of 'legal' causation.

It is instructive to consider *Friedman v New York*,¹⁰³ a United States tort law case. In this case, the Court of Claims of New York considered whether the claimant had 'acted reasonably in the light of her religious convictions'¹⁰⁴ rather than assumed that she must have acted reasonably simply because she was acting in response to them. The female claimant and a male friend became stranded on a chair-lift in the late afternoon because of the negligence of the State of New York, which owned and operated the relevant facility. The claimant, a member of an ultra-orthodox Jewish community, apparently jumped from this lift because she believed that it was contrary to Hebrew law for a woman 'to stay with a man in a place which is not available to a third person', and that breaking this religious rule would 'be an overwhelming moral sin'.¹⁰⁵ She was injured in the fall, and recovered compensation for this injury in tort law without a reduction for contributory negligence. However, what is important here is that this case illustrates that it is possible to make an assessment of conduct without evaluating the reasonableness or foreseeability of the belief to which it is a response. The court accepted that the 'thin skull' rule was relevant on the facts of the case, given the claimant's religious convictions.¹⁰⁶ Nonetheless, this does not automatically mean that her decision to jump was reasonable or foreseeable whatever the circumstances: for example, if the facts of the case had been different, she might have broken the chain of causation if she could have climbed down safely instead of jumping.

If we accept that responses by V to moral convictions should not be beyond question in the determination of the correct application of the law on 'legal' causation, an important issue is when they should break the chain of causation. The current approach in English criminal law is that 'If D's unlawful conduct has prompted the response from V, D will remain liable if V's reaction was within the range of responses which might be expected from a victim in his situation'.¹⁰⁷ This means that 'D does not have to take a 'daft' victim as he finds him – unless, presumably he knows him to be daft – that it is, likely to behave in an extraordinary fashion'.¹⁰⁸ Adopting Klimchuk's principle of equality, the rule could be that actions based

¹⁰⁰ The exception to this approach concerns mistakes induced by voluntary intoxication (section 76(5), Criminal Justice and Immigration Act 2008, codifying the rule in *R v O'Grady* [1987] QB 995).

¹⁰¹ Section 76(3), Criminal Justice and Immigration Act 2008, codifying the common law rule in *R v Williams (Gladstone)* [1987] 3 All ER 411 and *Beckford v R* [1988] AC 130.

¹⁰² As the High Court put it recently in *R (on the application of Collins) v Secretary of State for Justice* [2016] EWHC 33, 'the central question (and the standard) remains whether the degree of force that a defendant used was 'reasonable in the circumstances as the defendant believed them to be'. The standard remains that which is reasonable'.

¹⁰³ *Friedman*, *op. cit.* n 46.

¹⁰⁴ M. Ramsay's characterisation of the court's approach, *op. cit.* n 67 at 404.

¹⁰⁵ *Friedman*, *op. cit.* n 46 at 452.

¹⁰⁶ As M. Ramsay says, *op. cit.* n 67 at 405, her course of action might have been reasonable in any case, since the alternative might have been to remain overnight on the ski lift and therefore more physically dangerous.

¹⁰⁷ D. Ormerod, *op. cit.* n 34 at 98.

¹⁰⁸ *Ibid.*

upon moral convictions may be so ‘daft’ as to be unforeseeable, even taking these moral convictions into account.

6. Conclusions

The precise scope of the ‘thin skull’ rule remains undetermined in English criminal law, and it is unclear whether this rule even exists in Jersey and Guernsey criminal law. This article has explained that there might be convincing justifications for having such a ‘thin skull’ rule and drawn upon Klimchuk’s argument about the correct application of this rule in criminal law. The best approach might be that any ‘thin skull’ rule should respect the victim’s moral convictions where they are sufficiently important to this victim by declaring that they are beyond question in the application of the law on ‘legal’ causation, except perhaps where such moral convictions are contrary to fundamental values as found in anti-discrimination law. If this is the case, then there should be no pre-existing condition requirement in relation to V’s moral convictions; i.e. V’s conduct should never break the ‘chain of causation’ simply because it was taken in response to moral convictions that developed after D’s wrongful conduct. However, as this article has explained, this does not mean that all actions based upon moral convictions should fall within the scope of the ‘thin skull’ rule.

The best argument against extending the ‘thin skull’ rule to cover moral beliefs may be that the existence of this rule is itself unjustified and that its extension makes the law even more unfair on defendants. If it is legitimate for criminal law to contain a ‘thin skull’ rule, then there are strong reasons for the victim’s moral or ethical convictions to fall within the scope of this rule. The challenge for anybody who believes that the existence of a ‘thin skull’ rule is appropriate but that this rule should not apply to V’s moral or ethical convictions is to explain why this is the case. John Williams has attempted to meet this challenge, arguing that *Blaue*’s extension of the ‘thin skull’ rule ‘to the victim’s state of mind is an undesirable development’.¹⁰⁹ Williams believes that a valid distinction can be drawn between pre-existing physical vulnerabilities of V and the surrounding circumstances of V at the time of D’s wrongdoing, on the one hand, and cases where V refuses medical treatment, on the other hand. As he puts it: ‘A victim cannot help the fact that he has a weak heart, or that the attack took place in an area where he was unlikely to receive proper medical treatment. However, he can help the state of his mind and has a free choice as to whether to undergo medical treatment aimed at saving his life, even though the exercise of it may be influenced by the tenets of his particular faith’.¹¹⁰ Williams would not draw a distinction between reasonable and unreasonable refusals to seek medical treatment; instead, he would ‘distinguish between those cases where the victim, either as a result of his own physical defects or the surrounding circumstances, dies and those cases where he dies as a result of his own conscious decision to refuse treatment’.¹¹¹ His controversial conclusion is that ‘Victim refusal to undergo medical treatment designed to save life should be sufficient to break the chain of causation and render the accused liable to some lesser charge, albeit still a serious one’.¹¹²

A significant problem with Williams’ analysis is that it is not consistent with modern medical understanding. It is an over-simplification to state that V cannot help the fact that he or she has physical vulnerabilities, as if V never has any control at all in relation to such matters: for instance, even at the time that Williams advanced his victim refusal argument, preventative treatment was available for haemophilia to control bleeding.¹¹³ Thus, those who suffer from haemophilia might have some control over their condition through the use of preventative treatment. Similarly, although heart failure cannot necessarily be cured, it can be treated and

¹⁰⁹ J. Williams, ‘Victim Refusal’ 35 (1984) Northern Ireland Legal Quarterly 386 at 390.

¹¹⁰ *Ibid.*

¹¹¹ *Ibid.* at 392.

¹¹² *Ibid.*

¹¹³ See e.g. National Haemophilia Foundation, ‘History of Bleeding Disorders’, available at <<https://www.hemophilia.org/Bleeding-Disorders/History-of-Bleeding-Disorders>> (last viewed 23 July 2016).

steps can be taken to reduce the risk of its occurrence.¹¹⁴ Williams draws a dichotomy between cases where V dies as a result of his or her own physical defects and those cases where V dies because of a conscious decision to refuse treatment. He argues that the former, but not the latter, involve 'factors outside the victim's control'.¹¹⁵ In reality, preventative treatment or lifestyle management is available in relation to some types of physical defects. This does not mean that people who do not seek preventative treatment or take appropriate steps to manage the risk of physical defects arising are necessarily to blame for their conditions and that the criminal law on causation should take this into account, but it does mean that it is problematic to assume, as Williams does, that victims have no control at all in relation to physical vulnerabilities.¹¹⁶

A second, perhaps even more significant, problem with Williams' analysis lies in his conclusion that 'Just as the civil law can require the victim to mitigate his injury, so the accused in a criminal case should also be able to rely on his victim taking steps to receive the necessary medical treatment'.¹¹⁷ Williams does not provide any justification for his claim that D should always be able to rely upon V seeking medical treatment where such treatment is possible, other than to suggest that V 'can help the state of his mind and has a free choice as to whether to undergo medical treatment'.¹¹⁸ His view is that 'if perfectly adequate treatment is available and refused, the accused's liability should only extend as far as it would have done if the treatment had been accepted and some form of recovery effected'.¹¹⁹ He claims that this approach is desirable because it avoids raising 'questions of whose standards should be applied', which 'could lead to great disparity'.¹²⁰ However, this overlooks the fact that his proposed position would lead to indirect discrimination against those with 'moral thin skulls', since injuries inflicted on them would be less likely to lead to liability for serious harm. Furthermore, his unwillingness to make a distinction between reasonable and unreasonable refusals could lead to some other undesirable conclusions. Let us suppose that D stabs V in a fit of anger. D, a medical expert, regrets his attack immediately and offers V what Williams might call 'perfectly adequate medical treatment'. Not trusting that D has changed his heart, V refuses this treatment and runs away in search of help elsewhere. Adopting Williams' analysis, V's refusal could break the chain of causation.¹²¹ whether it was reasonable or reasonably foreseeably would be irrelevant. However, there is no reason why V's refusal should break the chain of causation if it was not so draft as to be unforeseeable, and it might be well be that V's refusal would be both reasonable and reasonably foreseeable in the circumstances.

Williams' proposed approach to the refusal of medical treatment is simple. However, as this article has explained, this area of the law on causation is not so simple: there are powerful arguments both for having a 'thin skull' rule and treating at least certain moral convictions of V as falling within the scope of this rule.

¹¹⁴ See National Health Service, 'Heart Failure', available at <<http://www.nhs.uk/Conditions/Heart-failure/Pages/Introduction.aspx>> (last viewed 23 July 2016).

¹¹⁵ J. Williams, *op cit.* n 109.

¹¹⁶ Williams' claim that V 'can help the state of his mind' (*op cit.* n 109) is also problematic from the point of view of medical understanding. It seems to overlook the possibility that V might have a pre-existing irrational fear of invasive medical treatment ('tomophobia').

¹¹⁷ J. Williams, *op cit.* n 109 at 392.

¹¹⁸ *Ibid.* at 390.

¹¹⁹ *Ibid.* at 389.

¹²⁰ *Ibid.*

¹²¹ Williams makes it clear that a refusal in this context includes 'a conscious decision by V to delay treatment' (*ibid.* at 391).

