For Want of a Nail: Causation in Queensland Criminal Law

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Introduction

In 1995, the Court of Appeal dealt with an appeal against sentence by Thomas Amituanai, a young man who had caused grievous bodily harm to another. Amituanai was out with friends in Toowong. When he came across the victim and his friends at a taxi rank, a dispute occurred. Amituanai was seriously provoked by the complainant. His response was to pursue and kick the victim, who fell heavily to the ground, striking his head on the bitumen. The victim suffered a serious head injury as a result.

In dismissing Amituania's appeal, Pincus JA wrote[1]

> One could perhaps defend a legal system in which the particular consequences for the victim of such a blow are treated as of little significance and the court is required to focus solely on the circumstances of the blow itself. But that is not our system; for reasons which are evident enough, the offender will find that his punishment may depend on the extent of the damage the victim happens to sustain. That is, the risk that a blow which might by good luck have caused little damage in fact has catastrophic results, as it had here, is one which is shared by the victim and the offender.

In Queensland, we have adopted a system for the attribution of criminal responsibility which is heavily dependent on the results of a defendant's actions. Liability can attach upon proof that the defendant caused a particular result without resort to notions of *mens rea* which infect the common law. There are many offences described in the Queensland *Criminal Code* where it is necessary, and often sufficient, to prove that the defendant caused a specific result. They include the various forms of homicide, unlawfully doing grievous bodily harm or wounding, dangerous operation of a vehicle causing death or grievous bodily harm and arson. As someone practicing in criminal law, it is inevitable that you will handle cases where proof of a specified result is an essential element of the alleged offence.

The approach to causation in Queensland criminal law presents some peculiar issues. The common law in Queensland is modified by Sir Samuel Griffith's Code.[2] In some instances, we apply a blend of the Code and the common law to determine if a defendant may be held to have caused a proscribed result. This paper is intended to provide an overview of the law of causation in criminal matters in Queensland. I will do so by first briefly – and superficially – discussing the legal theories that inform what might be called 'outcome based criminal responsibility', touching upon complementary theories for the imposition of criminal responsibility. Part of this discussion will highlight the importance of 'outcome responsibility' in the attribution of criminal liability and the exposure to punishment. Next, I will provide an overview of the general law of causation in criminal matters as set by the common law. Then, I will consider some specific instances of causation as an element of offences under the Code. This will focus

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* Judge of the District Court of Queensland. I would like to acknowledge the assistance of Nathan Vaitsas in the preparation of this paper.

1 *R v Amituanai* [1995] QCA 80; (1995) 78 A Crim R 588.

2 *Criminal Code* (Qld), which I will refer to simply as the Code.

on three areas: homicide, dangerous operation of a vehicle and arson. Finally, I will summarise what we have learned about the importance of causation in Queensland criminal law.

Legal theories concerning criminal responsibility and the importance of causation

Nicola Lacey has persuasively argued that the history of criminal law shows the influence of four foundational pillars of criminal responsibility. Professor Lacey identifies these pillars as 'capacity responsibility', 'character responsibility', 'outcome responsibility' and 'risk responsibility'.[3]

Outcome responsibility – which is of the most immediate concern when considering causation – is perhaps the easiest theory to explain. Under this theory, certain outcomes are considered harmful by society and are proscribed by the criminal law. A person's criminal responsibility thus depends upon whether they have caused the harm which is proscribed. This explains the common legal requirement for proof of causation before a person may be held responsible for a crime.

Risk responsibility may also be expressed simply, though in terms which may hide the complexity underlying this notion. Under this theory, criminal responsibility is grounded in an assessment of risk of harm which may result from a person's actions and the person's actual or constructive appreciation of this risk. A person is deserving of punishment for acts which carry a sufficient risk of resulting in proscribed harm, having regard to the extent to which the person was, or ought to have been, aware of the risk. This theory may be found reflected in the aspect of *mens rea* usually referred to under the sobriquet 'recklessness' and in legislation such as section 23 of the Code. The exploration of this theory of criminal responsibility, especially as it relates to attempts to find its outer boundaries, continues to provoke interest.[4] But as it is of no immediate relevance to the idea of causation, no more need be said in this paper.

Character responsibility can be traced to the writings of Scottish philosopher David Hume in the 18th Century and the doctrine of moral sense. Hume (and others) propose that we all have the innate ability to perceive morality through emotions and sentiments – our feelings of approval or disapproval for the actions of others provide the basis for distinguishing moral rights and wrongs. Under this theory, judgments about morality are not based solely on the application of standards of normative behaviour.[5] In turn, some expressions of legal theory rely upon moral sentimentalism to tie character to criminal responsibility. The result is, as George Fletcher wrote in his seminal work *Rethinking Criminal Law*, that we blame a person who committed a wrongful act only if the act reveals what sort of person the actor is. Put another way, we assign blame only if we can infer from the commission of a wrongful act that the actor's character is flawed.[6]

In the 18th and 19th Centuries, character responsibility manifested in ways we should now consider to be unfair and arbitrary. These manifestations included so called 'status' offences,

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3 Nicola Lacey, *In Search of Criminal Responsibility* (Oxford University Press, 2016).

4 The Victorian Law Reform Commission was recently tasked with considering whether the accepted definition of 'recklessness' for offences against the person should be changed. The Commission did not recommend that the definition be changed by legislation: Victorian Law Reform Commission, *Recklessness: Report* (Report No 47, February 2024).

5 This brief description is very much a simplification. 'Moral sentimentalism' has been the subject of debate and criticism since Hume's time by rationalists such as Immanuel Kant. The debate is irrelevant for present purposes.

6 George Fletcher, *Rethinking Criminal Law* (Little Brown and Co, 1978) 800. See also Michael Bayles, *Character, Purpose and Criminal Responsibility* (1982) 1 Law and Philosophy 5.

such as the criminalisation of poverty (vagrancy) or prostitution. These offences assume those states are the product of choice or weakness of character. By the late 19th Century theories of criminal responsibility moved toward capacity theory – the idea that it is 'only legitimate to hold people criminally responsible for things which they had the capacity to avoid doing.'[7] Capacity theory depends upon the 'notion of an agent endowed with powers of understanding and self-control',[8] and the asumption 'that human action is the rational product of autonomous choices about how to act.'[9] Thus, a person who is incapable of making such autonomous choices may be relieved from criminal responsibility, or at least be considered less blameworthy for their actions.[10]

The rise of the theory of capacity responsibility did not banish character theory. Despite some steps toward the decriminalisation of poverty and prostitution, status offences continue to exist. Indeed, recent legislative responses concerning 'dangerous prisoners' and terrorism can be seen as a manifestation of character theory.[11] It has been argued such legislation, intended as it is to reduce an unrealised risk of harm based upon judgments about a person's tendency to carry out a criminal act, represents a diffusion of criminal responsibility.[12] This expansion of State interference with personal freedom is perhaps a hammer in search of a nail. It is timely, as well, to note that character and its relevance to the assessment of an offender's moral culpability is once again a topic of discussion following the release of the Queensland Sentencing Advisory Council's recent report on sentencing for offences of sexual assault and rape.[13]

This is but the briefest of overviews of some theories about how we justify applying criminal responsibility and penal sanction. As may be readily understood, these theories do not operate in isolation, and the importance of one or the other will wax and wane. As Professor Lacey observed[14]

> the practices of criminal responsibility-attribution have long exhibited a concern with some combination of character, capacity and outcome: with 'character' standing in for a particular conception of how criminal evaluation attaches to persons and related to identity; 'capacity' standing in for the concern with agency, choice and personal autonomy; and outcome standing in for the concern with the social harms produced by crime. Yet the precise configuration of these elements, and the shape which each of them takes, has changed markedly over time.

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7 Lacey, n 1, 27.

8 Ibid.

9 Hon. Chris Maxwell AC, 'Criminal responsibility and human capacity: why impaired mental functioning affects moral culpability' (2023) 30(1) *Psychiatry, Psychology and Law* 4. Maxwell acknowledges the argument that this assumption may be considered a legal fiction.

10 Ibid.

11 Lacey, n 1, 18. Lacey also argues that character theory has affected the approach of the common law to criminal complicity or derivative liability, as seen in decisions in the United Kingdom concerning joint criminal enterprise. The High Court of Australia has taken a different path. For an informative discussion on this development see Andrew Ashworth CBE KC FBA, 'The Diffusion of Criminal Responsibility: a Cause for Concern?' (Current Legal Issues, Supreme Court of Queensland, 2 November 2017) and *R v Jogee* [2016] UKSC; 82 WLR 681; 2 All ER 1; *Miller v The Queen* [2016] HCA 30; 259 CLR 380.

12 Ashworth, n 11.

13 Queensland Sentencing Advisory Council, *Sentencing of Sexual Assault and Rape: The Ripple Effect* (December 2024). The Council recommended legislative intervention to limit the use which might be made of character evidence when sentencing for sexual offences.

14 Nicola Lacey, 'The Resurgence of Character: Criminal Responsibility in the Context of Criminalisation' in A Duff and S Green (eds), *Philosophical Foundations of Criminal Law* (Oxford University Press, 2011, 151,

Despite the variety and changing prominence of the theoretical or philosophical justifications which may be argued for imposing criminal responsibility and liability to punishment, it is an accepted starting point that we generally do not hold persons responsible for results they have not caused.[15] Outcome responsibility, and causation, assume a foundational position in discussions about criminal responsibility.

The position is no different in Queensland, where the approach of Sir Samuel Griffith in his draft Code was to eschew reliance upon the notion of *mens rea*.[16] Under the Code, liability is described by reference to conduct and circumstances. Depending on the alleged offence, the circumstances may include a specified result or a particular state of mind. Once the necessary conduct and circumstances have been established, criminal responsibility will attach unless the defendant has the benefit of one of the Code's 'defences.'[17] In this regard, the Code may be seen as a reflection of an objective theory of criminal responsibility which crystalised in the very early 20th Century. The common law, on the other hand, has moved in the direction of a subjective theory.[18] The result is that theories of capacity responsibility do little to inform the interpretation of the Code. Instead, criminal responsibility under the Code relies heavily on outcome responsibility, where proof that a defendant has caused a specified result is often foundational to a finding of criminal responsibility.

Having located the importance of causation to the theories and application of criminal law, I turn now to consider how proof of causation is approached in Queensland criminal law.

Causation in criminal matters according to the common law

In many instances the issue of causation raises no difficult questions – a person wielding a knife who stabs another will, according to widely held notions of common-sense, be held to have caused the resulting wound. It is always possible to apply a metaphysical analysis to any set of circumstances in an attempt to discover the combination of conditions which contributed to the occurrence of an event. In the preceding example a philosopher may consider what it was that brought the two people together and how those conditions contributed to the event. An engineer may consider the force applied and the protective qualities of the victims clothing. However, the common law prefers the common-sense approach which invites consideration of whether an ordinary person would hold the defendant to have caused the event or occurrence. That is enough for the ordinary run of cases.

But cases where harm has occurred subsequent to the act of the defendant, and most immediately because of the acts or omissions of someone else, have long troubled the common law. In 1991, in the decision of *Royall v The Queen*, McHugh J observed,[19]

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15 I say generally because the law in relation to criminal complicity or derivative liability and attempts to commit offences provide obvious exceptions.

16 *Widgee Shire Council v Bonney* (1907) 4 CLR 977, 981, in which Griffith CJ said of his Code, 'it is never necessary to have recourse to the old doctrine of *mens rea*, the exact meaning of which has been the subject of much discussion.' Despite Sir Samuel's view, there is reason to think that some aspects of criminal responsibility under the Code import concepts very similar to those of *actus reas* and *mens rea*.

17 Such as those found in Chapter 5, which are often collectively, and somewhat misleadingly referred to as 'defences.' More properly, the Code contains provisions which may authorise, justify, or excuse the conduct of a person by deeming it to be not unlawful. The distinction between the three categories may be important in theory, but it is much less so in practice.

18 As illustrated by Brennan J in *He Kaw Teh v The Queen* (1985) 157 CLR 523.

19 (1991) 172 CLR 378, 448.

> Judicial and academic efforts to achieve a coherent theory of common law causation have not met with significant success. Perhaps the nature of the subject matter when combined with the lawyer's need to couple issues of factual causation with culpability make achievement of a coherent theory virtually impossible.

I pause to note that in the last sentence, McHugh J was referring to the discrete concepts of 'factual' and 'legal' causation. The former is concerned with establishing a causal link between the act or omission of the defendant and the harm which has been suffered. Legal causation is concerned with whether the circumstances are such the defendant should be found to be criminally responsible for the harm.[20] It was the principles which govern the determination of the latter which were in issue in *Royall*, and which are of concern in this paper.

While McHugh J noted some of the difficulties which have attended the development of common law causation, the Court in *Royall* also provided the best solution the common law has come up with to date. The determination of the majority was that the defendant's acts need not be the only cause of the result in question and it is sufficient if they are a substantial or significant cause or have substantially contributed to the result.[21] Where further direction on the topic is necessary the jury might be told that the

> question of cause for them to decide is not a philosophical or scientific question, but a question to be determined by them applying their common sense to the facts as the find them, they appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter.[22]

Royall has stated the law as to causation according to the common law of Australia for many years now. While in Queensland we have the benefit of the Code, it has been held that the common law as expressed in *Royall* applies to questions of causation that might arise for determination.[23] In the years which have followed, the only significant addendum to what was said in *Royall* arose from the decision of the High Court in *Burns v R* (2012) 246 CLR 334, a case to which I will return.

To better understand the principle which emerges from *Royall*, it is useful to consider the facts in a little more detail. Kym Royall was a heavily tattooed underworld figure. He was in his late thirties and had convictions for assault and drug offences. In late 1986 he was living with twenty-three-year-old Kelly Healey. They had been together about four months. Their relationship was punctuated with arguments and violence. Kelly Healey had spent the days leading up to her death staying with a girlfriend. On 15 November 1986 she returned to the sixth floor flat at Kings Cross she had shared with Royall. Early the next morning Kelly Healey fell from the bathroom window and suffered fatal injuries.

Some of you might know this but there is a word for the act of throwing someone out of a window. That word is defenestration. It is derived from *fenestra*, the Latin word for a window or opening and as a cause of death it seems to have been common enough to have warranted a

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20 For a discussion of this distinction in 'Code States', see *Krakouer v Western Australia* [2006] WASCA 81.

21 *Royall v R* (1991) 172 CLR 378, 411 per Deane and Dawson JJ at 411. This provides the bases for the model directions suggested in the Supreme and District Courts Criminal Directions Benchbook dealing with the offences of murder and manslaughter.

22 *Campbell v The Queen* [1981] WAR 286, 290 per Burt CJ, cited with approval in *Royall v R*, ibid, 387, 411.

23 *R v Carter* (2003) 141 A Crim R 142 at 144 [6].

specific word to describe it. Indeed, the city of Prague can lay claim to not one, but two famous incidents of defenestration separated by almost 200 years.[24]

The first, in 1419, arose from a dispute between a proto-protestant Czech Christian group known as Hussites and the city council of Prague. The Hussites were marching on the town hall when when a stone was thrown at their leader. In what might be seen as something of an overreaction, the Hussites stormed the town hall and threw the judge, the Burgomaster and thirteen members of the town council out of the windows. All 15 victims either died from the fall or at the hands of the Hussite mob. This did not improve relations between the Catholic rulers of Bohemia and the Hussites, which were already strained since the Catholics executed the Hussites founder, Jan Hus, four years earlier. Bohemia soon descended in a civil war, with the parties divided on religious lines. The war persisted until the early 1430s when a moderate group of Hussites switched sides, joining the Catholics to defeat the radicals.

A later and better-known defenestration occurred in 1618, again motivated by religious disputation. By the 17th Century Protestantism was well entrenched on the Continent. The Habsburg rulers of Bohemia were religiously tolerant, and Bohemia had been trending toward Protestantism since the later 16th Century. This trend was arrested in 1617 when a new, pro-Catholic ruler was appointed. He halted construction of Protestant chapels on royal lands, ignoring the protests of Protestant nobles. Religious tensions were once again on the rise. On the morning of 23 May 1618, four Catholic regents met with some Protestant leaders to discuss the latter's grievances. The meeting did not go well. The result was that two Catholic regents and their secretary were thrown from a third-floor window. They fell more than 20 metres but, remarkably, the three men survived.

Of course, each side quickly engaged their propaganda machines to explain the regents' survival. For the Catholics, it was the miraculous intervention of angels who lowered the three men gently to the ground. For the Protestants it was said that the men landed in a dung heap. To date, historians have been unable to resolve the dispute.

The second defenestration triggered the Thirty Years War, a war unusual in history for having a name that actually coincides with the length of the war.[25] The war changed the internal borders of Europe and ended in the Peace of Westphalia, two treaties which are sometimes regarded as critical moments in the birth of modern nations.

Returning to *Royall*, Kelly Healey did not have the same good fortune as the victims of the second defenestration of Prague. She suffered fatal injuries in her fall from the sixth-floor window. Post-mortem examination revealed signs of significant facial injuries inflicted before her death. Blood and disturbance in the flat also suggested considerable violence had taken place before Healey fell from the bathroom window. Royall admitted that he had 'backhanded' Healey and punched her twice in the face but claimed she was alone in the bathroom when she fell. He claimed in an unsworn dock statement at his trial that he heard noises from the bathroom and when he forced the door open to investigate saw Healey step out of the window and fall.

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24 In fact, Prague has arguably been the scene of three significant defenestrations, with some counting the 1483 defenestration of a Burgomaster and seven corpses at the end of the Hussite Wars. This paper is not the place to resolve that debate.

25 Only one of the several 'Hundred Years' Wars' arguably lasted for a hundred years. While the Seven Years' War is usually said to have lasted from 1756 to 1763, it somehow includes the French and Indian War which began in 1754.

The Crown case was put on three bases: that Royall had pushed or forced Healey out of the window and thus directly caused her death; that she had fallen while reflexively trying to avoid a blow from Royall; or that she fell while seeking to escape a well-founded and reasonable apprehension of violence from Royall. That phrase, 'a well-founded and reasonable apprehension of violence', was not one coined by the Crown prosecutor. The origins of the phrase go back to 1894 in the decision of *R v Grimes & Lee* (1894) 15 N.S.W.R.(L.), 213. Grimes and Lee were charged with the murder of one Ah Choy who had fallen from a moving train during a robbery and assault. A newspaper report of the time describes Lee putting Ah Choy in a headlock as Grimes extracted a bundle of notes from Ah Choy's pocket. When Ah Choy tried to recover the money, he was 'struck severely' by Lee and, in fear, jumped out of the window of the train carriage. Grimes and Lee were convicted of manslaughter and sentenced to 10- and 14-years' imprisonment.

The trial judge in *Royall* adopted the directions given in *Grimes and Lee*, and a majority of the High Court in *Royall* approved those directions to the jury. For reasons I will come to shortly, the direction in *Grimes and Lee* which was endorsed in *Royall* is of little moment in Queensland. The provisions of the Code overtake the need for the jury to consider if the conduct of a victim which was the immediate cause of death or injury was the result of a 'well-founded apprehension of violence'. But the formula adopted by the High Court – that the acts of a defendant need not be the only cause of the event or occurrence, and that it is sufficient to prove the acts were a substantial or significant cause – provided welcome clarification.

That *Royall* represents well-settled law cannot be doubted. In *Baker v The Queen* (2012) 245 CLR 632 it was sufficient for the plurality to simply mention *Royall* in a footnote to the proposition that Baker could be responsible for causing death whether the deceased was pushed or whether he fell as he backed away from an attack.

Most recently, *Royall* was mentioned in *Swan v The Queen* (2020) 269 CLR 663; [2020] HCA 11. Swan and others attacked a 79-year-old man in his home, causing serious injuries. The victim spent four months in hospital before being moved to a care facility. He was unable to care for himself. Eight months after the assault, the victim fell and broke his femur. He died in hospital from the consequences of the broken leg. The outcome of the appeal to the High Court turned on the facts of the case. The Court refused an attempt by the appellant to amend the notice of appeal to put the trial judge's directions on causation in issue. Having referred to *Royall*, the Court said

> The trial judge addressed causation in a simple and clear direction to the jury that causation could be satisfied by acts of the appellant that "substantially contributed" or "significantly contributed" to the death of [the victim]. No issue was taken with this direction when the matter was raised with counsel by the trial judge. There was no dispute about it on appeal to the Court of Criminal Appeal, nor is there any issue concerning that direction in the extant grounds of appeal before this Court.

Causation in homicide

Royall represents the starting point whenever proof of a specified result or occurrence is a necessary element. But what about the Code? There are several provisions to be found in Chapter 28 which modify, or at least complement, the common law.

The first is the 'definition of killing', found in section 293, which provides that 'any person who causes the death of another, directly or indirectly, by any means whatsoever, is deemed to

have killed that other person.' As noted above, the law relating to causation under the Criminal Code is that dictated by the High Court in *Royall*. Proof that the accused caused the death of the deceased requires proof that the acts of the accused were a substantial or significant cause of the death. Notwithstanding the use of broad language – 'directly or indirectly, by any means whatsoever – section 293 of the Code does not extend liability for outcomes that are not 'caused' according to the principles in *Royall*. In *R v Carter* [2003] QCA 515; (2003) 141 A Crim R 142, McPherson JA, after setting out the terms of section 293, said at [6] (citations omitted),

> In consequence, courts in Queensland acting under the Code have applied to killing and causing death the meaning that was ascribed to those expressions at common law in *Royall v The Queen*.

There are however specific provisions of the *Criminal Code* which supplement the common law. Section 294 to 298 of the Code extend the definition of killing to encompass some situations where it might be thought section 293 does not apply because the chain of causation is broken. For example, section 298 extends liability in circumstances where a person suffers grievous bodily harm, but the immediate cause of death is the 'reasonably proper' medical treatment administered in good faith.

Section 295

In Queensland, defenestration cases like *Royall* may call into operation section 295, which provides: -

> A person who, by threats or intimidation of any kind, or by deceit, causes another person to do an act or make an omission which results in the death of that other person, is deemed to have killed that other person.

Section 295 of the Code has never been the subject of judicial consideration in Queensland, but the identical provision in the Western Australian *Criminal Code*, section 272, was considered in *TB v The State of Western Australia* [2015] WASCA 212; 49 WAR 297. The facts of this case were a little complicated, and it involved several defendants. It is enough for the moment to recount that the deceased was walking home one night at Mandurah when he came across a group of nine young men. The deceased was assaulted by one of the young men. He ran and was pursued by some of the young men. While being pursued, the deceased tripped over a low wall and struck his head forcefully on the bitumen. He died from brain injuries caused by this impact.

In construing the Western Australian provision, Buss JA (Mazza JA and Chaney J agreeing) determined that in the section, 'causes' related to the connection between the alleged threats or intimidation of the defendant and the act done (or omission made) by the victim. The provision is not concerned with a direct connection between the alleged threats or intimidation and the death of the victim. It is concerned with whether a defendant 'caused' the victim to do an act or make an omission and then whether the act or omission resulted in the victim's death.

Thus, Buss JA observed (paragraph numbering omitted): -[26]

> where:

[26] *TB v The State of Western Australia* [2015] WASCA 212; 49 WAR 297, [155]-[159].

(a) an accused is tried on a count of unlawful killing;

(b) the State relies on s 272; and

(c) the case is a fright, escape or self-preservation case,

the State must prove beyond reasonable doubt, relevantly, the following.

First, the accused made threats or performed acts of intimidation as alleged by the State.

Secondly, the alleged threats or intimidation 'caused' the victim to do an act or make an omission.

Thirdly, the alleged act done or omission made by the victim 'resulted' in his or her death.

If the State proves those matters then the accused is deemed by s 272 to have killed the victim.

In this way section 295 differs from the law discussed in *Royall*, where there is a need for a causal connection between the conduct of the defendant and the death of the victim, and where an unreasonable reaction by the victim may break the chain of causation.[27]

Buss JA went on to determine that there is no element of 'reasonable foreseeability' involved in the Code provision. That is, it is not necessary for section 272 of the Western Australian Code, and by extension section 295 of the Queensland Code, to prove that the defendant (or some ordinary person in their position) would reasonably have foreseen death as a result. Having said that, it is important to bear in mind that there may be cases where section 295 deems a defendant to have killed another person, but it may be very much in issue whether the killing was unlawful because of the operation of section 23(1)(b) of the Code. In such a case issues of reasonably foreseeability may loom large, but they will concern the concept we call 'accident' and not 'causation'.

In *TB*, Buss JA mentioned, but did not have to decide, the role to be played by the reasonableness of the victim's response to the defendant's act.[28] The issue would arise squarely in another Western Australian case a few years later. Unfortunately, the issue may not yet be settled.

In the early hours of one morning in August 2016, Lucas Yarran and two other men were at a house in an outer suburb of Perth. When others, including the victim Ms Fairhead, arrived at the house, they were threatened and assaulted by Yarran and his accomplices. Yarran stole the Ms Fairhead's car, holding her and others in the vehicle against their will. As Yarran drove erratically, Ms Fairhead said something like, 'I can't do this' or 'I can't handle this.' She opened the car door and fell out, striking the road and suffering head injuries which caused her death.

The State's case at trial was that the acts of the defendants, which amounted to threats or intimidation, caused Ms Fairhead to open the door intending to exit the car, and that this resulted in her death. At issue in the appeal was whether the trial judge should have directed the jury that the chain of causation would be broken, and the section 272 of the Western Australian code would not apply, if Ms Fairhead's response to Yarran's conduct was 'unreasonable or disproportionate.' While the appeal was allowed, the Court of Appeal split as

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27 *McAuliffe v The Queen* (1995) 183 CLR 108, 119.

28 *TB v The State of Western Australia* [2015] WASCA 212; 49 WAR 297, [166]-[169].

to the proper approach to issues of the reasonableness or proportionality of the victim's response.

Mazza and Beech JJA concluded that[29]

> On a proper construction of s 272 of the Code, a conclusion that the deceased's response to the accused's threats or intimidation (or deceit) was unreasonable or disproportionate may prevent satisfaction of the requirement, under s 272 of the Code, that the threats or intimidation (or deceit) caused the deceased to do the act. Whether it does so is a question for the jury, and to which the jury's attention should be directed.

Buss P agreed that the appeals should be allowed because of the trial judge's midsections concerning 'accident'. But, and consistently with his treatment of 'reasonable foreseeability' in *TB* which I have already mentioned, Buss P disagreed with Mazza and Beech JJA as to the role of the reasonableness or proportionality of the victim's response. Buss P determined that[30]

> if an accused is deemed to have killed the victim because the accused's threats or intimidation substantially or significantly contributed to the victim doing an act or making an omission which resulted in the victim's death, within s 272, the victim's response will not be a novus actus interveniens. Relevantly, the causal connection established upon satisfaction of the 'substantial cause' test will not be broken, and the deeming provision in s 272 will not fail to be engaged, if the victim's act or omission was an unreasonable or disproportionate response to the accused's threats or intimidation.
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> On a proper construction of the provisions of the Code with respect to homicide and the provisions of the Code with respect to criminal responsibility, there is a distinction between the concept of and test for causation under s 272 and the concept of and test for the defence of accident under s 23B. Section 272 is concerned with deemed causation in relation to a person's death. Section 23B is concerned with criminal responsibility; relevantly, with criminal responsibility for a death which the accused is deemed, by s 272, to have caused.

In Buss P's analysis, the 'event' for the purpose of section 23B of the Western Australia Code, and section 23(1)(b) of the Queensland Code, would be the act of the victim which resulted in injury or death. In a case where the reasonableness or proportionality of the victim's response is in issue, Buss P considered that the Crown could negative the defence where[31]

> the victim's alleged act or omission in response to the accused's alleged threats or intimidation was not unreasonable or disproportionate, having regard to all of the circumstances, including the nature of the accused's alleged threats or intimidation and the fear they were likely to have induced.

I respectfully agree with his Honour's conclusion that the reasonableness or proportionality of the victim's response is relevant to criminal responsibility, in accordance with Chapter 5 of the Code, rather than causation under a provision such as section 295 of the Code. In particular, I agree that the victim's response may properly be characterised as an 'event' for the purpose of section 23B, or section 23(1)(b), such that the jury's inquiry turns to the attribution of criminal responsibility having regard to what is required by these provisions. But I think there is a difficulty applying some of his Honour's reasons in Queensland. The Western Australian Code has retained the traditional formulation that a 'person is not criminally responsible for an event

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29 *Yarran v The State of Western Australia* [2019] WASCA 159, [219].
30 Ibid, [175]-[176].
31 Ibid, [184]-[185].

which occurs by accident.'[32] Some years ago in Queensland, the cognate provision was amended to read[33]

> a person is not criminally responsible for—
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> …
>
> (b) an event that—
>
> (i) the person does not intend or foresee as a possible consequence; and
>
> (ii) an ordinary person would not reasonably foresee as a possible consequence.

I would hesitate before concluding the gloss proposed by Buss P could apply in Queensland in the face of the words of section 23(1)(b). Having said that, I do not think it matters. For present purposes, the relevant question for accident in Queensland is whether 'an ordinary person in the position of the accused *would* reasonably foresee the possibility' of the event.[34] When it comes to what would be reasonably foreseen by an ordinary person, the reasonableness or proportionality of the victim's response will be an obviously relevant consideration. If the victim's response was unreasonable or disproportionate, it would be difficult for the jury to conclude the response was something that an ordinary person would have reasonably foreseen.

Of course, it is the reasoning of the majority in *Yarran* which is binding on courts in Western Australia, and which much be regarded as persuasive in courts in Queensland. Mazza and Beech JJA determined that the response of the victim is something which must be considered in the context of causation, and which may result in a finding that the act of the defendant did not 'substantially or significantly' contribute to the act of the victim in response.[35] As for the role of 'accident', Mazza and Beech JJA adhered to the dicta in *R v Taiters* [1997] 1 Qd R 333 that 'an event' is a reference to a condition or circumstance which renders the defendant liable to punishment. For this reason, their Honours concluded that the response of the victim to threats or intimidation cannot itself be an 'event' for the purpose of section 23B, which calls attention to the harm or death which has resulted from the response.

Plainly, this difficult issue is yet to be resolved and the debate in Western Australia proved the continuing truth of McHugh J's observation in *Royall*.[36]

Cases involving death resulting from fright, escape or self-preservation may be unusual, but when they arise it is important to note these differences between the approach at common law and that under the Code.[37]

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32 *Criminal Code* (WA), section 23B.

33 *Criminal Code* (Qld), section 23(1)(b).

34 *Irwin v The Queen* [2018] HCA 8; (2018) 92 ALJR 342, [51].

35 *Yarran v The State of Western Australia* [2019] WASCA 159, [294].

36 For an academic discussion of the decision which persuasively identifies difficulties with the reasoning of Mazza and Beech JJA, and some with the approach of Buss P, see Meredith Blake and Stella Tarrant, 'Causation in Homicide, 'Fright, Escape or Self-preservation Cases: *Yarran v The State of Western Australia*' (2022) 49(1) *University of Western Australia Law Review* 345, 353-359.

37 An interesting perspective on such cases may be found in Brendan Walker-Munro, 'Tostee, Criminal Causation and Provocation in Domestic Violence: A Novel Position' (2018) 92 ALJ 916. The article approaches the topic from the perspective of the common law, with little reference to Code provisions such

Other Code provisions

Some other Code provisions are worth noting. Section 296 deals with the acceleration of death. It may arise where a fatally ill or mortally wounded victim's death is hastened by the defendant. In such cases the defendant will not escape liability merely because the victim was doomed to die in any event. Section 297 provides that where death results from bodily harm caused by the defendant, it does not matter if the victim failed to seek care or treatment for the injury which may have prevented death. I have mentioned section 298 already.

Voluntary and informed decisions of the victim

One other topic is worth noting. Until 2012, difficult questions could arise in a case where a dangerous drug was been supplied to a person who voluntarily consumed it, resulting in their death. Two starkly different theories of causation developed in the common law in response to such cases. A useful summary of the competing theories can be found in the article 'Causation, homicide and the supply of drugs', Jones, (2006) 26 Legal Studies 139.

The Australian position had been unclear until the decision of the High Court in *Burns v The Queen* (2012) 246 CLR 334. The plurality (Gummow, Hayne, Crennan, Keifel and Bell JJ) considered the position adopted in England (as demonstrated in *R v Kennedy (No. 2)* [2008] 1 AC 269) and the Scottish position (as demonstrated by *McAngus v HM Advocate* 2009 SLT 137). The English took the view that:[38]

> [14] The criminal law generally assumes the existence of free will. The law recognises certain exceptions, in the case of the young, those who for any reason are not fully responsible for their actions, and the vulnerable, and it acknowledges situations of duress and necessity, as also of deception and mistake. But, generally speaking, informed adults of sound mind are treated as autonomous beings able to make their own decisions how they will act…
>
> [18] The finding that the deceased freely and voluntarily administered the injection to himself, knowing what it was, is fatal to any contention that the appellant caused the heroin to be administered to the deceased or taken by him.

The Scots took a different approach informed by concepts of recklessness and predictable human response. The New South Wales Court of Criminal Appeal in *Burns*, adopting aspects of the Scottish approach, put the issue thus:[39]

> Where natural or physical events are being considered a voluntary human act may be the cause of that act. But when the human act is one which follows from the act of another human the position may be otherwise. The more predictable the response the more likely it is that the earlier act will be accepted to have caused, in the relevant sense, the later act.

The plurality of the High Court in *Burns*, having considered both approaches, preferred that of the English courts, stating:[40]

> The analysis of the causation of homicide in *Royall v The Queen* is posited on an acceptance that the voluntary and informed act of an adult negatives causal connection. Absent intimidation,

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as section 295 and was written before *Yarran* was decided. Some caution should be exercised in adopting the article's conclusions.

38 *R v Kennedy (No. 2)* [2008] 1 AC 269 at [14]-[18].

39 *Burns v The Queen* (2011) 205 A Crim R 240 at [151].

40 *Burns v The Queen* (2012) 246 CLR 334 at [86]-[87] (footnotes omitted).

> mistake or other vitiating factor, what an adult of sound mind does is not in law treated as having been caused by another. The introduction of the concept of predictable response of the sane adult actor would radically change the rationale for and the nature of the causal inquiry.

French CJ at [14] expressly agreed with this statement of the plurality and at [15] stated that the approach of the Scottish courts in *McAngus* did not represent the law in Australia.

Queensland courts did not grapple directly with this issue prior to the decision of the High Court in *Burns*. But there were two earlier cases, which are factually similar to *Burns*, one of which produced a result that seems inconsistent with the reasoning of the High court.

In the case of *R v Carter* (2003) 141 A Crim R 142 the appellant admitted that he had injected a dose of heroin into the arm of the deceased intending to kill her. While the deceased had apparently wanted the appellant to kill her in this way, there was no act on her part to break the chain of causation between the appellant injecting her with heroin and her death resulting. It is perhaps telling to note that Carter was not charged with killing a man called Smyth who lived with the deceased. The evidence established that while the appellant prepared the dose of heroin and put the needle into his arm, Smyth pushed the plunger himself. It might be inferred that it was accepted the appellant had not caused Smyth's death.

Around the same time the Court of Appeal decided *R v Stott and van Embden* [2002] 1 Qd R 313. The two defendants were found guilty of manslaughter because they had either injected the deceased with heroin and were liable for their negligent handling of a dangerous thing (section 289) or alternatively they were guilty because they supplied the deceased with heroin the consumption of which caused his death. While there was little discussion in the Court of Appeal of the latter basis of liability, it appears to have been assumed that it was open to the jury to be satisfied the appellants had caused the death merely by supplying the heroin. After the decision of the High Court in *Burns* the correctness of such an assumption must be doubted.

What then is an 'adult of sound mind'? In the United Kingdom there are at least two cases dealing with the common law offence of manslaughter and a deceased under the age of 18. In *R v Khan and Khan* [1998] Crim LR 830 two men were charged with murder, and convicted of manslaughter, after supplying heroin to a 15-year-old sex-worker. According to the brief report of the case, the trial judge would not let the case be considered by the jury on the basis of an unlawful and dangerous act, consistent with authority that the mere supply of an unlawful drug is not itself a dangerous act.[41] The appellants were convicted on the basis of gross negligence but their appeals succeeded because the jury were not directed they first had to be satisfied a duty was owed to the deceased and the appellants had breached that duty.

Sir John Smith QC commented on the case, discussing other decisions where the 'unlawful act' was not directed at any person, such as in the case of supplying illicit drugs. *Khan* preceded *Kennedy (No. 2)* by some nine years and did not address the causation issue. But it appears to have been assumed, at least, that it was not inherently dangerous to supply the 15-year-old deceased with heroin.

R v Evans [2010] 1 All ER 13; [2009] 1 WLR 1999 was decided after the decision of the House of Lords in *Kennedy (No. 2)*. There the appellant supplied heroin to her sister who was 'not quite seventeen years old'.[42] The sister self-injected the heroin and later died as a result. Again, the case was run on the basis of gross negligence and the decision is concerned with the

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41 See *R v Dalby* [1982] All ER 916 and *Burns v The Queen* (2012) 246 CLR 334, [88].

42 *R v Evans* [2010] 1 All ER 13 at 15 [1].

existence and potential breach of a duty owed to the deceased. But Lord Judge CJ at 17 [16] cited *Kennedy (No. 2)* for the proposition that the supply of heroin itself could not form the basis for 'unlawful act' manslaughter. The underlying assumption appears to be that the 'not quite' 17-year-old deceased could decide what to do with the heroin given to her by the appellant and the appellant's actions were not inherently dangerous.

Notable academic commentators have given similar primacy to the concept of personal autonomy. Professor Glanville Williams considered, 'What a person does (if he has reached adult years, is of sound mind and is not acting under mistake, intimidation or other similar pressure) is his own responsibility and is not regarded as having been caused by other people.'[43] Sir John Smith QC in commentary on the decision of the Court of Appeal in *Kennedy* upon the first (unsuccessful) appeal said, '[w]here the actor is a person of full capacity and the act is fully voluntary, there is no reason why those who assist or encourage him to do it should be guilty of an offence.'[44] Sir John's views were later to be vindicated in *Kennedy (No. 2)*.

This 'positivist' approach can be traced to the work of Professor HLA Hart and A Honoré, who wrote, '[t]he free, deliberate, and informed intervention of a second person, who intends to exploit the situation created by the first, but is not acting in concert with him, is normally held to relieve the first actor of criminal responsibility.'[45]

Of these academics, only Glanville Williams makes express reference to an individual of 'adult years'. Others focus on the nature of the decision and the 'capacity' of the individual to make the decision which is the proximate cause of their death. Consistent with a 'capacity' approach, Russell Heaton of the University of Nottingham has suggested the chain of causation would not be broken in circumstances of:

- Incapacity of the victim due to age or mental condition;
- where the victim is acting under duress or intimidation;
- where the defendant is in a position of authority or undue influence over the victim;
- where the victim has been materially deceived as to the nature and/or quantity and/or quality of the drugs.[46]

I would suggest this is the proper approach. To simply select an age, below which causation might be proved and above which proof will fail, would likely produce unacceptable results. What justification could there be for different results in the case of a victim one day short of their eighteenth birthday compared to a victim who dies they day they turn eighteen? On Heaton's approach the issue ultimately depends upon an assessment of the circumstances of the deceased rather than the application of a rigid rule based upon their age. The question for a jury would be: was the decision of the deceased to consume the drug one they made voluntarily, knowing what it was they were injecting, and in circumstances where they were competent to make such a choice?

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43 G. Williams, *Textbook of Criminal Law (2nd edition)*, 39. This was a view Professor Williams adhered to in other writing: e.g., G. Williams, 'Finis for novus actus?' [1989] Cambridge LJ 391, 392 where he said, 'the individual's will is the autonomous (self-regulating) prime cause of his behaviour.'

44 *R v Kennedy* [1999] Crim LR 65 at 68.

45 *Causation and the Law* (Oxford University Press, 2nd edition, 1985), p 326.

46 Russell Heaton, 'Dealing in Death' [2003] Crim LR 497, 507.

Causation of death or grievous bodily harm in cases of dangerous operation

In England the test for causation in driving cases has been expressed as requiring proof that the defendant's driving was something more than *de minimus* in causing the relevant result. This was said to equate to the driving being a 'substantial' cause of the result.[47] However it is clear from Australian authorities that the test for causation in such cases is that expressed in *Royall*. The Western Australian case of *Campbell* referred to above concerned a collision on a highway in which a woman had died. There was evidence that the movements of the car in which the woman was travelling had played a substantial role in the collision occurring. The conviction was overturned because the trial Judge had effectively removed from the jury's consideration the issue of causation telling them it was enough that the defendant was driving dangerously, and that the death was the result of the collision. The jury should have been directed that the death must have been caused by the way in which the defendant drove. After *Royall* it is the case that to be held result for the death (or grievous bodily harm) the manner of operation of the vehicle by the defendant must be a substantial or significant cause.

Meaning of 'sets fire to' in cases of arson

The charge of arson in section 461 of the *Criminal Code* is a 'results driven' offence. That is, liability depends in part upon a specific result occurring. However, the section does not speak of a defendant 'causing' a fire but instead requires proof that the defendant has set fire to one of a defined list of objects. Earlier consideration of the phrase 'sets fire to' had focused on the aspect of what it means to cause a fire and the requirement that some part of the structure be charred. There was little authority touching upon what is meant to 'set' the fire.

In *R v Miller* (1983) 1 All ER 978 Lord Diplock considered the crime of causing damage by fire. His Lordship, with whom the other Lords agreed, said:

> The first question to be answered when a completed crime of arson is charged is: did a physical act of the accused start the fire which spread and damaged property property belonging to another…
>
> The first question is a pure question of causation; it is one of fact to be decided by the jury in a trial on indictment. It should be answered No if, in relation to the fire during the period starting immediately before its ignition and ending with its extinction, the role of the accused was at no time more than that of a passive bystander.

Support for this proposition may also be found in *R v Hayes* [2008] QCA 371 where Keane JA said (at [57]):

> The appellant's contention upon this ground of appeal is that the learned trial judge's directions to the jury were apt to suggest to a jury that the appellant could be found guilty of arson if the jury accepted that the appellant set a fire at some distance away from the house and the house caught fire as a result. The appellant's argument on this point seemed to involve a proposition that, as a matter of law, a person cannot be guilty of arson under s 461 of the Criminal Code unless he or she applies 'fire' directly to the building in question so as to set it alight. There is, not surprisingly, no support in authority for such an artificially narrow view of what is involved in setting fire to a building. Whether or not a person has set fire to a structure is a question of fact, and the jury were correctly instructed to that effect."

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47 *Hennigan* [1973] 3 All ER 133 at 135.

The issue was authoritatively determined in Queensland in the decision of *R v Joinbee* [2014] 2 Qd R 69; [2013] QCA 246. The issue in that case concerned what had ignited flammable vapour spread throughout a house by the defendant. Either the defendant had ignited the flammable vapour himself, or it had ignited because of a spark from a refrigerator motor. The trial judge had not directed the jury of the need be satisfied that the acts of the defendant were a substantial or significant cause of the fire. Boddice J (with whom Holmes JA and Phillipides J agreed) considered the meaning of 'sets fire to' and at [76] wrote, 'In context, "sets fire to" in s 461 of the Code refers to conduct which **causes** the building being set of fire. It is not limited to conduct involving physically igniting the building.'

Boddice J went on to refer to the absence of a direction that the defendant's actions were a substantial or significant cause of the fire, citing *Royall v R*. It is clear from the decision in *Joinbee* that proof a defendant has set fire to a structure is to be determined in accordance with the well understood principles of causation. In appropriate cases the jury should be directed that a defendant has set fire to a structure if their actions were a substantial or significant cause of the fire. The absence of such a direction in *Joinbee* was not fatal to the conviction for arson as the jury could only have convicted if satisfied the defendant had dispersed flammable liquid in the house creating the vapour which was later ignited.

Conclusion

> *For want of a nail the shoe was lost;*
>
> *For want of a shoe the horse was lost;*
>
> *For want of a horse the battle was lost;*
>
> *For the failure of battle the kingdom was lost -*
>
> *All for the want of a horse-shoe nail.*
>
> Proverb, author unknown.

Causation is central to the attribution of criminal responsibility in Queensland. Questions of causation are above all concerned with the application of logic and common sense. Overly technical or philosophical inquiries are eschewed. The law guards against attributing liability for results that are far-fetched or too remote. It recognises personal autonomy and shields others from the results of the voluntary and informed decision of a person with capacity.

In the end, causation remains quintessentially a jury question to be determined upon the proven facts in each case.