



Queensland
Law Reform Commission

**A review of the excuse
of accident**

Discussion Paper

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COMMENTS AND SUBMISSIONS

You are invited to make comments and submissions on the issues and key questions in this Discussion Paper.

Written comments and submissions should be sent to:

Email: **qlrcaccident@justice.qld.gov.au**

Facsimile: (07) 3247 9045

The Secretary
Queensland Law Reform Commission
PO Box 13312
GEORGE STREET POST SHOP QLD 4003

Oral submissions may be made by telephoning: (07) 3247 4544

Closing date: 1 August 2008

It would be helpful if comments and submissions addressed specific issues or questions in the Discussion Paper.

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Legal Officers: **Ms M T Collier**
Ms M Ker
Ms A J Quayle
Ms P L Rogers

Administrative Officers: **Ms K Giles**
Mrs A Lathouras

Email: **qlrcaccident@justice.qld.gov.au**
Email (general): **LawReform.Commission@justice.qld.gov.au**
Website: **<http://www.qlrc.qld.gov.au>**
Postal address: **PO Box 13312, George Street Post Shop, Qld 4003**
Telephone: **(07) 3247 4544**
Facsimile: **(07) 3247 9045**

Table of contents

CHAPTER 1	1
INTRODUCTION	1
THE REVIEW	1
THE PROVISIONS UNDER REVIEW	2
Accident.....	3
Provocation reducing murder to manslaughter	3
Provocation as a complete defence to an assault	3
BACKGROUND TO THE REVIEW	5
The audit of homicide cases	5
The Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld).....	6
ABOUT THIS DISCUSSION PAPER	6
Methodology.....	6
Content.....	7
CALL FOR SUBMISSIONS.....	7
CHAPTER 2	8
OVERVIEW OF HOMICIDE	8
INTRODUCTION	8
HOMICIDE PROVISIONS UNDER THE CRIMINAL CODE (QLD)	8
Causing death	9
<i>Criminal</i> responsibility	9
Murder.....	10
Manslaughter.....	11
Alternative verdicts.....	11
Statutory alternatives	12
Alternative offences charged on an indictment for murder or manslaughter	13
EXCUSES AND DEFENCES TO HOMICIDE.....	14
SENTENCING FOR HOMICIDE	14
Sentencing for murder.....	14
Sentencing for manslaughter	16
CHAPTER 3	17
THE REVIEW OF THE EXCUSE OF ACCIDENT	17
TERMS OF REFERENCE.....	17
STRUCTURE OF REVIEW	17
CHAPTER 4	19
HISTORICAL DEVELOPMENT	19
THE COMMON LAW AND THE CODE	19
SECTION 23.....	20
THE COMMON LAW AND <i>MENS REA</i>	21
HISTORY OF THE DEFENCE AT COMMON LAW.....	21
MANSLAUGHTER UNDER MODERN AUSTRALIAN COMMON LAW	23
THE DEFENCE UNDER THE CRIMINAL CODE	24
INTERPRETATION OF SECTION 23.....	25
THE DIRECT AND IMMEDIATE RESULT TEST.....	26

MARTYR OVERRULED BY VAN DEN BEMD: THE REASONABLY FORESEEABLE CONSEQUENCES TEST.....	27
THE FAULT ELEMENT AT COMMON LAW COMPARED WITH THE FAULT ELEMENT UNDER THE CRIMINAL CODE AND AN ALTERNATIVE APPROACH FOR CONSIDERATION	29
AMENDMENT TO OVERCOME (IN PART) THE DECISION IN VAN DEN BEMD	29
THE REASON FOR THE AMENDMENT OF SECTION 23.....	30
THE CURRENT EFFECT OF SECTION 23(1) AND SECTION 23(1A)	31
CHAPTER 5	33
CASE REVIEW.....	33
INTRODUCTION	33
CASES PRE VAN DEN BEMD	35
<i>R v Callaghan</i>	35
<i>R v Vallance</i> (in the Tasmanian Court of Criminal Appeal)	36
<i>Vallance v R</i> (in the High Court).....	39
<i>R v Martyr</i>	40
<i>R v O'Halloran</i>	45
<i>R v Knutsen</i>	46
<i>R v Tralka</i>	48
<i>R v Mamote-Kulang of Tamagot</i>	49
<i>R v Hansen</i>	51
<i>R v Dabelstein</i>	51
<i>Timbu Kolian v R</i>	54
<i>Kaporonovski v R</i>	56
VAN DEN BEMD AND POST VAN DEN BEMD CASES.....	57
<i>R v Van den Bemd</i> (in the Court of Appeal).....	57
<i>Griffiths v R</i>	58
<i>R v Taiters</i>	60
<i>R v West</i>	62
<i>R v Auld</i>	62
<i>R v Camm</i>	63
<i>R v Watt</i>	64
<i>R v Fitzgerald</i>	64
<i>R v Francisco</i>	67
<i>R v Grimley</i>	68
<i>R v Day</i>	68
<i>R v Stott & Van Embden</i>	69
<i>R v Charles</i>	70
<i>R v Seminara</i>	71
<i>R v Reid</i>	72
<i>R v Stevens</i>	74
<i>R v Trieu</i>	75
OBSERVATIONS ABOUT THE CASES POST VAN DEN BEMD.....	77
THE DECISION OF THE HIGH COURT IN R V VAN DEN BEMD	78
CHAPTER 6	86
JURY DIRECTIONS.....	86
INTRODUCTION	86
GENERAL DIRECTION ON ACCIDENT	86
DIRECTION FOR OFFENCE INVOLVING A FATAL PUNCH	87

DIRECTION WHERE THERE IS A CONCEALED DEFECT, WEAKNESS OR ABNORMALITY	88
DOES THE LANGUAGE IN THE BENCHBOOK DIRECTIONS ACCURATELY COMMUNICATE THE FORESEEABILITY TEST?	89
CHAPTER 7	91
DJAG DISCUSSION PAPER AND COMMUNITY EXPECTATIONS	91
THE DJAG DISCUSSION PAPER	91
<i>R v Little</i>	92
<i>R v Moody</i>	93
THE CONCLUSIONS OF THE DJAG AUDIT	94
Murder trials	94
Manslaughter trials	95
COMMUNITY EXPECTATIONS	97
CHAPTER 8	101
SUGGESTED NEW OFFENCE	101
INTRODUCTION	101
THE CRIMINAL CODE (ASSAULT CAUSING DEATH) AMENDMENT BILL 2007 (QLD)	101
Indicting on the proposed new offence	102
Section 576	103
Directions to juries where the proposed new offence is included as an alternative count to murder or manslaughter	104
Sentencing issues	104
THE WESTERN AUSTRALIAN BILL	104
THE RECOMMENDATIONS OF THE LAW REFORM COMMISSION OF IRELAND	105
CHAPTER 9	108
THE POSITION IN OTHER JURISDICTIONS	108
INTRODUCTION	108
NEW SOUTH WALES	108
NORTHERN TERRITORY	109
TASMANIA	110
WESTERN AUSTRALIA	111
AUSTRALIAN CAPITAL TERRITORY	114
SOUTH AUSTRALIA AND VICTORIA	114
COMMONWEALTH	115
MODEL CRIMINAL CODE	115
RECENT DEVELOPMENTS IN ENGLAND AND WALES	117
RECENT DEVELOPMENTS IN IRELAND	118
CHAPTER 10	120
RELATED ISSUES	120
WHETHER CHANGING THE LAW WILL CHANGE OUTCOMES	120
An acquittal of manslaughter under common law	120
THE WORD 'ACCIDENT'	122
THE RESPONSE OF THE COURTS	122
CHAPTER 11	125
DISCUSSION AND KEY QUESTIONS	125
INTRODUCTION	125

OPTIONS FOR CONSIDERATION.....	126
Option 1: Retaining section 23(1)(b) in its present form	126
Arguments in favour of retaining section 23(1)(b) in its present form.....	128
Argument in favour of abolishing accident.....	128
Option 2: Changing the scope of the excuse of accident	128
The direct and immediate result test.....	129
Argument in favour of the reinstatement of the direct and immediate result test	130
Arguments against the reinstatement of the direct and immediate result test	130
A pure causation test for criminal responsibility.....	131
Argument in favour of a pure causation test.....	131
Argument against a pure causation test.....	131
Changing the fault element for manslaughter: foreseeability of serious injury (or grievous bodily harm), rather than of death.....	131
Argument in favour of changing the foreseeable event for the purpose of manslaughter	132
Argument against changing the foreseeable event for the purpose of manslaughter	132
Option 3: Retaining, amending or repealing section 23(1A).....	132
Argument in favour of retaining section 23(1A)	133
Arguments against retaining section 23(1A).....	133
Option 4: Creating a new offence or new offences	134
Manslaughter based on an unlawful and dangerous act.....	134
Argument in favour of creating a new category of manslaughter based on an unlawful and dangerous act.....	134
Argument against creating a new category of manslaughter based on an unlawful and dangerous act.....	135
Assault occasioning death	135
Argument in favour of creating a new offence of assault occasioning death ...	135
Argument against creating a new offence of assault occasioning death	136
KEY QUESTIONS	137
APPENDIX 1	139
TERMS OF REFERENCE	139

Chapter 1

Introduction

THE REVIEW	1
THE PROVISIONS UNDER REVIEW.....	2
Accident.....	3
Provocation reducing murder to manslaughter	3
Provocation as a complete defence to an assault	3
BACKGROUND TO THE REVIEW	5
The audit of homicide cases	5
The Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld).....	6
ABOUT THIS DISCUSSION PAPER	6
Methodology.....	6
Content.....	7
CALL FOR SUBMISSIONS.....	7

THE REVIEW

1.1 The Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, the Honourable Kerry Shine, has asked the Commission to review the following provisions of the Criminal Code of Queensland:¹

- Section 23(1)(b) – the excuse of accident;
- Section 304 – the partial defence of provocation, which reduces murder to manslaughter; and
- Sections 268 and 269 – the complete defence of provocation to an assault.

1.2 In undertaking this review, the Commission is required to have particular regard to:

- the results of the Attorney-General’s recent audit of homicide trials on the nature and frequency of the use of the excuse of accident and the partial defence to murder of provocation;
- whether the current excuse of accident, including current case law, reflects community expectations;
- whether the partial defence of provocation should be abolished, or recast to reflect community expectations;

¹ The terms of reference are contained in Appendix 1 to this Discussion Paper.

- whether the current provisions are readily understood by a jury and the community;
- whether the complete defence of provocation should be abolished, or recast to reflect community expectations;
- the use of alternative counts to charges of manslaughter (for example, assault or grievous bodily harm), including whether section 576 of the Criminal Code should be redrafted;
- whether there is a need for new offences, for example assault occasioning grievous bodily harm or assault causing death (to apply where accident would otherwise be a complete defence to a murder or manslaughter charge); and
- recent developments and research in other Australian and overseas jurisdictions, including reviews of the law of accident and provocation undertaken in other jurisdictions.

1.3 In referring the review to the Commission, the Attorney-General has taken into account various matters, including:

- the need for the Criminal Code (Qld) to reflect community standards;
- the need for the Criminal Code (Qld) to provide coherent and clear offences which protect individuals and society;
- the need for concepts of criminal responsibility to be readily understood by the community;
- the need for the criminal law to provide appropriate offences and penalties for violent conduct; and to provide appropriate and fair excuses and defences for murder, manslaughter and assault offences; and
- the mandatory life sentence for murder, which the State Government does not intend to change.

1.4 The Commission is to provide a report on the results of the review by 25 September 2008.

THE PROVISIONS UNDER REVIEW

1.5 The Commission is required to review three of the excuses and defences to offences provided by the Criminal Code (Qld), namely, the excuse of accident under section 23(1)(b) (which applies to all offences); the partial defence of provocation under section 304 (which reduces murder to manslaughter); and the complete defence of provocation to an assault under sections 268 and 269.

Accident

1.6 Section 23(1)(b) of the Code applies to all persons charged with any criminal offence against the statute law of Queensland, and it provides that a person is not criminally responsible for an 'event' that occurs 'by accident':

23 Intention – Motive

(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—

...

(b) an event that occurs by accident.

1.7 Currently, the law requires the finder of fact² to consider whether the 'event' was a consequence which was not intended or foreseen by the defendant, and which an ordinary person, in the defendant's position, would not reasonably have foreseen.

1.8 The operation of section 23(1)(b) is limited by section 23(1A):

(1A) However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness or abnormality even though the offender does not intend or foresee or can not reasonably foresee the death or grievous bodily harm.

Provocation reducing murder to manslaughter

1.9 Section 304 provides a partial defence of provocation in murder cases. If accepted by a jury, the defence reduces murder to manslaughter:

304 Killing on provocation

When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion, caused by sudden provocation, and before there is time for the person's passion to cool, the person is guilty of manslaughter only.

Provocation as a complete defence to an assault

1.10 Provocation under sections 268 and 269 is different from provocation under section 304. Provocation under section 304 draws its definition from the common law, and applies only to murder. The 'other' provocation is defined by section 268 of the Criminal Code, and applies to offences which contain assault as an element (for example, assault, assault occasioning bodily harm):

²

Where the defendant is charged with manslaughter, the finder of fact at trial will be a jury.

268 Provocation

- (1) In this section—

provocation, used with reference to an offence of which an assault is an element, means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person, or in the presence of an ordinary person to another person who is under the person's immediate care, or to whom the person stands in a conjugal, parental, filial, or fraternal, relation, or in the relation of master or servant, to deprive the person of the power of self-control and to induce the person to assault the person by whom the act or insult is done or offered.

- (2) When such an act or insult is done or offered by one person to another, or in the presence of another to a person who is under the immediate care of that other, or to whom the latter stands in any such relation as aforesaid, the former is said to give to the latter provocation for an assault.
- (3) A lawful act is not provocation to any person for an assault.
- (4) An act which a person does in consequence of incitement given by another person in order to induce the person to do the act, and thereby to furnish an excuse for committing an assault, is not provocation to that other person for an assault.
- (5) An arrest which is unlawful is not necessarily provocation for an assault, but it may be evidence of provocation to a person who knows of the illegality.

269 Defence of provocation

- (1) A person is not criminally responsible for an assault committed upon a person who gives the person provocation for the assault, if the person is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for the person's passion to cool, and if the force used is not disproportionate to the provocation and is not intended, and is not such as is likely, to cause death or grievous bodily harm.
- (2) Whether any particular act or insult is such as to be likely to deprive an ordinary person of the power of self-control and to induce the ordinary person to assault the person by whom the act or insult is done or offered, and whether, in any particular case, the person provoked was actually deprived by the provocation of the power of self-control, and whether any force used is or is not disproportionate to the provocation, are questions of fact.³

3

Questions of fact are questions for the finder of fact: namely the Magistrate in summary matters and a jury in trials on indictment.

BACKGROUND TO THE REVIEW

1.11 The use and operation of these provisions has prompted debate in the community, particularly in the wake of three recent homicide trials: *R v Little*, *R v Moody* and *R v Sebo*.⁴

1.12 Little was charged with murder. Moody was charged with manslaughter. In each case, the victim's death followed a punch. The excuse of accident was raised in each case. Each defendant was acquitted.

1.13 Sebo was charged with murder. He committed a violent assault upon his ex-girlfriend which killed her. He was convicted of manslaughter on the basis of provocation.

1.14 The publicity surrounding these cases led to an audit of homicide trials. It also resulted in a legislative proposal, through a private member's Bill, to introduce a new offence of 'assault causing death' into the Criminal Code (Qld). These matters are briefly discussed in the following sections.

The audit of homicide cases

1.15 In May 2007, the Attorney-General commissioned an audit of homicide trials to establish the nature and frequency of the reliance on the excuse of accident and the partial defence of provocation.⁵ The audit, conducted by the Department of Justice and Attorney-General, examined a selection of murder and manslaughter trials finalised in the period between July 2002 and March 2007.⁶

1.16 In October 2007, the Department of Justice and Attorney-General released the results of the audit in a Discussion Paper, *Audit on Defences to Homicide: Accident and Provocation* (the 'DJAG Discussion Paper').⁷ As well as outlining the results of the audit, the Discussion Paper provided general information about the excuse of accident and the partial defence of provocation, the role of the jury, and sentencing for homicide offences. It invited public

⁴ See, for example, Kay Dibben, 'Accident "defence" reviewed', *The Courier-Mail Online*, 20 May 2007; Amanda Watt, 'Acquittal "says killing ok" – Family devastated as man admits unprovoked bashing death but walks free', *The Courier-Mail*, 2 April 2007, 12; Amanda Watt, 'Getting away with murder', *The Courier-Mail*, 14 April 2007, 49; Leanne Edmestone and Jodie Munro O'Brien, 'Families robbed – Voice of the victim "lost" in legal system', *The Courier-Mail*, 2 May 2007, 16; Amanda Watt, 'Verdict a painful blow', *The Courier-Mail*, 13 August 2007, 10; 'Victim's family protests Qld "accident" defence', *ABC News Online*, 13 August 2007.

⁵ Hon Kerry Shine MP, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland, 'Audit of "Accident" Defence Cases in Queensland', *Ministerial Media Statement*, 20 May 2007.

⁶ The audit examined 80 murder trials and 20 manslaughter trials over the nominated period. The audit only considered homicide cases where a jury was required to determine the guilt or otherwise of the accused; it did not consider matters which were resolved by a plea of guilty in the absence of a trial: Queensland Department of Justice and Attorney-General, *Audit on Defences to Homicide: Accident and Provocation*, Discussion Paper (October 2007) 29.

⁷ Queensland Department of Justice and Attorney-General, *Audit on Defences to Homicide: Accident and Provocation*, Discussion Paper (October 2007).

comment about the current operation and use of the excuse of accident and the partial defence of provocation.

1.17 The Department of Justice and Attorney-General received a number of submissions in response to its Discussion Paper. The Attorney-General sought the consent of the authors of those submissions to their use by the Commission in its review. If the author's consent was given, a copy of the submission was sent to the Commission. The Commission will consider these submissions (as well as other submissions received in response to this Discussion Paper) in the consultation phase of its review.

1.18 The audit, and the DJAG Discussion Paper, are considered in Chapter 7.

The Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld)

1.19 On 9 August 2007, the Shadow Attorney-General and Shadow Minister for Justice, Mr Mark McArdle MP, introduced, as a private member's Bill, the Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld) into the Queensland Legislative Assembly. The Bill proposed a new offence, 'unlawful assault causing death', which would apply where death followed an assault, but the elements of murder or manslaughter could not be established.⁸

1.20 In introducing the Bill, Mr McArdle referred to the cases of *R v Little* and *R v Moody* and explained that the Bill sought to respond to 'community concern' in relation to 'one punch' cases.⁹

1.21 The Bill failed on 13 February 2008. The Bill is discussed in more detail in Chapter 8 of this Discussion Paper.

ABOUT THIS DISCUSSION PAPER

Methodology

1.22 To maximise the time for consultation and consideration, the Commission has broken this review into two parts. This Discussion Paper reviews the law of accident. A second Discussion Paper, to be published shortly, reviews the law of provocation (under section 304, and sections 268 and 269).

⁸ Explanatory Notes, Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld) 3.

⁹ Second Reading Speech, Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld): *Queensland Parliamentary Debates*, 9 August 2007, 2465 (Mr Mark McArdle, Shadow Attorney-General and Shadow Minister for Justice). Mr McArdle also noted that the Coalition had considered amending s 23 of the *Criminal Code* (Qld) to limit its application to special circumstances but it was recognised that this could cause 'legislative uncertainty'.

1.23 Each Discussion Paper provides information about the current law relating to accident and provocation, and raises issues for consideration. The Commission invites readers to make submissions on the issues raised in the Discussion Paper, or in relation to any other issues relevant to the review.

Content

1.24 The terms of reference for this review require the Commission to consider issues additional to those raised in the audit commissioned by the Attorney-General. In particular, the Commission's terms of reference direct it to review:

- the complete defence of provocation for assault offences under sections 268 and 269;
- the use of alternative counts to charges of manslaughter;
- whether there is a need for new offences, for example, assault occasioning grievous bodily harm or assault causing death; and
- whether the current provisions dealing with the excuse of accident and the complete and partial defences of provocation are readily understood by a jury and the community.

These matters were not addressed in the DJAG Discussion Paper.

CALL FOR SUBMISSIONS

1.25 The Commission invites submissions on the review.

1.26 Details on how to make a submission are set out at the beginning of this Discussion Paper.

1.27 The closing date for submissions is **1 August 2008**.

1.28 These submissions will be taken into consideration when the Commission is formulating its recommendations. At the conclusion of the review, the Commission will publish its recommendations in its final report which will be presented to the Attorney-General for tabling in Parliament.

Chapter 2

Overview of homicide

INTRODUCTION	8
HOMICIDE PROVISIONS UNDER THE CRIMINAL CODE (QLD)	8
Causing death	9
<i>Criminal</i> responsibility	9
Murder	10
Manslaughter.....	11
Alternative verdicts.....	11
Statutory alternatives	12
Alternative offences charged on an indictment for murder or manslaughter	13
EXCUSES AND DEFENCES TO HOMICIDE	14
SENTENCING FOR HOMICIDE	14
Sentencing for murder.....	14
Sentencing for manslaughter	16

INTRODUCTION

2.1 This chapter contains a general overview of the homicide provisions in the Criminal Code (Qld) to provide background for the discussion of the excuse of accident. It considers the offences of murder and manslaughter, and alternative verdicts for those offences. This chapter briefly examines the excuse of accident as it applies to homicide offences and the provisions providing for the punishment of murder or manslaughter.

HOMICIDE PROVISIONS UNDER THE CRIMINAL CODE (QLD)¹⁰

2.2 Homicide includes murder and manslaughter.

2.3 Under the Criminal Code (Qld), any person who unlawfully kills another is guilty of murder or manslaughter, depending on the circumstances of the case.¹¹

2.4 A person is taken to have killed another if they cause death directly or indirectly, by any means whatever.¹²

¹⁰ In Queensland, the source of the criminal law is the Criminal Code of Queensland. The differences between common law and codified law, and the position of the criminal law in other jurisdictions, are discussed in Chapter 4.

¹¹ Criminal Code (Qld) ss 300, 302, 303. Note the Criminal Code (Qld) also provides for other offences arising from the death of a person, for example, s 328A (Dangerous driving causing death) and s 313 (Killing an unborn child).

¹² Criminal Code (Qld) s 293.

2.5 A killing is unlawful unless it is authorised, justified or excused by law.¹³

Causing death

2.6 Often, the question whether a defendant's act (or omission) has caused death is simple. Occasionally though it is complex. For example, in *Royall v R*,¹⁴ the evidence suggested that the deceased had jumped from a window to her death to avoid the defendant's violent assault.¹⁵

2.7 In Queensland,¹⁶ a person causes the death of another if their conduct is a substantial or significant cause of death, or substantially contributes to death. It need not be the sole, direct or immediate cause of death.¹⁷

2.8 That question is not a philosophical or scientific one, but a question to be determined by the jury applying their common sense to the facts as they find them, at the same time appreciating that the purpose of the inquiry is to attribute legal responsibility in a criminal matter.¹⁸

Criminal responsibility¹⁹

2.9 The distinction between civil responsibility and criminal responsibility is a distinction between a person's responsibility for harm caused to another individual (for which a civil remedy may be sought through the courts), and a person's responsibility to the State or the community broadly. A crime often causes harm to a private individual, but it additionally offends against the order, peace and well being of society as a whole, and is punishable by the State. A

¹³ Criminal Code (Qld) s 291. See, for example, Criminal Code (Qld) ss 23 (Intention-motive), 27 (Insanity), 271 (Self-defence against unprovoked assault), 272 (Self-defence against provoked assault).

¹⁴ (1991) 172 CLR 378.

¹⁵ Royall was convicted of murder, and ultimately appealed to the High Court against his conviction, arguing that the trial judge's directions about his responsibility for the death of the deceased were incorrect.

Essentially, the High Court said that the question for the jury was:

- whether it was a 'natural' consequence of the defendant's conduct that the deceased would seek to escape (per Mason CJ, Deane and Dawson JJ);
- whether it was a 'foreseeable' consequence of the defendant's conduct that the deceased would seek to escape (per Brennan and McHugh JJ); or
- whether the deceased's attempt to escape was a 'not disproportionate or unreasonable reaction to' the defendant's violent conduct (per Toohey and Gaudron JJ).

The trial judge's directions on the point contained no error, the appeal was dismissed and the conviction sustained.

¹⁶ Following *Royall v R* (1991) 172 CLR 378.

¹⁷ (1991) 172 CLR 378, 387 (Mason CJ), 398–9 (Brennan J), 411 (Deane and Dawson JJ), 423 (Toohey and Gaudron JJ), 441 (McHugh J); *R v Sherrington* [2001] QCA 105, [41] (McPherson JA).

¹⁸ *R v Sherrington* [2001] QCA 105, [4] (McPherson JA).

¹⁹ 'Criminal responsibility' is defined in s 1 of the Criminal Code (Qld) to mean 'liable to punishment as for an offence.'

crime is conduct regarded by the State as sufficiently harmful to warrant punishment.

2.10 Breaking a contract may cause detriment to another person, but it is not a crime against the State. Burglary causes loss to an individual, and is also a crime: conduct which the State will punish with penal sanctions. The civil courts provide remedies for detriment or harm. The criminal courts impose punishment.

2.11 In a criminal trial by jury, a defendant may only be convicted of an offence if the jury is satisfied beyond reasonable doubt that the Crown (the Prosecution) has proved every element of the offence, and negated, or overcome, any excuse or defence raised beyond reasonable doubt.

Murder

2.12 The offence of murder, which is the most serious of the homicide offences, is defined in section 302 of the Criminal Code (Qld). Section 302 sets out a number of different circumstances in which a person is guilty of murder:

302 Definition of *murder*

- (1) Except as hereinafter set forth, a person who unlawfully kills another under any of the following circumstances, that is to say—
 - (a) if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm;
 - (b) if death is caused by means of an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life;
 - (c) if the offender intends to do grievous bodily harm to some person for the purpose of facilitating the commission of a crime which is such that the offender may be arrested without warrant, or for the purpose of facilitating the flight of an offender who has committed or attempted to commit any such crime;
 - (d) if death is caused by administering any stupefying or overpowering thing for either of the purposes mentioned in paragraph (c);
 - (e) if death is caused by wilfully stopping the breath of any person for either of such purposes;is guilty of *murder*.
- (2) Under subsection (1)(a) it is immaterial that the offender did not intend to hurt the particular person who is killed.

- (3) Under subsection (1)(b) it is immaterial that the offender did not intend to hurt any person.
- (4) Under subsection (1)(c) to (e) it is immaterial that the offender did not intend to cause death or did not know that death was likely to result.

2.13 Most commonly, a charge of murder is based on section 302(1)(a), alleging that the defendant killed another,²⁰ intending to kill them, or at least intending to do them grievous bodily harm.²¹

Manslaughter

2.14 The offence of manslaughter is defined in section 303 of the Criminal Code:

303 Definition of *manslaughter*

A person who unlawfully kills another under such circumstances as not to constitute murder is guilty of *manslaughter*.

2.15 For example, the crime of manslaughter is committed where the offender has killed another, without an intention to kill them, or to do them grievous bodily harm. Particular examples include killing by criminal negligence, or killing by a punch intended only to hurt, but not to seriously harm. (It is to this second example that the excuse of accident is relevant.)

Alternative verdicts

2.16 Once a person has been committed for trial, the Office of the Director or Public Prosecutions (ODPP) is responsible for the presentation of the indictment, which is a document charging the defendant with one or more offences.²² On a plea of not guilty to a charge on an indictment, guilt is determined by a jury.

2.17 A Crown Prosecutor from the ODPP makes a decision about which offences to charge on indictment, having regard to the available evidence, the

²⁰ It is immaterial that the offender did not intend to hurt the particular person who was killed: s 302(2).

²¹ 'Grievous bodily harm' is defined in s 1 of the Criminal Code (Qld) to mean:

- (a) the loss of a distinct part or an organ of the body; or
 - (b) serious disfigurement; or
 - (c) any bodily injury of such a nature that, if left untreated, would endanger or be likely to endanger life, or cause or be likely to cause permanent injury to health;
- whether or not treatment is or could have been available.

It is immaterial that the offender did not intend to hurt the particular person who was killed: s 302(1)(a).

²² An indictment is a written charge against an accused person in order to commence the person's trial before the court: Criminal Code (Qld) s 1 (definition of 'indictment').

law, the Director's Prosecution Guidelines²³ and the way it wishes to prosecute the case – for example, attempted murder as a single count on an indictment, or with an alternative count of assault occasioning bodily harm. Charging in the alternative usually reflects the state of the evidence available to the Prosecution.

2.18 Where an indictment contains offences in the alternative, a jury may find the defendant guilty of the first offence on the indictment,²⁴ in which case there is no need for them to go on to consider the alternative offence. If the jury are not satisfied beyond reasonable doubt that the Prosecution has proved the first offence they are required to return a verdict of 'not guilty', and to go on to consider the alternative offence.

2.19 If the jury are satisfied beyond reasonable doubt that the Prosecution has proved the alternative offence, they are required to return a verdict of 'guilty' of the alternative offence. If the jury are not satisfied that the alternative offence has been proven beyond reasonable doubt, they are required to return a verdict of 'not guilty' of the alternative offence.

2.20 The Prosecution is not limited (other than by common sense and the evidence) in the charges it sets out as alternatives.

Statutory alternatives

2.21 For some offences, the Criminal Code (Qld) itself provides alternatives, which are referred to in this Discussion Paper as 'statutory alternatives'. Most of these statutory alternatives are contained in Chapter 61 of the Criminal Code.²⁵

2.22 If the evidence at trial raises the possibility of conviction of a statutory alternative, then the trial judge must inform the jury of that alternative, *whether or not it has been included on the indictment by the Prosecution*, and the defendant may be convicted of that alternative offence.

2.23 The Criminal Code provides a number of statutory alternatives to homicide. The starting point is section 576:

23 As the Guidelines explain, they are guidelines not directions – 'designed to assist the exercise of prosecutorial decisions to achieve consistency and efficiency, effectiveness and transparency in the administration of criminal justice.' The Guidelines may be viewed at: <http://www.justice.qld.gov.au/files/CourtsAndTribunals/guidelines.pdf>.

24 If satisfied the Prosecution has proved that offence beyond reasonable doubt.

25 And occasionally, elsewhere in the Criminal Code (Qld), for example ss 328B, 568.

576 Indictment containing count of murder or manslaughter

- (1) Upon an indictment against a person containing a count of the crime of murder, the person may be convicted on that count of the crime of manslaughter if that crime is established by the evidence but not on that count of any other offence than that with which the person is charged except as otherwise expressly provided.
- (2) Upon an indictment against a person containing a count of the crime of manslaughter the person can not on that count be convicted of any other offence except as otherwise expressly provided.

2.24 The alternatives ‘expressly provided’ by the Criminal Code on a charge of murder are manslaughter, attempted murder, killing an unborn child, concealing the birth of a child and dangerous driving.²⁶ The statutory alternative verdicts available for manslaughter are killing an unborn child, concealing the birth of a child and dangerous driving.²⁷

Alternative offences charged on an indictment for murder or manslaughter

2.25 Under section 576(1), a person charged with murder or manslaughter cannot be convicted of another less serious offence (for example, grievous bodily harm, wounding or assault) unless the Prosecution specifically charges that offence as an alternative count on the indictment.

2.26 The DJAG Discussion Paper notes that the Prosecution may decide not to charge alternative verdicts on an indictment for ‘tactical reasons’.²⁸ The Chief Justice of the Supreme Court of Queensland, the Honourable Paul de Jersey, made a similar observation in an article published in *The Courier-Mail*, extracts of which appear later in this Discussion Paper.²⁹ The Chief Justice noted that, on a charge of manslaughter, the Crown could charge grievous bodily harm, but generally does not do so ‘presumably to avoid offering the jury what might be considered a ‘soft option’, to compel the jury to confront the more serious charge head-on’.

²⁶ Criminal Code (Qld) ss 576, 577, 583. See the following offences in the Criminal Code (Qld): Manslaughter (s 303), attempted murder (s 306), Killing an unborn child (s 313), Concealing the birth of a child (s 314), Dangerous driving (s 328B).

²⁷ Criminal Code (Qld) ss 577, 583. See the following offences in the Criminal Code (Qld): Killing an unborn child (s 313), Concealing the birth of a child (s 314), Dangerous driving (s 328B).

²⁸ Queensland Department of Justice and Attorney-General, *Audit on Defences to Homicide: Accident and Provocation*, Discussion Paper (October 2007). The Discussion Paper noted that one of the reasons the prosecution may not charge alternative verdicts on an indictment is that it may encourage the jury to return a ‘compromise verdict’.

²⁹ de Jersey CJ, ‘A fair balance of law’, *The Courier-Mail*, 5 May 2007, 70, discussed in Chapter 10 of this Discussion Paper.

EXCUSES AND DEFENCES TO HOMICIDE

2.27 The Criminal Code (Qld) provides for a number of excuses and defences to homicide. This section briefly considers the available verdicts in homicide cases where the excuse of accident or the partial defence of provocation has been successfully raised.

2.28 As noted in Chapter 1, section 23(1)(b) of the Code excuses a person from criminal responsibility for an event that occurs by accident. Accordingly, if the excuse of accident is fairly raised on the evidence³⁰ at trial and not excluded beyond reasonable doubt by the Prosecution, the jury must acquit the defendant: in the language of the Code, the defendant is excused from criminal responsibility.

2.29 Where the Prosecution has satisfied the jury beyond reasonable doubt that an unlawful killing amounts to murder,³¹ but is unable to exclude beyond reasonable doubt that the act which caused death was done in the heat of passion, caused by sudden provocation, and before there was time for the defendant's passion to cool, under section 304, the defendant is guilty of manslaughter only. Section 304 provides what is known as a 'partial defence', which reduces murder to manslaughter.

SENTENCING FOR HOMICIDE

2.30 Generally, under the Criminal Code (Qld), a person convicted of murder must be sentenced to life imprisonment ('mandatory life imprisonment'). A person convicted of manslaughter may be sentenced to punishment up to a maximum of life imprisonment, at the discretion of the sentencing judge.

Sentencing for murder

2.31 Section 305(1) of the Criminal Code (Qld) provides that a person convicted of murder must be sentenced to life imprisonment or to an 'indefinite sentence' under Part 10 of the *Penalties and Sentences Act 1992* (Qld):

305 Punishment of murder

- (1) Any person who commits the crime of murder is liable to imprisonment for life, which can not be mitigated or varied under this Code or any other law or is liable to an indefinite sentence under part 10 of the *Penalties and Sentences Act 1992*.

³⁰ And s 23(1A) does not apply. Section 23(1A) is discussed in detail in Chapter 4.

³¹ In the circumstances set out in s 302(1) of the Criminal Code (Qld), for example, where the defendant intends to cause the death of the person killed or some other person or if the defendant intends to do grievous bodily harm to the person killed or some other person.

- (2) If the person is being sentenced—
- (a) on more than 1 conviction of murder; or
 - (b) on 1 conviction of murder and another offence of murder is taken into account; or
 - (c) on a conviction of murder and the person has on a previous occasion been sentenced for another offence of murder;

the court sentencing the person must make an order that the person not be released from imprisonment until the person has served a minimum of 20 or more specified years of imprisonment, unless released sooner under exceptional circumstances parole under the *Corrective Services Act 2006*.

- (3) Subsection (2)(c) applies whether the crime for which the person is being sentenced was committed before or after the conviction for the other offence of murder mentioned in this paragraph.

2.32 Under section 305, if an offender is being sentenced for more than one conviction for murder, or for one conviction of murder with another offence of murder taken into account,³² or the offender has been previously convicted of murder, the sentencing judge must order that the offender not be released from imprisonment until the offender has served a minimum of 20 or more specified years.³³

2.33 An offender sentenced to mandatory life imprisonment is not eligible to apply for release on parole until they have served 15 years imprisonment.³⁴

2.34 The court cannot order that an offender be eligible for parole at a date earlier than that set by the provisions of the *Corrective Services Act 2006* (Qld), but may order that an offender be eligible for parole at a later date.³⁵

2.35 As explained in the DJAG Discussion Paper, parole will not necessarily be granted: a prisoner has to apply for release on parole. If a prisoner serving a sentence of life imprisonment is released on parole, the prisoner is subject to parole for the rest of their life, and may be returned to prison to serve out the sentence if the parole is breached.

2.36 Mandatory life imprisonment is the most serious penalty available under the Criminal Code (Qld).

³² Under *Penalties and Sentences Act 1992* (Qld) s 189.

³³ *Corrective Services Act 2006* (Qld) s 194(1)(a) provides for exceptional circumstances parole.

³⁴ *Corrective Services Act 2006* (Qld) s 181(3).

³⁵ *Penalties and Sentences Act 1992* (Qld) s 160A(5)(b).

Sentencing for manslaughter

2.37 Under section 310 of the Criminal Code (Qld), a person convicted of manslaughter is liable to life imprisonment.

2.38 A manslaughter conviction may arise in a wide variety of circumstances, from a negligent killing, to an intentional killing under provocation. As a consequence of such variation, it is difficult to identify a sentencing pattern in manslaughter cases.³⁶

2.39 The DJAG Discussion Paper referred to the decision of the Court of Appeal in *R v Whiting, Ex parte Attorney-General*,³⁷ in which it was observed that 'manslaughter is, above all, an offence in which particular circumstances vary so much that it is difficult, and perhaps undesirable, to try to generalise in advance about the appropriate sentence to be imposed'.

2.40 An additional consideration in sentencing for manslaughter is whether the sentencing court ought to make a declaration that the defendant has been convicted of a 'serious violent offence'.

2.41 Under Part 9A of the *Penalties and Sentences Act 1992* (Qld), an offender is deemed to have committed a serious violent offence if they are convicted of an offence mentioned in the schedule,³⁸ and sentenced to imprisonment for 10 years or more.

2.42 Additionally, if a court sentences an offender to between five and 10 years imprisonment for an offence in the schedule, the court may declare that the offender has been convicted of a serious violent offence.

2.43 The effect of a declaration that an offender has been convicted of a serious violent offence is that the offender must serve 80 per cent of the sentence or 15 years imprisonment (whichever is the shorter period) before being eligible to apply for parole.³⁹

³⁶ See *R v Auberson* [1996] QCA 321.

³⁷ [1995] 2 Qd R 199.

³⁸ The schedule of the *Penalties and Sentences Act 1992* (Qld) lists certain offences, including manslaughter.

³⁹ See *R v Sebo; ex parte A-G (Qld)* [2007] QCA 426.

Chapter 3

The review of the excuse of accident

TERMS OF REFERENCE.....	17
STRUCTURE OF REVIEW	17

TERMS OF REFERENCE

3.1 Under the terms of reference,⁴⁰ the Commission is required to review the excuse of accident in section 23(1)(b) of the Criminal Code (Qld) having particular regard to:

- the results of the Attorney-General’s audit of homicide trials on the nature and frequency of use of the excuse;
- whether the current excuse of accident (including current case law) reflects community expectations;
- the use of alternative counts to charges of manslaughter, including whether section 576 of the Criminal Code should be re-drafted;
- whether there is a need for new offences;
- whether the current provisions are readily understood by a jury and the community; and
- recent relevant developments and research in other Australian jurisdictions and overseas.

STRUCTURE OF REVIEW

3.2 This review commences in Chapter 4 with a discussion of the historical development of section 23 of the Criminal Code (Qld), including a comparison of it with the position under modern Australian common law, and an analysis of the amendment to it contained in section 23(1A). A review of the cases is contained in Chapter 5. One of the purposes of this case review is to illustrate the application of the excuse of accident from the early 20th century until 2008. Chapter 6 sets out the directions a jury receives in trials in which accident is raised as an excuse. The audit commissioned by the Attorney-General and the DJAG Discussion Paper are considered in Chapter 7. Chapter 8 discusses the proposed new offence of ‘assault causing death’ and section 576 of the Code.

⁴⁰ The terms of reference are set out in Appendix 1 to this Discussion Paper.

The position in other jurisdictions is explained in Chapter 9. Chapter 10 contains other issues for consideration, which do not arise elsewhere in the discussion.

3.3 The essential issue in this review is the just and fair extent of *criminal* responsibility for the unintended, unforeseen and unforeseeable consequences of willed acts. Amongst other things, that issue requires consideration of questions such as whether a person is to be criminally responsible for *every* harmful consequence of their willed (or intentional) act, or only those consequences which were intended or foreseeable; whether criminal responsibility should extend to the harmful consequences of *all* acts, or only *unlawful* acts; and whether a stricter approach to criminal responsibility is required where a willed act has caused death. These questions and others are posed by the Discussion Paper, and addressed in Chapter 11 'Discussion and key questions'.

Chapter 4

Historical development

THE COMMON LAW AND THE CODE	19
SECTION 23.....	20
THE COMMON LAW AND <i>MENS REA</i>	21
HISTORY OF THE DEFENCE AT COMMON LAW.....	21
MANSLAUGHTER UNDER MODERN AUSTRALIAN COMMON LAW	23
THE DEFENCE UNDER THE CRIMINAL CODE	24
INTERPRETATION OF SECTION 23.....	25
THE DIRECT AND IMMEDIATE RESULT TEST.....	26
<i>MARTYR</i> OVERRULED BY <i>VAN DEN BEMD</i> : THE REASONABLY FORESEEABLE CONSEQUENCES TEST.....	27
THE FAULT ELEMENT AT COMMON LAW COMPARED WITH THE FAULT ELEMENT UNDER THE CRIMINAL CODE AND AN ALTERNATIVE APPROACH FOR CONSIDERATION	29
AMENDMENT TO OVERCOME (IN PART) THE DECISION IN <i>VAN DEN BEMD</i>	29
THE REASON FOR THE AMENDMENT OF SECTION 23.....	30
THE CURRENT EFFECT OF SECTION 23(1) AND SECTION 23(1A)	31

THE COMMON LAW AND THE CODE

4.1 The common law is law created and defined by the courts. The source of the common law is the reasons for decisions in cases, and the legal rules and principles extracted therefrom. Those principles are applied in accordance with the doctrine of precedent, under which every court must follow the decision of a court superior to it.⁴¹ The common law evolves over time.⁴²

4.2 In New South Wales, Victoria and South Australia, the criminal law is a composite of common law and statute law. In Queensland, Western Australia, Tasmania, the Northern Territory, and the Australian Capital Territory, the criminal law has been codified completely.

4.3 In 1899, Queensland passed the *Criminal Code Act*, which included as a schedule to it the 'Criminal Code'. The Criminal Code was essentially the work of Sir Samuel Griffith, who was then the Chief Justice of Queensland, and

⁴¹ *Lipohar v The Queen* (1999) 200 CLR 485, quoted in David Ross QC, *Crime* (2002) 209.

⁴² In *Breen v Williams* (1996) 186 CLR 71, Gaudron and McHugh JJ commented (at 115):

In a democratic society, changes in the law that cannot logically or analogically be related to existing common law rules and principles are the province of the legislature. From time to time it is necessary for the common law courts to re-formulate existing legal rules and principles to take account of changing social conditions. Less frequently, the courts may even reject the continuing operation of an established rule or principle. But such steps can be taken only when it can be seen that the 'new' rule or principle that has been created has been derived logically or analogically from other legal principles.

who later went on to be the first Chief Justice of the High Court of Australia. Sir Samuel Griffith prepared a draft Criminal Code, to replace the common law and Imperial statutes which had previously provided the criminal law of Queensland.

4.4 The draft was considered by a Royal Commission consisting of judges, Crown Prosecutors and the Crown Solicitor before it was introduced into the Queensland Parliament in 1899.⁴³

4.5 Where a statute, such as the Criminal Code, is the source of the law, it is the words of the statute itself which govern its interpretation and application.

SECTION 23

4.6 Section 23, as originally enacted, stated:

23. Intention: Motive Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

Unless an intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

4.7 In his letter to the Attorney-General, enclosing the draft Criminal Code, Sir Samuel Griffith said:⁴⁴

I have throughout the Code intentionally avoided the use of the terms 'malice' and 'maliciously', which have come to acquire a technical meaning, quite different from that which they bear in ordinary language, and of which the use is, I think, as unnecessary as under these circumstances, is misleading. I will refer later to the use of the term 'malice' in connection with homicide. When used with respect to injury to the person or property it means no more than that the offender did the act in question voluntarily (that is, not accidentally) and knowing what he was doing. The general rules of criminal responsibility set out in s 25 [s 23 of the Code as enacted] render it unnecessary to express these elements in the definition of an offence. In the case of injuries to the person, unless an intention to cause a specific result is expressly made an element of the offence, actual knowledge of the probable effect of the act is immaterial.

⁴³ RG Kenny, *An Introduction to the Criminal Law in Queensland and Western Australia* (6th ed, 2004) [1.14].

⁴⁴ MJ Shanahan, PE Smith and S Ryan, *Carter's Criminal Law of Queensland* (LexisNexis online service) [s 23.1] (at 23 June 2008).

THE COMMON LAW AND *MENS REA*

4.8 The historical development of section 23 is covered by several of the cases discussed below in the case review contained in Chapter 5 of this Discussion Paper. The Commission has drawn upon those cases for this part of the discussion.

4.9 The starting point is the history of the defence at common law. At common law, a person cannot be convicted of an offence unless they have voluntarily committed an overt act, prohibited by law, or made a default in doing some act which they were legally obliged to do. Generally, it is also necessary that the act or default is associated with a legally blameworthy condition of mind. This principle is traditionally addressed in the maxim *actus non facit reum nisi mens sit rea*,⁴⁵ or '*mens rea*'. Loosely translated, *mens rea* means a guilty mind.

HISTORY OF THE DEFENCE AT COMMON LAW

4.10 Philp J explained the history of the defence at common law, and the common law position prior to the enactment of the Criminal Code (Qld), in *R v Callaghan*:⁴⁶

In England the effect of accident in homicide is a matter of history and not of logic. In early times, if A caused the death of B, by pure accident or involuntarily in self-defence, he was nevertheless guilty and became liable to forfeiture of his goods. Pardon was his only means of escaping punishment.

It became the practice of the judges to get a special verdict of a killing *per infortunium* or *se defendendo*, and upon payment for their issue a pardon and writ of restitution was granted. In order to avoid this expense it later became the practice of the judges to direct the jury to acquit if, in its opinion, the killing were *per infortunium* or *se defendendo*, and this practice was legalised by Statutes (see Russell on Crime, 9th ed., vol 1 p 504), the last of which in Queensland was *The Offences Against the Person Act of 1865*, s 6 (in England 24 and 25 Vic, c 100, s 7), which provided as follows:

'No punishment or forfeiture shall be incurred by any person who shall kill another by misfortune or in his own defence or in any other manner without felony.'

In England, if death by accident supervene upon a felonious act – at least when that act is likely to endanger life, it is the felony of murder, if upon an unlawful act not felonious it is the felony of manslaughter, if upon a lawful act it is homicide *per infortunium*.

⁴⁵ *Halsbury's Laws of England* (4th ed) vol 11(1), 'Criminal Law, Evidence and Procedure' [4].

⁴⁶ [1942] St R Qd 40, 49–50.

It is to this last type of homicide that the section mentioned relates. It did not alter the law that death supervening by accident on an unlawful act was at least the felony of manslaughter; such killing was not 'by misfortune' nor was it 'without felony'.

What, then, in Queensland, is the effect of accident in homicide? It is interesting to note that in the draft Code Sir Samuel Griffith gave the sources⁴⁷ of s 23 as being the common law and the section of *The Offences Against the Person Act* referred to. He may have mistaken the effect of that section, which is hardly likely, but in any event all we can do is to interpret the Code as we find it, without any supposition that it was intended merely to codify the common law or earlier statute law.

4.11 Philp J noted in *R v Martyr*⁴⁸ that the marginal notes in the draft Criminal Code (referring to the sources of section 23) were of nothing but historical significance. What Sir Samuel Griffith thought was the law on the subject when the Code was enacted was irrelevant. It was what the legislature finally enacted that mattered:⁴⁹

... the Queensland Criminal Code is no mere codification of the criminal law as it stood in 1899. Many parts of that Code designedly make fundamental changes in the law. Thus the concept of malice aforethought⁵⁰ in relation to murder has no place in Queensland law and there are many other obvious alterations of the former law ...

More particularly as Griffith CJ judicially determined in *Widgee Shire Council v Bonney* ((1907) 4 CLR 977, at p 981), the controversial doctrine of *mens rea* is no part of our law.

The fundamental concept of the common law is that all common law crimes require *mens rea* and that where death accidentally occurs as the result of or in the course of doing an unlawful act the *mens rea* involved in the unlawful act extends to the accidental death. In construing the words of the Code there can be no resort to this ancient doctrine ...

4.12 There was further elaboration on the common law position by Windeyer J in *Mamote-Kulang v R*:⁵¹

[T]he common law left the matter beyond doubt. *Hale*⁵² put it in these words: 'He that voluntarily and knowingly intends hurt to the person of a man, tho he intend not death, yet if death ensues, it excuseth not from the guilt of murder, or manslaughter at least; as if A intends to beat B, but not to kill him, yet if death ensues, this is not *per infortunium*, but murder or manslaughter, as the circumstances of the case happen: *Pleas of the Crown* p 472. That passage

47 In the margin of the draft Criminal Code, Sir Samuel Griffith made short notes about the sections proposed.

48 [1962] Qd R 398, 410–11.

49 Ibid 413. See also *Brennan v R* (1936) 55 CLR 253.

50 'Malice aforethought' – an intention to kill or do grievous bodily harm: *R v Vickers* [1957] 2 All ER 741, 743, as cited in JB Saunders, *Words and Phrases Legally Defined* (2nd ed, 1969).

51 (1964) 111 CLR 62, 79–80.

52 *Hale's Pleas of the Crown*.

states the common law as it still is. If death is a consequence, direct and not remote, of an unlawful act done with intent to do grievous bodily harm, it is murder. If it is a consequence, direct not remote, of an unlawful act done with intent to hurt, but not to do grievous bodily harm, it is manslaughter. To prevent misunderstanding, I should add at this point that, whatever may have been the position in earlier times, it is not now enough to constitute manslaughter at common law that a man is killed in the course of an unlawful act of any kind. To make an unintended and unexpected killing a crime at common law, it must now be, generally speaking, the result of an unlawful and dangerous act, or of reckless negligence. There is, however, no doubt that at common law a man is guilty of manslaughter if he kills another by an unlawful blow, intended to hurt, although not intended to be fatal or to cause grievous bodily harm. It does not avail an accused charged with manslaughter in such a case to say that death was unexpected and that it was only because the person struck was in ill-health or had some unsuspected weakness that the blow proved fatal. That does not make homicide excusable. A killing is not the less a crime because the victim was frail and easily killed.

... If death should unintentionally and unexpectedly occur from a lawful blow, no offence is committed. That is a clear case of homicide excused by law. Homicide unintentionally caused by an unlawful blow is manslaughter. Homicide unintentionally caused by a lawful blow is not. This common law distinction does not arise from any doctrine of constructive illegality. It is not that an antecedent illegality makes its unintended results unlawful. It is that at common law, and by the Code, all homicide is unlawful unless justified or excused by law, and a homicide that was the unintended and unexpected consequence of a lawful act done in a careful manner was always excusable. (note added)

MANSLAUGHTER UNDER MODERN AUSTRALIAN COMMON LAW

4.13 The common law offence of manslaughter covers all forms of culpable homicide which do not amount to murder, just as it does under the Criminal Code (Qld).

4.14 The common law draws a distinction between voluntary and involuntary manslaughter. The crime of murder may be reduced to voluntary manslaughter because of partial defences like provocation or diminished responsibility. The crime of involuntary manslaughter is committed where there is a killing without the fault element for murder; for example, without an intention to kill.

4.15 Modern common law identifies two categories of involuntary manslaughter: (1) manslaughter by gross negligence and (2) manslaughter by an unlawful and dangerous act. The second category is particularly relevant to this review of the law of accident.

4.16 Manslaughter by criminal negligence is committed where the act which caused death was done by the defendant consciously and voluntarily, without any intention of causing death or grievous bodily harm, but in circumstances which involved such a great falling short of the standard of care which a reasonable person would have exercised, and which involved such a high risk

that death or grievous bodily harm would follow, that the doing of the act merited criminal punishment.⁵³

4.17 A defendant will be guilty of manslaughter by an unlawful and dangerous act where the circumstances are such that a reasonable person in the defendant's position, performing the act, would have realised that they were exposing another to an appreciable risk of *serious* injury. It is not sufficient that there was a risk of *some* harm resulting, albeit not serious harm.⁵⁴ (emphasis added)

4.18 A third category, battery manslaughter, was abolished by the High Court in *Wilson v R*.⁵⁵ Battery manslaughter occurred where a defendant intentionally and unlawfully applied force, which resulted in death, if the force was applied with the intention of doing some physical injury of a minor character: something less than grievous bodily harm, but not merely trivial or negligible.⁵⁶

4.19 In *Wilson*, the High Court determined that this third category was unnecessary. Mason CJ, Toohey, Gaudron and McHugh JJ explained that cases of death caused by a serious assault, previously covered by battery manslaughter, would thereafter be covered by manslaughter by an unlawful and dangerous act. Cases in which death arose unexpectedly from a comparatively minor assault, previously covered by battery manslaughter, would thereafter be covered by the law as to assault.⁵⁷

4.20 Brennan, Deane and Dawson JJ similarly concluded that any offence of battery manslaughter would be subsumed in the crime of manslaughter by an unlawful and dangerous act.⁵⁸

THE DEFENCE UNDER THE CRIMINAL CODE

4.21 The Criminal Code of Queensland was intended to replace the common law. Its interpretation is based on the construction of its language according to its natural meaning, and without any presumption that it was intended to do no more than restate the existing law.⁵⁹ Criminal responsibility under the Code does not depend on *mens rea*. It depends on the provisions of the Code, particularly those contained in Chapter 5 ('Criminal Responsibility'), of

⁵³ *R v Mydam* [1977] VR 430, as cited in David Ross QC, *Crime* (2002).

⁵⁴ *Wilson v R* (1992) 174 CLR 313.

⁵⁵ (1992) 174 CLR 313.

⁵⁶ Stanley Yeo, *Fault in Homicide* (1997) 197.

⁵⁷ (1992) 174 CLR 313, 332–4.

⁵⁸ *Ibid* 342.

⁵⁹ *Bank of England v Vagliano Brothers* [1981] AC 107, 144–5; *Brennan v R* (1936) 55 CLR 253, 263 (Dixon and Evatt JJ).

which section 23 ('Intention – Motive') is one. Under the Code, a person cannot be guilty of a defined offence unless the Crown has negated the operation of any excuse contained in Chapter 5, where such an excuse is raised on the evidence.

4.22 The original form of section 23 is set out above at paragraph [4.6] above.

4.23 The opening phrase – 'Subject to the express provisions of this Code relating to negligent acts and omissions' – means that a person charged with an offence on the basis of criminal negligence cannot be excused from criminal responsibility under section 23. Nothing more needs to be said about that qualification for the purposes of this present discussion.

4.24 The balance of the first sentence contains what were commonly referred to as the first and second 'limbs' of section 23. Under the first limb, a person is not criminally responsible for an act or omission which occurs independently of the exercise of their will. Under the second limb, a person is not criminally responsible for an event that occurs by accident.

4.25 Like the other provisions of Chapter 5,⁶⁰ section 23 excuses a person from criminal responsibility, and in that sense, creates a limit to it. The effect of the provision, of course, depends on the meanings given to 'act', 'event' and 'an event that occurs by accident'.

INTERPRETATION OF SECTION 23

4.26 In the early cases, judicial opinion about the meaning of the word 'act' in the first limb of section 23 differed. The issue was whether the 'act' was the physical act of the defendant (the narrow view), or the physical act and its consequences (the wide view). Whatever view was adopted affected the scope of criminal responsibility.

4.27 For the purposes of this Discussion Paper, it is enough to say that there was disagreement between members of the High Court about the meaning of the word 'act' in the section. The disagreement was resolved in *Kaporonovski v R*,⁶¹ in which it was determined that 'act' meant the physical act of the defendant, in the context of the surrounding circumstances, but not its consequences. Its consequences were the 'event'.

4.28 Thus, if the facts under analysis involved death caused by a gunshot, the act was pulling the trigger of a gun while it was pointed at another person – but not the injury which resulted. The 'act' is limited to the willed pulling of the trigger. Accordingly, a defendant is not excused from criminal responsibility

⁶⁰ See, for example, s 25, which excuses a person from criminal responsibility for an act or omission done or made in circumstances of extraordinary emergency.

⁶¹ (1973) 133 CLR 209.

under the first limb of section 23 because the resulting injury was unwilled (or unintended). A defendant may, however, be excused from criminal responsibility for the consequence of their willed act under the second limb of section 23 if the consequence is an event which occurred 'by accident'.

4.29 Over the years, different tests of whether an event has occurred 'by accident', and whether, accordingly, a person is criminally responsible for it or not, have been applied. The case review in Chapter 5 discusses these tests and their application in more detail. The two tests of significance to this discussion may be referred to, in a shorthand way, as:

- The 'direct and immediate result' test; and
- The 'reasonably foreseeable consequence' test.

4.30 Expressed in this way, they are tests of criminal responsibility, rather than tests of accident.

THE DIRECT AND IMMEDIATE RESULT TEST

4.31 Philip J expressed the 'direct and immediate result' test, with reference to the facts in *R v Martyr*,⁶² in this way:⁶³

If a non-fatal blow be struck and there supervenes upon the blow an unforeseeable happening, whereby the actual fatal force is applied to the body of the victim, his resultant death occurs by accident. But that is not the case here since the death was the immediate – the direct result of the willed act. What I have said does not only apply to homicide.

4.32 In the same case, Townley J expressed the test in this way:⁶⁴

If a person kills or injures another by a 'willed' blow with his fist, although the death or particular injury is not reasonably foreseeable, the death or injury is not an event which occurs by accident. The event occurs by reason of something which is intended and not merely accidental. It is the direct and immediate result of an intentional act.

4.33 In *Martyr*, the deceased had an inherent weakness in his brain, which was unknown to the defendant, and which made him more susceptible to death after a punch. The direct and immediate result test arising out of *Martyr* has been interpreted in one of three ways:

- As a test to be confined to the situation where a victim has an unusual, unknown, weakness, because of which the harm was caused;

⁶² [1962] Qd R 398, which is discussed at [5.36] below.

⁶³ Ibid 415.

⁶⁴ Ibid 417.

- As a broad test of criminal responsibility under which a person is criminally responsible for the consequences of their willed act, whatever the state of health of the victim, and whether reasonably foreseeable or not;
- As an exception to the foreseeable consequences test, in circumstances where the willed act causes *directly* the fatal trauma, for example, where the impact of a punch to the head causes brain injury and death.

4.34 Each of these applications provides an approach for consideration in this review.

MARTYR OVERRULED BY VAN DEN BEMD: THE REASONABLY FORESEEABLE CONSEQUENCES TEST

4.35 *Martyr* was overruled by the Queensland Court of Appeal in *R v Van den Bemd*.⁶⁵ The Court approved the reasonably foreseeable consequences test, and expressed it in this way:⁶⁶

The test of criminal responsibility under s 23 is not whether the death is an 'immediate and direct' consequence of a willed act of the accused, but whether death was such an unlikely consequence of that act that an ordinary person would not reasonably have foreseen it.

4.36 This was not a new test. It had been applied, for example, in *R v O'Halloran*,⁶⁷ *R v Knutsen*,⁶⁸ *R v Tralka*,⁶⁹ *R v Dabelstein*,⁷⁰ and *Kaporonovski v R*.⁷¹

4.37 The Crown sought special leave to appeal to the High Court against the decision of the Queensland Court of Appeal in *R v Van den Bemd*.⁷² By majority, special leave was refused.

4.38 In a short judgment, the majority (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) explained that special leave was only granted to the Crown in 'exceptional circumstances'.⁷³ The outcome of the case depended on the

⁶⁵ [1995] 1 Qd R 401 (judgment delivered 30 October 1992); special leave refused (1994) 179 CLR 137, discussed at [5.126] below.

⁶⁶ *Ibid* 405.

⁶⁷ [1967] Qd R 1, which is discussed at [5.64] below.

⁶⁸ [1963] Qd R 157, which is discussed at [5.68] below.

⁶⁹ [1965] Qd R 225, which is discussed at [5.79] below.

⁷⁰ [1966] Qd R 411, which is discussed at [5.96] below.

⁷¹ (1973) 133 CLR 209, which is discussed at [5.119] below.

⁷² (1994) 179 CLR 137.

⁷³ *Ibid* 139, citing *R v Lee* (1950) 82 CLR 133; and *R v Benz* (1989) 168 CLR 110.

application and interpretation of the words ‘an event that occurs by accident’ – a question of statutory construction, which did not depend upon an important question of principle, and which did not warrant a grant of special leave. The majority concluded that the words of the section were:⁷⁴

inherently susceptible of bearing the meaning placed on them by the Court of Appeal of Queensland. The interpretation given to the section by the Courts is one which favours the individual and reflects accepted notions of criminal conduct. Moreover, it is an interpretation which derives support from comments made in some judgments of this Court, particularly Gibbs J (with whom Stephen J agreed) in *Kaporonovski v The Queen*.⁷⁵

4.39 Brennan J was strong in his dissent. His Honour’s judgment is considered in detail in Chapter 5. His Honour and McHugh J would have granted special leave to appeal.

4.40 More recently, in *R v Taiters*,⁷⁶ the test was expressed in terms of the Crown’s obligation to negative the excuse:

The Crown is obliged to establish that the accused intended that the event in question should occur or foresaw it as a possible outcome, or that an ordinary person in the position of the accused would reasonably have foreseen the events as a possible outcome.

4.41 The model direction in the Bench Book reflects this judgment:⁷⁷

It is settled law that an event occurs by accident within the meaning of [section 23] if it was a consequence which was not in fact intended or foreseen by the defendant and would not reasonably have been foreseen by an ordinary person.⁷⁸ The prosecution must prove that [the defendant] intended that the event⁷⁹ in question should occur, or foresaw it as possible outcome or that an ordinary person in the position of the defendant would reasonably have foreseen it as a possible outcome.⁸⁰ In considering the possibility of an outcome, you should exclude possibilities that are no more than remote and speculative.

74 Ibid 139.

75 (1973) 133 CLR 209.

76 [1997] 1 Qd R 333, which is discussed at [5.146] below.

77 Bench Book – Accident s 23(1)(b): No 75.1, 75.2. Footnotes as they appear in the Bench Book, re-numbered in accordance with their position in this Discussion Paper.

78 *Kaporonovski v R* (1973) 133 CLR 209, 231 (Gibbs J).

79 In *Stuart v R* [2005] QCA 138 this direction was approved at [18] and [19].

80 In *Murray v R* (2002) 198 ALR 40 the appellant succeeded because the trial judge had not separated the concept of a willed act in ‘discharging the gun’ from the concept of doing so with the intent to kill a person or do that person grievous bodily harm. Hence the necessity for the separation of the concepts in the direction. Further, Kirby J (at [94]–[102]), Callinan J (at [103]–[155]), and Gaudron J (at [1]–[24]) concluded that a direction on s 23 was required in a trial on a charge of murder even where intention was the major issue on the trial where the evidence raised its application.

THE FAULT ELEMENT AT COMMON LAW COMPARED WITH THE FAULT ELEMENT UNDER THE CRIMINAL CODE AND AN ALTERNATIVE APPROACH FOR CONSIDERATION

4.42 The common law offence of involuntary manslaughter based on an unlawful and dangerous act (most commonly, an unlawful assault) to which the excuse of accident does not apply, provides an alternative approach for consideration. As the common law developed, the unlawful and dangerous act was considered, in theory, sufficient fault to support a conviction for manslaughter. By contrast, the fault element under section 23, required to support a conviction for manslaughter (where there has been an unlawful assault), is foreseeability of death as a reasonable possibility, either subjectively or objectively.

AMENDMENT TO OVERCOME (IN PART) THE DECISION IN *VAN DEN BEMD*

4.43 The decision in *Van den Bemd* was partly reversed by an amendment to section 23 of the Criminal Code (Qld), which became operational on 1 July 1997. The amendment was recommended by the Criminal Code Advisory Working Group ('AWG'), which provided its report in July 1996.⁸¹ Prior to its amendment,⁸² the section was re-formatted by breaking the first and second limbs referred to above into separate numbered subsections.⁸³ The amendment appears as section 23(1A). The current form of section 23 of the Criminal Code (Qld) provides.

23 Intention—motive

- (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—
 - (a) an act or omission that occurs independently of the exercise of the person's will; or
 - (b) an event that occurs by accident.
- (1A) However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality even though the offender does not intend or foresee or can not reasonably foresee the death or grievous bodily harm.
- (2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

⁸¹ *Report of the Criminal Code Advisory Working Group to the Attorney-General*, July 1996.

⁸² *Criminal Law Amendment Act 1997* (Qld) s 10.

⁸³ See *Reprints Act 1992* (Qld).

- (3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

THE REASON FOR THE AMENDMENT OF SECTION 23

4.44 The AWG's reason for recommending the amendment was explained in its report:⁸⁴

The intention is to amend section 23 so as to reverse the decision of the High Court in *Van den Bemd* (1994) 119 ALR 385 in which special leave to appeal from the decision in that case of the Court of Appeal was refused by a majority, it being said by the Court that the consequence of that decision would be that the law as laid down by the Court of Appeal would be the law for Queensland. Shortly, the question is whether a person should be criminally responsible for an event (the result or consequence of a willed act) which is due to an unknown weakness or defect in the victim which is neither intended nor foreseeable.

Section 23 is perhaps the most important single provision in the Criminal Code. It replaces the common law concept of mens rea (guilty state of mind). Uncertainty about the meaning of section 23 was finally set to rest by the judgment of Gibbs J, as he then was, in *Kaporonowski*⁸⁵ ... It is important that the principles established for general application by that decision not be disturbed ... The notion of an event not involving criminal responsibility if it was unintended, unforeseen and unforeseeable is a fundamental and essentially just provision of the criminal law and many lawyers were nervous at the prospect of a modification of the principle of which section 23 and in particular the second limb thereof was an expression. Nothing, in our opinion, should be done by well intentioned legislation which puts this aspect of the principle in doubt. The question then is whether this proposal has that effect. The AWG have considered this problem with great care and in the final analysis the AWG are of the opinion that, provided it is confined to the precise problem to which reference has been made, it does not. The question of whether an event is unforeseeable is, at the end of the day, one of fact. A jury is perfectly entitled to say that the event under consideration, namely the death of the victim, was foreseeable, although the precise mechanism was not known to the offender. Indeed trial judges are finding that juries not infrequently convict, although the possibility of accident is strongly urged on them in address.

It must be remembered that while human anatomy is remarkably uniform, it obviously cannot be assumed that all human beings and their bodily parts and functions are of the same health and strength. Quite apart from congenital defects, the aging process and the vicissitudes of life make it inevitable that some people will have or develop defects not all of which will be visible and obvious. This is a fact of human existence known to all. It follows that the possibility of a defect making some person more vulnerable than others cannot be said to be unforeseeable for the purposes of the criminal law. It is no doubt with that human common sense that juries are reluctant to find accident in such cases.

⁸⁴ *Report of the Criminal Code Advisory Working group to the Attorney-General, July 1996, 19–20.*

⁸⁵ This was the spelling of the appellant's name when this case was reported in the Australian Law Reports: see (1973) 1 ALR 296. It was revised as 'Kaporonovski' when it was later reported in the Commonwealth Law Reports: see (1973) 133 CLR 209.

Accordingly, the AWG propose the following additional paragraph for insertion in section 23 which is plainly concerned only with the case of the especially vulnerable victim. Being formulated as a proviso, it will leave the interpretation of the two limbs of section 23 undisturbed and give effect to what would seem to be the general understanding of the community. In particular, it will not remove the possibility of accident in cases even of homicide where, for example, the presence of the victim was unknown and unforeseeable as in *Timbu-Kolian* (1968) 119 CLR 47, or where the fatal event occurred due to an unknown and unforeseeable malfunction of equipment. It is unnecessary to multiply instances in which this type of defence must be available. (note added)

4.45 The AWG proposed the following amendment:⁸⁶

23. Intention: Motive

- (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of ~~the person's~~ his will, or for an event which occurs by accident, provided that if a person who is unlawfully assaulted suffers death or injury by reason of a defect or weakness or abnormality in such person, the offender is criminally liable for such death or injury, whether or not he intended or foresaw or could reasonably have foreseen such death or injury. (strikethrough and shading in original)

4.46 Section 23(1A) is not in the form recommended by the AWG in which it was plainly a proviso to the excuse of accident.

4.47 The proposed amendment was limited to unlawful assaults. It would not therefore have applied where death or injury was brought about by something other than an unlawful assault. It would not have applied, for example, where a disease was transmitted during consensual sexual intercourse because the deceased had a rare weakness which made them unusually susceptible to the disease.⁸⁷ That limitation does not appear in the amendment as enacted.

THE CURRENT EFFECT OF SECTION 23(1) AND SECTION 23(1A)

4.48 The current effect of section 23(1A) upon section 23(1)(b) produces results which may be thought anomalous.

4.49 Assume the following:

- A throws a moderate punch which lands on B's head;
- B dies;

⁸⁶ Report of the Criminal Code Advisory Working group to the Attorney-General, July 1996, 20.

⁸⁷ Cf *R v Reid* [2006] QCA 202.

- A did not intend to kill B. Nor did A foresee that death might result from the punch;
- A knows nothing about B's health.

4.50 Section 23 as presently drafted has the following effect upon the criminal responsibility of A for the harm caused by the punch:

- If there is no suggestion that B died because of an inherent weakness, then A's criminal responsibility depends on whether B's death was reasonably foreseeable by an ordinary person.
- But, if B died because of an inherent weakness, then A is criminally responsible for B's death, regardless of whether B's death was reasonably foreseeable by an ordinary person.

4.51 The test of A's criminal responsibility for the consequences of his punch depends on the state of health of his victim. If the victim is particularly vulnerable, then A may not rely upon the excuse of accident. If the victim is not particularly vulnerable, then A may rely on the excuse.

4.52 Whether A's reliance upon the excuse in fact results in an acquittal is, of course, a matter for a jury at trial. But the issue raised is whether there is any justifiable reason for imposing a stricter test of criminal responsibility for the same willed act because the victim had a particular hidden vulnerability.

Chapter 5

Case review

INTRODUCTION	33
CASES PRE <i>VAN DEN BEMD</i>	35
<i>R v Callaghan</i>	35
<i>R v Vallance</i> (in the Tasmanian Court of Criminal Appeal)	36
<i>Vallance v R</i> (in the High Court).....	39
<i>R v Martyr</i>	40
<i>R v O'Halloran</i>	45
<i>R v Knutsen</i>	46
<i>R v Tralka</i>	48
<i>R v Mamote-Kulang of Tamagot</i>	49
<i>R v Hansen</i>	51
<i>R v Dabelstein</i>	51
<i>Timbu Kolian v R</i>	54
<i>Kaporonovski v R</i>	56
VAN DEN BEMD AND POST <i>VAN DEN BEMD</i> CASES.....	57
<i>R v Van den Bemd</i> (in the Court of Appeal).....	57
<i>Griffiths v R</i>	58
<i>R v Taiters</i>	60
<i>R v West</i>	62
<i>R v Auld</i>	62
<i>R v Camm</i>	63
<i>R v Watt</i>	64
<i>R v Fitzgerald</i>	64
<i>R v Francisco</i>	67
<i>R v Grimley</i>	68
<i>R v Day</i>	68
<i>R v Stott & Van Embden</i>	69
<i>R v Charles</i>	70
<i>R v Seminara</i>	71
<i>R v Reid</i>	72
<i>R v Stevens</i>	74
<i>R v Trieu</i>	75
OBSERVATIONS ABOUT THE CASES POST <i>VAN DEN BEMD</i>	77
THE DECISION OF THE HIGH COURT IN <i>R V VAN DEN BEMD</i>	78

INTRODUCTION

5.1 The terms of reference require the Commission to consider whether the current excuse of accident reflects community expectations. The issue is essentially whether the apparently successful application of the excuse produces a result which is considered just or acceptable by the community.

5.2 A fair interpretation of the DJAG audit results, in which 100 trials were reviewed, is that accident was rarely the crucial consideration in murder trials (if it was raised at all), and that no conclusions could be drawn about the success of accident as a defence in manslaughter trials. Jury deliberations are confidential. If more than one defence is raised, as regularly occurs, it may not always be possible to determine the basis of the jury's verdict. The results of the DJAG audit are discussed in Chapter 7 of this Discussion Paper.

5.3 Because it is often difficult to know the basis of a jury's verdict, the Commission has approached the matter from another perspective. The Commission has set out, chronologically, some cases in which appellate Courts, including the High Court, have considered the excuse. These decisions provide authoritative guidance for trial judges at first instance. Directions to juries about the excuse are derived from these decisions.

5.4 Generally, these cases are appeals from conviction by defendants who argue, for example, that the excuse should have been left for the jury's consideration, but was not, or that their conviction was unreasonable having regard to the accident excuse. The Commission's review of the excuse of accident is not limited to homicide cases, and accordingly, the cases which follow are not only homicide cases.

5.5 One of the Commission's purposes in presenting this chronology is to provide information about the way in which the excuse is intended or permitted to operate. The criminal justice system operates, as it must, on the assumption that juries reach a verdict in accordance with the directions given to them by trial judges. The cases in this chronology illustrate the test the jury is asked to apply, and include cases in which a defendant has been denied the defence. The Commission trusts it will provide a reference against which community expectations may be judged.

5.6 As observed in the DJAG Discussion Paper, the accident excuse has not been the subject of any sustained challenge until recently. The facts of many of the cases included here are not dissimilar to more recent cases which have attracted public comment. One of the purposes in discussing these cases chronologically is to examine whether there has been, over time, any change in outcome where the excuse has been raised in similar circumstances, which may reflect a change in community attitudes, as expressed in jury verdicts.

5.7 The more recent cases covered by the DJAG Discussion Paper are discussed later in this chapter.

5.8 The judgments in the early cases concentrate on the meaning to be given to section 23(1)(b) or its equivalent. The conclusions reached, which were not consistent, reflected the different attitudes of the judges to the appropriate and just limits of criminal responsibility. The cases post *Van den*

*Bemd*⁸⁸ concern primarily the application of settled law⁸⁹ to particular facts, and the trends observed in those cases are of most relevance to this discussion.

CASES PRE *VAN DEN BEMD*

*R v Callaghan*⁹⁰

5.9 This was an application to the Court of Criminal Appeal for an extension of time within which to appeal a conviction for wilful murder.

5.10 Callaghan told police that, on 8 November 1940, after a ‘wordy exchange’⁹¹ with the deceased (Groves), Groves made a punch at him with his left fist. Callaghan swung at Groves with his left fist, hitting Groves on the right side of the jaw and knocking him down. Groves’ head hit an anvil,⁹² and he died within 20 minutes. Callaghan panicked, and burnt the body. There was evidence that Callaghan owed Groves a considerable sum for wages, and that Callaghan was in a bad way financially.

5.11 The trial judge told the jury that he could not see that there was any possible defence of accident. His Honour referred to section 23, and told the jury that a blow which is deliberately aimed at another, and which has the effect, though not the intended effect, that the other is killed, was not an accident within the meaning of the Criminal Code.

5.12 Callaghan appealed against his conviction, arguing that the jury had been misdirected on section 23.

5.13 Webb CJ was not prepared to differ from the trial judge as to the effect of section 23, but in any case could not see that a miscarriage of justice arose from that direction. The jury’s verdict would have been the same even if they had been directed that accident was open. Their verdict of guilty of wilful murder indicated that they were satisfied that Callaghan had killed the deceased intending to kill him. A direction that accident was open would not have changed that belief.

5.14 EA Douglas J similarly took the jury’s verdict to mean that Callaghan’s blow was one which was intended to kill the deceased. His Honour said:⁹³

88 (1994) 179 CLR 137.

89 That is, settled by *Van den Bemd*.

90 [1942] St R Qd 40.

91 Ibid 42 (Webb CJ).

92 A heavy iron block used in blacksmithing as a surface upon which metal can be struck and shaped.

93 [1942] St R Qd 40, 46.

In the present case, as the appellant struck the deceased with intent to kill, death must fairly and reasonably be considered a consequence of his act if the deceased actually died by reason of a fracture of the skull caused by his falling onto the anvil or onto the ground ...

5.15 Philp J took a different view. His Honour did not agree:⁹⁴

if A [intentionally⁹⁵] strike B a light blow but by accident grievous bodily harm result, the blow is not an incident which occurs by accident, but the grievous bodily harm is a result which occurs by accident. That under those circumstances A should escape liability for the grievous bodily harm while being liable for the assault, is quite consistent with one's notion of justice. Why, then, should not the section have a similar application when the accidental result of the blow, intended merely as a light blow, is death?

...

... if the blow was not intended to do grievous bodily harm or kill, but was intended as a blow, and in the result the man at whom the blow was directed is in fact killed ... the killing under those circumstances could not be manslaughter

...

5.16 However, despite Philp J's disagreement with the directions given, his Honour was satisfied that on the whole, there had not been a substantial miscarriage of justice. The jury must have been satisfied that Callaghan acted with intent to kill.

5.17 Philp J suggested, effectively, that criminal responsibility for the consequences of an act should be based upon the nature of the act itself (for example, that it was a light blow) and not the unintended consequences of the act. His Honour found this approach consistent with 'one's notion of justice'.⁹⁶

R v Vallance (in the Tasmanian Court of Criminal Appeal)⁹⁷

5.18 Vallance was 17 years old. On 14 February 1960, he was at home alone at his parents' house in Hobart. There was a scrap yard next door. Four young children aged 6, 6, 7 and 8, were playing in the scrap yard. They were banging galvanised iron tanks with pieces of wood. This annoyed Vallance. He told them to 'clear out'. In reply, they threw rocks over the fence and on to his house. Vallance threw stones back. Then he went inside and got his father's air rifle. He fired it over the fence into the scrap yard. A pellet struck the chest of the 7 year old girl, wounding her.

94 Ibid 50, 51.

95 The word 'unintentionally' appears in the report. Philp J plainly meant 'intentionally', as his Honour explained in *R v Martyr* [1962] Qd R 398, 413.

96 [1942] St R Qd 40, 50.

97 [1960] Tas SR 51.

5.19 Vallance was charged under the Tasmanian Criminal Code with (1) committing an unlawful act intending to cause bodily harm and (2) wounding.

5.20 He gave evidence at trial that he did not fire at the girl, but fired towards the ground. His purpose was to scare the children out of the yard. He did not intend to hurt them.

5.21 The defence at trial also sought to rely upon section 13(1) of the Tasmanian Criminal Code, which is expressed differently to section 23. Rather than excusing an event which occurs by accident, it excuses an event which occurs 'by chance'.

S 13 (1) No person shall be criminally responsible for an act, unless it is voluntary and intentional, nor, except as hereinafter expressly provided, for an event which occurs by chance.

(2) ...

(3) Any person who with intent to commit an offence does any act or makes any omission which brings about an unforeseen result which, if he had intended it, would have constituted his act or omission of some other offence, shall, except as otherwise provided incur the same criminal responsibility as if he had effected his original purpose.

(4) ...

5.22 The trial judge's directions about this section were confusing:⁹⁸

But I also tell you that even though he now says to you – and he says that he told the police at the time – that he did not intend to wound Pauline at all, you are nevertheless entitled to find by inference that he did intend to wound her if you find as a fact that the reasonable and probable consequences of what he did – the reasonable and probable consequences which a reasonable man would expect from what he did – would be that the girl would be wounded. It is a question of fact for you and even if you did think that the reasonable and probable consequences of what he did would be that the girl would be wounded you don't have to draw the inference that he intended that consequence. It is a matter for you ... if it is a reasonable and probable consequence it does not follow as a matter of law that he intended it.

5.23 Vallance was acquitted of both offences. The Crown appealed against his acquittal on count 2,⁹⁹ arguing, among other grounds, that:¹⁰⁰

- An intent on the part of the respondent to wound Pauline Latham was not a necessary ingredient of the charge [of wounding];

98 Ibid 58–9.

99 Such an appeal by the Crown is no longer available.

100 [1960] Tas SR 51, 59.

- It was sufficient for the Crown to prove on the part of the respondent a voluntary and intentional but unlawful act causing a wound to Pauline Latham, the wound not being an event occurring by chance.
- The wound would *not* have occurred by chance if it was an event which a reasonable man would have been expected to foresee and guard against.

5.24 The Crown was successful on grounds (a) and (b) above (and on another ground not relevant to this discussion). The Court ordered a re-trial on the charge of wounding.

5.25 Burbury CJ considered in detail the common law, before reaching this conclusion:¹⁰¹

It must steadily be borne in mind that whether the event occurs by accident is a *test of the accused's criminal responsibility*. The issue is I think whether the event occurs by chance *vis à vis* the accused. Judicial definition of the synonym 'accident' in other contexts must be invoked with caution, but having said that, I feel that Lord *M'Naughten's* classic definition of 'accident' ... is apt: 'An unlooked-for mishap or an untoward event which is not expected or designed'.

...

I have said that the issue is whether the event occurs by chance *vis à vis* the accused. That means that a subjective element is involved. The basic question as I see it is, Did the accused in fact foresee that wounding the girl was the possible or probable consequence of his conduct? The question is not *Ought* he to have adverted to the consequences? but, *Did* he? If he contemplated the wounding of the girl as a possible or probable consequence of his conduct the wounding is not an 'unlooked-for mishap', nor is it an event 'which is not expected'. If a man in fact foresees the actual consequences of his action as possible or probable then he cannot be heard to say that the consequences have occurred by chance. Neither at common law nor under s 13(1) of the Code would the 'defence' of accident be open. But as a matter of interpretation of s 13(1) it is impossible I think to go further and say that the test of foresight is not whether the accused foresaw the consequences but whether a man of reasonable prudence would have foreseen them.

5.26 Crisp J referred to the definition of chance in the Oxford English Dictionary and concluded that an accident or a chance result was one which happened without foresight or expectation. The test was a subjective one, requiring actual foresight in the actor, and excusing him from results not in fact foreseen or contemplated by him as possible consequences.¹⁰² Crawford J reached the same conclusion: an 'event by chance' was one which was unintentional and not adverted to as a possibility (a subjective test).¹⁰³

101 [1960] Tas SR 51, 75.

102 Ibid 98.

103 Ibid 114.

5.27 This case illustrates the most generous approach to criminal responsibility, the Court basing it on the actual intentions of the defendant, and making a defendant liable only for what the defendant actually intended or foresaw as a possible consequence of their actions. This approach was not followed, and is not considered further in this Discussion Paper.

Vallance v R (in the High Court)¹⁰⁴

5.28 Vallance sought special leave to appeal to the High Court against the decision of the Tasmanian Court of Criminal Appeal. Special leave was refused.

5.29 Dixon CJ concluded that the direction given by the trial judge was too favourable to Vallance, but his Honour did not think it was appropriate that Vallance be tried again. Of section 13(1), and the expression 'an event which occurs by chance', Dixon CJ said:¹⁰⁵

this somewhat difficult phrase covers events which the person who might otherwise be criminally responsible neither intended nor foresaw as possible results of his conduct: they must too be fortuitous in the sense that no one would reasonably expect them to occur as a consequence of that conduct.

5.30 Kitto J observed that the Court of Criminal Appeal had to choose between a subjective and objective test of 'an event which occurs by chance', and that the Court of Criminal Appeal chose a subjective test. His Honour agreed that an event actually foreseen as a possibility by the actor could not be described as event which happened by chance; but it did not follow that every unforeseen event occurred by chance:¹⁰⁶

In addition to having been unforeseen by him it must, I think, have been so unlikely to result from the act that no ordinary person similarly circumstanced could fairly have been expected to take it into account. In a provision relative to a consequence of an act voluntarily and intentionally done, and denying criminal responsibility for that consequence if it has occurred by chance, it seems to me that 'by chance' is an expression which, Janus-like, faces both inwards and outwards, describing an event as having been both unexpected by the doer of the act and not reasonably to be expected by any ordinary person, so that it was at once a surprise to the doer and in itself a surprising thing.

5.31 His Honour considered that the verdict of acquittal may well have been because of the erroneous direction. Whether Vallance was to be retried or not was a matter for the Executive.¹⁰⁷

104 (1961) 108 CLR 56.

105 Ibid 61.

106 Ibid 65.

107 Ibid 66.

5.32 Taylor J considered that, in the circumstances of the case, the application of section 13(1) meant that it was necessary only to show that the wounding was the result of acts which were voluntary and intentional, and which were done with reckless and wanton indifference to their result foreseen as a not unlikely consequence.¹⁰⁸

5.33 Menzies J interpreted 'by chance' as referring to an event which the doer of the act did not foresee as a possible consequence.¹⁰⁹

5.34 Windeyer J observed that the idea that wholly accidental and unintended harm was not culpable was an idea deeply imbedded in the law – whether section 13(1) had been enacted or not.¹¹⁰ In determining the meaning of 'by chance' his Honour said:¹¹¹

Section 13(1) is an exonerating and exculpatory provision ... It does not say that a person is responsible for what does not occur by chance: all that it says is that a person is not responsible for what does. This purpose, and past history, combine to show what is meant here by a chance occurrence; for a man who intended to do a wrong is not to escape the consequences by saying that only by luck did he succeed in his purpose. If, for example, he, being a poor shot with a rifle, were to fire at another person a thousand yards away and hit him, it might be said to be a chance that he did so; but that would not exonerate him. If he had aimed badly, yet the bullet had struck a rock and ricocheted and wounded the intended victim, again it would not avail the shooter that only by that chance had he effected his design. The statutory provision only operates in cases where the event was not foreseen by the actor, and would not have been expected by reasonable men as an outcome of his actions.

5.35 His Honour did not consider that the trial judge's error was so serious as to warrant a re-trial. His Honour would have given leave and allowed the appeal – but agreed with the course proposed by the Chief Justice.

R v Martyr¹¹²

5.36 Martyr was convicted of unlawfully killing Alexander Scott. Scott and two other people (Edna Casey and Roley Wilder) were standing outside a café in South Townsville. Martyr, who had been inside the café, went outside. He told Casey and Wilder that he was going to 'bust' them up. A scuffle started between Martyr and Scott. Wilder did not see Scott punch Martyr, but he saw him grab Martyr around the waist. He saw Martyr hit Scott twice in the chest and twice in the face. Scott went on to the window and slid down it. Wilder caught him, and eased him down to the ground. His head did not hit the

108 Ibid 69.

109 Ibid 73.

110 Ibid 77.

111 Ibid 80.

112 [1962] Qd R 398.

ground. An ambulance was called, and Scott was taken to hospital. He died shortly after admission.

5.37 On external examination post mortem, Scott had an abrasion to his right frontal region, a small bruise to the right of the point of the chin and an abrasion on the back of the right arm. Internally, Scott had a large collection of blood behind the tentorium.¹¹³ His death was probably due to a haemorrhage on the base of the brain. A punch on the jaw could have caused that haemorrhage. It was not usual that a punch on the chin would cause that injury. The injury could have indicated some peculiar weakness in the deceased.

5.38 The trial judge did not direct the jury that a defence of accident was available to Martyr. Martyr appealed against his conviction to the Court of Criminal Appeal. The trial judge's failure to so direct the jury was one of his grounds of appeal.

5.39 To decide this ground of appeal, the Court of Criminal Appeal had to construe the expression 'event which occurs by accident'.

5.40 Mansfield CJ said:¹¹⁴

The words "which occurs by" imply the notion of causation, and the latter part of the section in my view covers the case where in consequence of an intentional act by A (whether lawful or unlawful) an unintended and unforeseen happening occurs which is the proximate cause of an injury resulting in death.

In such a case although the act of A is *sine qua non*¹¹⁵ the death of B, it is not the *causa causans*,¹¹⁶ and A is protected by the section.

'Accident' therefore, in my view does not include an existing physical condition or an inherent weakness or defect of a person, such as an egg-shell skull, or as in this case, a possible inherent weakness in the brain.

5.41 The proximate cause of death was Martyr's unlawful assault upon Scott, and there was no evidence which raised accident.

5.42 Philp J took the same view:¹¹⁷

I will assume that Scott's death would not have resulted from the blows if he had not been suffering from some invisible and highly unusual weakness or constitutional abnormality. Now the appellant was charged with killing ... Scott – and the fact that Scott had a constitutional abnormality did not in my view make his death an 'accident' as that word is used in the section. If a

113 The membrane across the inside of the skull which divides the brain into upper and lower portions.

114 [1962] Qd R 398, 406–7.

115 Latin: 'without which nothing' or 'without which it could not be'.

116 Latin: the primary cause.

117 [1962] Qd R 398, 414–15.

haemophilic bleed to death from a small cut, his death cannot be said to be an accidental outcome of the cut.

The words under discussion I think have operation in the following circumstances. If a non-fatal blow be struck and there supervenes upon the blow an unforeseeable happening, whereby the actually fatal force is applied to the body of the victim, his resultant death occurs by accident. But that is not the case here, since the death was the immediate – the direct result of the willed act. What I have said does not only apply to homicide. If a man not knowing whether a vase is fragile or not, deliberately taps it and it thereupon shatters, the shattering, in my view, is not an event which occurs by accident.

In this case I hold that s 23 had no operation ...

5.43 Townley J similarly concluded:¹¹⁸

if a person kills or injures another by a 'willed' blow with his fist, although the death or particular injury is not reasonably foreseeable, the death or injury is not an event which occurs by accident. The event occurs by reason of something which is intended and is not merely accidental. It is the direct and immediate result of an intentional act.

5.44 In this case, the immediate cause of death was one of Martyr's blows: it was the impact of the blow itself upon a uniquely weak brain which caused the haemorrhage which led to death. The judgments in this case reflect a distinction between fatal harm caused in this direct manner and fatal harm caused by something other than the blow itself.

5.45 Mansfield CJ expressed the distinction as one between (a) an intentional act which was the primary cause of death, and (b) an intentional act, which was not the primary (or proximate) cause of death, but without which death would not have occurred. The accident excuse (based on foreseeability) did not protect a defendant whose act was the primary cause of death.

5.46 Philp J spoke of unforeseeable happenings supervening upon a blow, and producing unintended consequences, in which case the accident excuse would apply. But in *Martyr's* case, death was the direct result of the willed act, and the excuse did not apply.

5.47 Thus, this Court applied a different test of criminal responsibility upon a defendant whose act was *of itself* fatal.

5.48 Although the deceased in *Martyr* had a peculiar weakness, confining the test in *Martyr* to instances where a blow causes death because of an uncommon fragility in the deceased gives rise to difficulty.

5.49 The direct impact of a moderate blow might unforeseeably cause the death of a person who was without any peculiar weakness (because, for example, the blow happened to land on a particularly vulnerable part of the

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Ibid 417.

body). Assume the facts of *Martyr* without the deceased's peculiar weakness. In that case, Martyr's criminal responsibility would then be determined by reference to whether death was a foreseeable consequence of the punch.

5.50 Section 23(1A) as presently drafted has the same result, as explained at [4.48]–[4.51] above.

5.51 Instead of confining *Martyr* to its facts, it may be interpreted as drawing a distinction between a blow which *itself* causes death (a 'fatal blow'), and a blow which is followed by another (supervening) occurrence which causes death (for example, where the person punched falls to the ground and suffers a fatal injury upon impact).

5.52 Applying that interpretation, the fragility or otherwise of the deceased is not relevant to the criminal responsibility of a defendant who causes death by a fatal blow. Such a defendant is unable to rely upon the excuse of accident, whether or not the deceased had a particular fragility, because their blow was the direct and immediate cause of death.

5.53 But this distinction causes difficulty too, which is best illustrated by the following example.

If:

- A throws a moderate punch which lands on B's head; and
- the impact of the punch causes brain damage and death,

then the excuse of accident is not available to A because it was the impact of his blow which caused death.

But if:

- A throws a moderate punch which lands on B's head;
- it knocks B off balance and he falls onto the ground; and
- the impact of B's head hitting the ground causes brain damage and death,

then the excuse of accident is available to A, because it was not the impact of his punch upon B's head which inflicted fatal trauma, but rather, B's impact with the ground which caused his death.

5.54 On this approach, B's fall and impact with the road is treated as a supervening occurrence. B would not have fallen had he not been punched,¹¹⁹ but the punch per se did not inflict the fatal injury.¹²⁰

5.55 It may be considered artificial to describe the fall which followed the punch as a 'supervening occurrence', but the real issue is whether there is any rational basis for denying the excuse to A in the first example, but allowing him to rely upon it in the second. Is not the fall and the injury sustained thereby as much a consequence of the punch as (say) the bruise left by the impact of the punch itself?

5.56 It may be argued that a fall following a punch to the head is inevitably foreseeable as a possible outcome of the punch. Every fall carries with it a risk of fatal impact with the ground. And the expectation is that a jury would not acquit on the basis of accident in the second example. But take the example one step further:

If:

- A throws a moderate punch which lands on B's head;
- it knocks B off balance; and
- B stumbles onto the road into the path of an oncoming car and is killed,

has there by now been a supervening occurrence? Or is B's collision with the car still to be considered a consequence of A's punch?

5.57 Assume B does not die in the collision, but requires hospitalisation and dies as a result of an infection which sweeps the hospital. Is B's death still a consequence of A's moderate punch for which A is criminally responsible? At what point is the line to be drawn for the purposes of the criminal law?

5.58 Consider the application of the reasonably foreseeable consequence test to the same facts.

5.59 If a defendant throws a fatal blow, their criminal responsibility depends on whether death was a reasonably foreseeable consequence of the punch. The answer depends on an assessment by the jury of all the circumstances, including, for example, the force with which the punch was delivered, the site to which the punch was directed, and the relative sizes of the defendant and the deceased.

¹¹⁹ The *sine qua non*, as per Mansfield CJ.

¹²⁰ It was not the *causa causans*, as per Mansfield CJ.

5.60 If a moderate blow causes the deceased to fall, and upon falling the deceased sustains a fatal injury, then criminal responsibility would depend on whether the fatal fall was a reasonably foreseeable consequence of the punch. The answer depends on an assessment by the jury of all the circumstances including, for example, the location at which the punch was thrown. If the punch was thrown while the defendant and the deceased were standing on a road, then a fatal fall may be considered reasonably foreseeable. If the punch was thrown while both were in a carpeted room, then a fatal fall might not be considered reasonably foreseeable.

5.61 If a moderate blow caused the deceased to stumble into the path of an oncoming car, then criminal responsibility would depend on whether the deceased's being hit by a car was a reasonably foreseeable consequence of the punch, taking into account all the circumstances, including the location at which the punch was thrown, and the traffic conditions at the time.

5.62 Where the deceased died because of infection acquired during hospitalisation, then criminal responsibility depends on whether the series of events, from impact with the car to infection and death, were reasonably foreseeable.

5.63 These examples raise the issues of the validity of the distinction between the criminal responsibility of a defendant whose blow itself causes death, and a defendant whose blow has been followed by another occurrence which causes death, and whether the concept of reasonable foreseeability should operate to determine criminal responsibility.

R v O'Halloran¹²¹

5.64 O'Halloran was a 13 year old boy, who was convicted of the murder of his father. He shot his father in the back as his father was walking from their caravan to a hall. O'Halloran told another boy earlier that day that he was going to kill his father because his father had been cruel to him. In a written statement, O'Halloran said his father 'went up to open the door [of the hall] and I closed my eyes and pulled the trigger'. In evidence, he said that he put the rifle to his shoulder, aimed it at a point close to his father, shut his eyes and pulled the trigger. He said he was shaking and only intended to scare his father.

5.65 He appealed against his conviction to the Court of Criminal Appeal, arguing, among other things, that the jury had not been properly directed on accident. The trial judge read section 23 to the jury. The trial judge said he did not think the facts supported accident, but he left the matter to the jury.

¹²¹

[1967] Qd R 1. Although this decision is reported in the 1967 volume of the Queensland Reports, it was delivered on 25 September 1962.

5.66 Of the section 23 direction, Philp J said:¹²²

Before it is necessary for the judge to direct on accident there must be evidence from which accident can be deduced. Accepting the appellant's story it amounts to this. He deliberately aimed the rifle at a spot close to his father who was only a few feet away, closed his eyes and pulled the trigger. That act admittedly did not occur independently of the operation of his will and it is quite impossible to hold that the event of the bullet striking the father occurred by accident. The foreseeability of that event was beyond question. In my view it is very doubtful whether accident should have been left to the jury but in any event the judge did leave it with a sufficient direction.

5.67 Mack J was of the same view, but the appeal was allowed on another ground relating to the directions on criminal negligence. The verdict of murder was set aside, and a verdict of manslaughter substituted for it.

R v Knutsen¹²³

5.68 Knutsen met a woman named Frandl. They went to dinner together, and both consumed 'a good deal of liquor'.¹²⁴ Knutsen said Frandl invited him to spend the night with her. They got into a cab together, and travelled to her flat at Sandgate. When they arrived, she told Knutsen he could not come in. They argued. Knutsen pulled Frandl out of the cab and hit her on the face. He told police he hit her with backhanded blows which were 'pretty lethal on a girl like her'. Frandl fell to the ground, in the middle on the road. The cab driver saw Knutsen kick her. Knutsen claimed she was conscious and abusing him. There was other evidence that she was unconscious.

5.69 An oncoming motorist, who was intoxicated, ran over her. She suffered serious injuries, including brain damage. She was permanently disabled and unable to give evidence.

5.70 The trial judge told the jury that they could convict Knutsen of unlawfully doing grievous bodily harm if they were satisfied he in fact foresaw, as a likely outcome of his leaving Frandl on the road, that she would be struck by a vehicle, or if Frandl's being struck by the vehicle was something an ordinary person in the circumstances would reasonably have foreseen. (The trial judge's direction was to the same effect as the current direction.)

5.71 Knutsen was convicted of unlawfully doing grievous bodily harm (the brain damage). He appealed against his conviction. He argued that, under section 23, a person was criminally responsible for a physical act which he 'willed' but was not so responsible for even the foreseeable consequences of that act unless he willed those consequences. Alternatively, he argued that a

¹²² [1967] Qd R 1, 2.

¹²³ [1963] Qd R 157.

¹²⁴ Ibid 160 (Philp J).

person was criminally responsible for the consequences of his physical act only in so far as he in fact foresaw those consequences.

5.72 His argument about the interpretation of section 23 was not successful, but his appeal against conviction was allowed (by majority) on the basis that Frandl's injuries were not reasonably foreseeable.

5.73 Philp J said the test for liability of a willed act was an objective one. The question was whether an ordinary man would reasonably foresee the consequence which did in fact occur.¹²⁵ If the jury accepted the Crown's version of the facts, namely, that Knutsen left Frandl unconscious on the road, then it was open to them to be satisfied that an ordinary man would foresee the likelihood of an unconscious woman lying in the roadway being struck by a car. His Honour added:¹²⁶

If she had been injured by a helicopter striking her that injury would have been an event which occurred by accident – an unforeseeable consequence – and the appellant would not have been responsible.

5.74 But his Honour was in the minority.

5.75 Stanley J applied the same test but arrived at a different conclusion: Frandl's injuries were not reasonably foreseeable. Unconsciousness may be of short duration. It was impossible for a jury to say that an ordinary man in Knutsen's position at the time would reasonably have foreseen that Frandl would probably be unconscious when a motor vehicle came along. There was no basis upon which an ordinary man could form an opinion about the probable period of unconsciousness and the probable length of time before a car arrived. There was no reason why the car ran over her. The driver saw her, and he had time, space and opportunity to avoid her: 'a clear line can be drawn between [the driver's] negligent driving and Knutsen's violence'.¹²⁷

5.76 Similarly, Mack J was influenced by the details of the width of the roadway, traffic conditions and visibility and concluded that it was unlikely that any vehicle would run over Frandl. Accordingly, Knutsen was not criminally responsible for the grievous bodily harm which she suffered.

5.77 Knutsen's conviction for unlawfully doing grievous bodily harm was quashed, and a conviction for assault occasioning bodily harm (based on his punches) was substituted.

5.78 This case was decided in December 1962, and the conclusion of the majority about what was foreseeable may be surprising to those with experience of life in 2008. Philp J's conclusion accords with modern sensibility.

125 Ibid 165.

126 Ibid 166.

127 [1963] Qd R 157, 170.

It may be suggested that a jury today would find Knutsen criminally responsible for grievous bodily harm, applying the test of reasonable foreseeability. It is more difficult to see how Knutsen would bear criminal responsibility for causing grievous bodily harm under the direct and immediate test.

R v Tralka¹²⁸

5.79 Tralka was convicted of unlawfully wounding Buddy Facer. On 29 September 1962, John Facer drove three men (Buschell, Bill Facer, Buddy Facer) in his truck to Tralka's house. Buschell, John Facer and Bill Facer got out of the truck. Buddy remained in the truck. Buschell and Tralka had a conversation about Buschell's claim for wages. Tralka ordered the Facers to leave. John Facer made an obscene remark and got into the truck. Tralka went into his house and got an axe. John Facer was reversing the truck out onto the roadway. Tralka threw the axe at John Facer. The axe broke the windscreen and struck Buddy, who was sitting between John and Bill in the front seat. It caused a four inch laceration on Buddy's right shoulder. Tralka threw the axe intending to hurt John Facer – not Buddy.

5.80 The trial judge ruled that it was not open to the jury to consider the defence of accident because Buddy's wound was the direct, although unintended, result of Tralka's willed act.

5.81 Tralka appealed against his conviction to the Court of Criminal Appeal, arguing that the excuse of accident ought to have been left to the jury. The Court of Criminal Appeal agreed, and his conviction was quashed. No re-trial was ordered having regard to the modest sentence imposed at first instance (a bond).

5.82 Mansfield CJ adhered to his view in *R v Martyr*¹²⁹ that the correct test was one of reasonable foreseeability. The jury ought to have been directed on accident. The willed unlawful act was the throwing of the axe. Hitting and wounding Buddy was not part of the willed act. If hitting Buddy was not a foreseeable consequence of the willed act, it was an accident, and the wounding was an event which occurred by accident. The other members of the Court agreed. They distinguished *Martyr* on the basis that it was concerned with force deliberately applied to the body of the victim.¹³⁰

5.83 Gibbs J said:¹³¹

... having regard to the evidence as to the distance over which the axe was thrown and to the fact that John Facer quite unexpectedly stopped his vehicle instead of continuing to reverse it, it was quite open to the jury to find that the

128 [1965] Qd R 225.

129 [1962] Qd R 398.

130 [1965] Qd R 225, 232 (Gibbs J).

131 Ibid 232.

appellant did not foresee that the axe would strike Buddy ... and that a reasonable man in the circumstances would not have foreseen that the axe would strike him.

R v Mamote-Kulang of Tamagot¹³²

5.84 The facts are recited succinctly in the judgment of Taylor and Owen JJ:¹³³

In a fit of temper the appellant, a native of New Guinea, intentionally struck his wife a strong back-hand blow with his fist, hitting her in the stomach. The blow ruptured her spleen which was abnormally large and, in consequence, she died. The appellant intended the blow to cause pain to his wife but he did not intend to kill her or to do her grievous bodily harm, and, had her spleen been of a normal size, it was unlikely that it would have been ruptured by the blow. It was not proved that the appellant foresaw, or that a person unaware of the deceased's abnormality would reasonably have foreseen, that death might follow as a consequence of the blow. He was indicted upon a charge of manslaughter and was convicted and from that conviction this appeal is brought.

5.85 The trial judge held that a defence of accident was not available to Mamote-Kulang. Mamote-Kulang argued on appeal that it was. He argued that, on a charge of manslaughter, where there was no intention to kill or do grievous bodily harm, criminal responsibility would not attach if death as a direct consequence of his actions was not reasonably foreseeable by a person unaware of some physical weakness of the deceased. His argument was unsuccessful in the High Court.

5.86 McTiernan J said:¹³⁴

What is missing is proof of an accidental cause of death. Certainly the blow was not an accidental occurrence; nor was the disease to her spleen such an occurrence. The defence of accident must fail because the deceased struck the blow intentionally and it directly and immediately caused the injury to Donate-Silu from which she died. The blow was the sole cause of her death.

5.87 Taylor and Owen JJ said:¹³⁵

If, as here, death is the immediate and direct result of an intentional blow, the fact that the person struck has some constitutional defect, be it an enlarged spleen or an egg-shell skull, unknown to the person striking the blow and which makes the recipient of the blow more susceptible to death than would be a person in normal health does not enable an accused to assert that he is being sought to be made criminally liable for an 'event' occurring by accident.

132 (1964) 111 CLR 62.

133 Ibid 64.

134 Ibid.

135 Ibid 70.

5.88 Windeyer J considered that section 23 did not depart from common law principles. The blow to the deceased was not an accident. The fact that she had an enlarged spleen was not an accident. No accidental occurrence intervened between the blow and the death. Mamote-Kulang was guilty of manslaughter:¹³⁶

The act and the intent that together make up manslaughter in a case such as this are an act which, without justification or excuse, was done with an intent to inflict some bodily harm, but not fatal harm, but which in fact cause death. If the accused did not in the exercise of his will do such an act with such an intent he is not criminally responsible. If, although he did intend to hurt, death was caused by some agency unexpectedly intervening, then again he is not criminally responsible; for in that case the death is not a consequence, in the legal sense, of his conduct. Whether that was so or not is a question of causation as a determinant of legal responsibility. It is whether there was a break in the chain of causation, and a new cause. It is a matter of remoteness of consequence ... But in the present case there was no intervening happening. Nothing other than the blow that the accused delivered was in any relevant sense the act which caused the death.

5.89 Menzies J, in dissent, took a different view. His Honour saw no reason to confine what is now section 23(1)(b) to a case where there is an intervening accidental event between the act and its consequences. In his Honour's view, an event is said to be accidental when the act by which it is caused is not done with the intention of causing it and when its occurrence as a consequence of such act is not so probable that a person of ordinary intelligence ought under the circumstances in which it is done to take reasonable precautions against it. In the present case, the deceased's death was the unusual event of the blow, and her killing was excused under section 23:¹³⁷

Death due to an accidental blow is an event occurring by accident and so it seems to me is death from an intentional blow which was not intended to harm and was apparently unlikely to harm – such, for instance, as a friendly slap on the back or a fair blow in a boxing contest. Football too provides many occasions for heavy physical contact with the intention of stopping an opposing player. Where a blow, a tackle or a bump causes death because of an idiosyncrasy of the deceased, it is not the idiosyncrasy which is the accident; it is the surprising consequence of slapping, striking, tackling or bumping someone with an unknown idiosyncrasy ...

5.90 This dissenting view accords with the current, post *Van den Bermd*, approach to the application of the excuse (subject to section 23(1A)), and avoids the need to determine whether the consequence of an act is a 'supervening' or 'intervening' accidental event.

5.91 From the point of view of the majority, accident was not available as an excuse because the blow struck was fatal – not because the deceased had a particular weakness.

136 Ibid 83.

137 Ibid 72.

R v Hansen¹³⁸

5.92 Hansen was convicted of the murder of Rose Clark. He entered her house, intending to steal from it. He carried a loaded rifle, with which he intended to shoot wallabies. He found money in a purse. He put the money in his pocket. He heard the deceased say 'Who's there?' At trial, he said he did not know what happened, but that the next minute, blood was coming out of the deceased's chest – the gun just went off. He said he had no intention to shoot, kill or hurt the deceased in any way.

5.93 The deceased had been shot in the back. There was evidence that the rifle would go off easily, including by banging the butt on the floor or by being hit on the butt.

5.94 Hansen appealed against his conviction. At his trial, Philp J directed the jury that, if Hansen's story were true, then it would be death by accident,¹³⁹ or at the most, manslaughter due to his criminal negligence in having a loaded rifle in his hand in such a way that it could injure the deceased. On appeal, Hansen argued that this direction did not deal with unwilled acts¹⁴⁰ and inadequately dealt with events occurring by accident.

5.95 Jeffriess and Wanstall JJ agreed with Hart J that, in the light of *Martyr*, the excuse of accident was not relevant in this case at all. Hart J said, 'If Mrs Clark was killed at all by the appellant, it was by the direct result of his actions, there was no supervening event and there is no room for the application of the second part of the section'.¹⁴¹

R v Dabelstein¹⁴²

5.96 Dabelstein inserted a sharp pencil into the vagina of his partner. He said it was an act done on the spur of the moment. His intention was to allow her to achieve sexual satisfaction. The pencil lacerated her vaginal wall, and she bled to death.

5.97 The trial judge told the jury that, if the deceased died as a result of what Dabelstein had done, then he had killed her, and unless that killing was authorised, justified or excused in some way, the killing would be manslaughter. His Honour told the jury that it was not authorised or justified, nor was it an accident in any way. Dabelstein was convicted of manslaughter.

138 [1964] Qd R 404.

139 Philp J's approach in this case, and in the cases of *Knutsen* and *O'Halloran* suggests that his Honour was intending to confine *Martyr* to its facts.

140 That is, s 23(1)(a).

141 [1964] Qd R 404, 413.

142 [1966] Qd R 411.

5.98 Dabelstein appealed against his conviction, arguing, among other things, that he was entitled to have the excuse of accident left to the jury.

5.99 Hanger J considered in detail the High Court decisions *Vallance v The Queen*¹⁴³ and *Mamote-Kulang of Tamagot v The Queen*,¹⁴⁴ but his Honour found himself unable to obtain any authoritative test from them about the application of section 23. His Honour felt that the decision in *Mamote-Kulang* must be confined to its particular facts. His Honour considered the meaning of section 23 (and therefore its application) unsettled.¹⁴⁵

5.100 In reaching a conclusion about the interpretation of section 23, Hanger J made the following comment:¹⁴⁶

The common law made a man who caused only a bruise by a wrongful punch guilty of common assault, but him whose victim had something the matter with his brain and died from a similar punch, guilty of manslaughter, liable to imprisonment for life. Such a distinction in a civilised criminal code is ludicrous;

...

5.101 And later:¹⁴⁷

Why is it necessary that there should be some agency supervening between a willed blow and a death to constitute the death an event which occurs by accident? The event is *ex hypothesi* the result of the blow in the circumstances; the blow being given, death follows because (a) the victim had an enlarged spleen; (b) the victim had a weak heart; (c) the victim was pushed by the blow onto a haystack which contained an upturned pitchfork; (d) the victim was pushed by the blow into the path of an oncoming car which rounded the corner of a road in the country; (e) the victim was pushed by the accused so that he staggered into the path of falling debris from building operations. What is the basic difference between these cases which makes one an occurrence by accident and not another? That in one case something was in fact moving, and in another case it was not, does not seem to me to matter. A set of circumstances existed in each case: the blow or push operated in those circumstances and produced the result. Effect followed cause as it always does. A motor car coming round a corner, falling debris, and an enlarged spleen or an eggshell skull are each of them equally part of the circumstances in which a blow or a push operates. There is no reason for distinguishing amongst them; to make a distinction for purposes of the criminal law has no justification.

5.102 In his Honour's opinion, a defence based on section 23 was open to Dabelstein. It was not put to the jury and the verdict of manslaughter could not stand. However, his Honour was in the minority in the result. His Honour's view reflects the current law (subject to section 23(1A)).

143 (1961) 108 CLR 56.

144 (1964) 111 CLR 62.

145 [1964] Qd R 404, 422–3.

146 *Ibid* 424.

147 *Ibid* 427–8.

5.103 On the section 23 argument, Wanstall J adopted the foreseeability test: the application of accident depended on whether the fatal penetration of the vaginal wall was unforeseen and could not reasonably have been foreseen. His Honour noted that the trial judge did not direct the jury to that aspect of section 23 but, in his Honour's opinion:¹⁴⁸

... it was not open to the jury to take any other view than that a person of ordinary intelligence ought to have foreseen that a sharpened pencil thrust into the vagina of the deceased in the way described and demonstrated by the appellant, would probably penetrate the vaginal wall and its blood vessels, and that death would probably result from that bodily injury unless prevented by proper care and treatment. The appellant had not suggested the contrary, but in raising [the] excuse had confined himself to the question whether the deceased's consent (if she did consent) would have excused his act – an untenable argument. The non-direction is therefore immaterial and the learned judge was right in telling the jury in effect that there was no justification or excuse open on the facts.

5.104 Wanstall J was satisfied that there had been no miscarriage of justice. Stable J reached a similar conclusion, without discussing section 23, and the appeal was dismissed.

5.105 Hanger J was of the view that criminal responsibility ought to depend on the nature of the act, and any distinction based on unforeseeable consequences was 'ludicrous'.¹⁴⁹

5.106 Philp J in *Callaghan* similarly considered that basing criminal responsibility on the nature of the blow, not its unintended consequences, was 'quite consistent with one's notion of justice'.¹⁵⁰

5.107 The issue is perhaps complicated by considering it in the context of death which has followed a punch, because a punch is an unlawful act, and assumes a blameworthy defendant. It must be remembered that any change to the availability of the excuse of accident will affect a person whose willed act is lawful, friendly or playful.

5.108 Consider the issue where the willed act is not unlawful, but where death is the immediate and direct result of a lawful act. Menzies J gives examples in *Mamote-Kulang* such as a friendly slap on the back, a fair blow in a boxing contest or a fair tackle in a football match. If an ordinary person would not reasonably have foreseen death as a possible outcome of that sort of lawful act, should the actor be held criminally responsible for death, through a conviction for manslaughter followed by penal sanctions? Under the current law, they would not be criminally responsible. Under a 'direct and immediate' test of criminal responsibility, they would be.

148 Ibid 429.

149 Ibid 424.

150 [1942] St R Qd 40, 50.

5.109 It may be suggested that any perceived harshness in the outcome of a direct and immediate test of criminal responsibility could be redressed by an appropriately lenient sentence where the willed act was lawful, and the tragic consequences unexpected. As against that argument, it may be suggested that the fact of conviction for manslaughter per se, and the stigma attaching to it, must not be trivialised, whatever the ultimate sentence imposed.

Timbu Kolian v R¹⁵¹

5.110 Timbu Kolian had been arguing with his wife. Tired of the argument, he went outside in the dark some distance from their house. His wife followed him to continue the argument. It was so dark, he could not see her, but he could judge from the sound of her voice where she was. He could stand no more of what, to him, was her 'nagging',¹⁵² and he decided to physically chastise or beat her.

5.111 He picked up a stick, which was not heavy, and aimed a blow at her. Had Timbu Kolian's blow struck her, it would have hurt her, but would not have done her physical harm. Unknown to Timbu Kolian, she was carrying in her arms their five month old son. The blow landed on the baby and killed him. Timbu Kolian was convicted of the manslaughter of his son.

5.112 The trial judge (who sat alone without a jury) considered that, in accordance with *Mamote-Kulang v R*,¹⁵³ he could not accept the submission that the baby's death was an event which occurred by accident.

5.113 Timbu Kolian appealed against his conviction on several grounds, including that the event – the death of the infant – occurred by accident. Neither Timbu Kolian nor a reasonable man placed as he was did or could have foreseen that the blow aimed at his wife would kill his son.

5.114 His appeal to the High Court was successful. Barwick CJ and McTiernan J allowed the appeal on the basis that the striking of the child on the head was the relevant act for the purposes of section 23(1)(a). That act was not his willed act, and he was not therefore criminally responsible for it. Menzies J and Owen J (with whom Kitto J agreed) allowed the appeal on the basis that the baby's death was an event which occurred by accident. Timbu Kolian's conviction for manslaughter was quashed.

5.115 Windeyer J's discussion of criminal responsibility is particularly apposite to the issues raised in this reference. His Honour said:¹⁵⁴

151 (1968) 119 CLR 47.

152 Ibid 48 (Barwick CJ).

153 (1964) 111 CLR 62.

154 (1968) 119 CLR 47, 63.

In general, criminal responsibility is today attached to moral blame. And according to deep rooted beliefs blameworthiness does not depend simply on what a man did, or on the results his actions caused. It depends upon his knowledge and his intentions when he acted – or upon his advertence to the possible outcomes of what he was doing or was about to do, or his careless ignoring of them. That of course is trite. The doctrines of mens rea in the common law and of *dole* in the law of Scotland express this element in guilt. I see no reason for thinking that s 23 demands any departure from this basic concept or that it at all attenuates it ...

5.116 His Honour had no hesitation in concluding that the striking of the child causing death was an event which occurred by accident within the meaning of section 23:¹⁵⁵

An event in s 23 clearly means a happening for which an accused person would be criminally responsible if it did not occur by accident and he was not otherwise exonerated. Therefore an event in this context refers to the outcome of some action or conduct of the accused, for a man cannot be responsible for an event in which he had no part at all; and it would be unnecessary to say so.

As to accident, for centuries courts and the great writers on the criminal law have spoken of misadventure or accident as, by the common law, excusing a homicide. There is no reason ... to seek for any new meaning for an old word now appearing in the Code and expressing an old idea. The only change which the Code has made is that whereas by the common law misadventure excused only a homicide which was not associated with an unlawful act, the Code provides that an accidental event is never of itself punishable, and it is immaterial whether it arose out of the doing of an unlawful act or of a lawful act. The only question then is, was the killing of the child 'an event which occurred by accident'?

... In the light of the decision in *Vallance's* case, it can now be said that an event occurs by accident if it was not intended, not foreseen, and unlikely, that is not reasonably to be foreseen as a consequence of a man's conduct.

In the present case the striking of the child causing his death seems to me to answer the description of an event which occurred by accident.

5.117 Owen J arrived at his conclusion by reasoning that Timbu Kolian's aiming the blow at his wife was intentional, but before it reached its target, a wholly unexpected and unforeseeable event intervened. The child's head intercepted the blow aimed at his wife. The fact that the blow struck the child was held to be an event which occurred by accident.

5.118 A modern fact finder, applying the reasonably foreseeable consequence test, might reach a different conclusion about whether it was reasonably foreseeable that a mother might be holding her infant child in her arms, who might be struck by a blow intended for the mother, and who would be more susceptible to serious harm from that blow. A foreseeability test allows changing community perceptions to be taken into account in decisions about criminal responsibility.

155

Ibid 66–7.

Kaporonovski v R¹⁵⁶

5.119 Kaporonovski was charged with unlawfully doing grievous bodily harm to Bajric. He was convicted. The trial judge had not directed the jury on accident. After his conviction, the trial judge stated a case for the Court of Criminal Appeal,¹⁵⁷ asking two questions: one about accident, and the other about provocation. The accident question was whether the defence was available on the evidence in this case. The Court of Criminal Appeal said it was not. Kaporonovski sought special leave to appeal that decision to the High Court.

5.120 Bajric wrongfully insulted Kaporonovski. Kaporonovski said that he became very upset and struck Bajric. He took hold of Bajric's wrist, and pushed against Bajric's hand. Bajric pushed back with his hand. Bajric was holding a glass of beer. Kaporonovski pushed Bajric's hand back towards Bajric's face. The glass broke against Bajric's eye. Bajric suffered a laceration and serious eye injury, amounting to grievous bodily harm.

5.121 McTiernan ACJ and Menzies J said:¹⁵⁸

Here the event for the purposes of the section is the grievous bodily harm suffered by Bajric. The act, for the purposes of the section, is the forcing of the glass against and into Bajric's face.

That event did not happen by accident. It was the obvious, natural and probable consequence of the act. That act did not occur independently of the exercise of the will of the applicant. What he did was done deliberately.

...

The Court of Criminal Appeal were correct in deciding that the ... question should be answered 'No'.

5.122 Walsh J also found that section 23 did not apply.

5.123 After reviewing the authorities, Gibbs J said:¹⁵⁹

It must now be regarded as settled that an event occurs by accident within the meaning of the rule if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person: See *Vallance v The Queen*, *Mamote-Kulang v The Queen*, *Timbu-Kolian v The Queen*, and *Reg v Tralka*. It is impossible to say that the grievous bodily harm was so unlikely a consequence of pushing a glass forcibly towards his face that no ordinary person would reasonably have foreseen it – indeed no very strong argument was advanced to the contrary. (notes omitted)

156 (1973) 133 CLR 209.

157 Under s 668B of the Criminal Code (Qld).

158 (1973) 133 CLR 209, 215.

159 *Ibid* 231.

5.124 His Honour concluded that section 23 did not apply, and the question was answered correctly by the Court of Criminal Appeal.

5.125 His Honour's definition of an event which occurs by accident, set out above, was followed in *R v Van den Bemd*¹⁶⁰ and is the source of part of the general directions on accident contained in the model Bench Book directions.

VAN DEN BEMD AND POST VAN DEN BEMD CASES

***R v Van den Bemd* (in the Court of Appeal)¹⁶¹**

5.126 The decision of the Court of Appeal and the High Court's refusal of special leave from it are central to this discussion. The Court of Appeal decision only will be discussed within this chronology. The High Court decision is discussed separately below.

5.127 Van den Bemd was convicted of unlawfully killing Alan Bankier. They got into a fight at a public bar at a hotel in Toowoomba. Eye witnesses saw Van den Bemd strike the deceased at most two blows about the face. However, a post mortem examination revealed subcutaneous bruising within the neck muscles. Death was the result of subarachnoid haemorrhage associated with the impact which caused the bruising within the neck muscles. The guilty verdict was explicable on the basis that, despite what eye witnesses had seen, Van den Bemd struck the deceased on the side of the neck rather than on the face.

5.128 At the trial, defence counsel asked the trial judge to instruct the jury on accident. The trial judge refused to do so, holding that section 23 had no application where the blow struck by the offender was a willed act, and the death was a direct result of it. That ruling was consistent with *R v Martyr*. The correctness of *Martyr* was challenged on appeal.

5.129 The Court of Appeal considered *Martyr*, *Mamote-Kulang*, *Hansen*, *Tralka*, *Knutsen*, *Timbu-Kolian*, and *Ward v R*¹⁶² (a Western Australian case).

5.130 Those cases were not easy to reconcile, and the Court considered them 'in disarray'.¹⁶³ However, *Kaporonovski v R*¹⁶⁴ was a decision of the High Court subsequent to those decisions. Four of the five judges of the High Court in *Kaporonovski* held that, for the purposes of section 23, the 'act' was pushing the glass into Bajric's face, and the 'event' was the grievous bodily harm that

¹⁶⁰ [1995] 1 Qd R 401.

¹⁶¹ *Ibid.*

¹⁶² [1972] WAR 36.

¹⁶³ [1995] 1 Qd R 401, 403.

¹⁶⁴ (1973) 133 CLR 209.

ensued as a consequence. Section 23 did not provide Kaporonovski with a defence, because the act was willed and the event was a reasonably foreseeable consequence of the act.

5.131 The Court of Appeal concluded that the test under section 23 was one of the foreseeability of the likelihood of the consequence as a matter of probability or likelihood. In the face of the reasoning in *Kaporonovski, Martyr* was no longer good authority:¹⁶⁵

The test of criminal responsibility under s 23 is not whether the death is an 'immediate and direct' consequence of a willed act of the accused, but whether death was such an unlikely consequence of that act an ordinary person would not reasonably have foreseen it.

5.132 To establish guilt, the Prosecution had to negative, or overcome, the defence. The jury should have been asked to consider whether they were satisfied, beyond reasonable doubt, that death was not such an unlikely consequence of the punches that an ordinary person in the position of the accused could not reasonably have foreseen it. The appeal was allowed, Van den Bemd's conviction was quashed, and a re-trial was ordered.

5.133 Van den Bemd was re-tried and acquitted in September 1994.

5.134 At least at face value, it is possible to say that accident made the difference in this case.

Griffiths v R¹⁶⁶

5.135 Griffiths was convicted of manslaughter. He unsuccessfully appealed against his conviction to the Court of Appeal. By special leave, he appealed to the High Court.

5.136 Griffiths and John Apps (the deceased) were 16 years old. They were best friends, in the same class at high school. Apps went missing on 28 November 1989. He had been living with his father in a caravan park at Caboolture. In November 1990, his remains were found in the Glasshouse Mountains, not far from his home. There was a bullet hole in the back of his skull. It was probably from a .22 calibre rifle. It was possible that it was fired from his father's rifle, which went missing at the time of his disappearance. No rifle was found. His bicycle and backpack were found near his body.

5.137 Griffiths was charged with his manslaughter. The evidence against him came from two girls, Jodie Parker and Leeanne Clack. Parker gave evidence that after the deceased's body was found, Griffiths said to her, 'I know whose body is up in the mountains. I know whose it is and I was the one that killed

¹⁶⁵ [1995] 1 Qd R 401, 405.

¹⁶⁶ (1994) 125 ALR 545.

him. If you tell anybody, I'll do the same to you. Clack said Griffiths, her friend, told her, 'I shot [or I killed] John. It was an accident. I didn't mean to do it.'

5.138 The trial judge left the case to the jury on the simple basis that, if they were satisfied beyond reasonable doubt that Griffiths' admissions to Parker and Clack were truthful, they should convict. His Honour told the jury:¹⁶⁷

The Crown does not contend that the accused killed the deceased for any particular reason or with any particular intention or whatever. It does not have to do that and it does not do that and you should be very clear about that. Any killing of the deceased could, for argument's sake, have arisen through the careless handling of a rifle. You might think that if the accused did kill the deceased, then that is the most likely explanation, but you need not and really should not wonder about those things, because it involves entering into a field of speculation.

5.139 His Honour also told the jury that the evidence did not raise matters of authorisation, justification or excuse. His Honour accordingly withdrew from the jury any issue arising under section 23 or section 289.

5.140 The main argument before the Court of Appeal was whether the evidence was sufficient to establish that Griffiths had killed the deceased. Section 23 was raised as a subsidiary point. Fitzgerald P thought that the evidence was insufficient to sustain the verdict. The majority (Pincus and Davies JJA) disagreed. Their Honours also said that a bald statement that death was an accident was not enough to throw upon the Crown the burden of excluding section 23.

5.141 In the High Court, in relation to accident, Brennan, Dawson and Gaudron JJ observed that the onus of negating section 23 rested on the Crown. If Griffiths in fact fired the bullet which entered the deceased, his criminal responsibility for manslaughter depended on proof that (i) the act of firing the bullet was willed or voluntary and (ii) that the death of the deceased did not occur by accident: it was a foreseen or foreseeable result of that act; or alternatively, that the deceased was killed by criminal negligence.

5.142 The plea of not guilty put all elements of the crime charged in dispute. The trial judge erroneously withdrew the crucial issues from the jury.

5.143 Brennan, Dawson and Gaudron JJ said:¹⁶⁸

In the present case, on the view of the evidence adopted by the majority, two schoolboys, best friends without any evidence of hostility between them, were out in the mountains together with a gun; the gun went off and killed one boy and the other went away and tried to lay a false trail about the incident but, when acknowledging that he shot or killed the other, said it was an accident. On that evidence, the possibility that death was due to 'accident' – stumbling when the gun was cocked and loaded or some other kind of accident – was

167 Ibid 546.

168 Ibid 550.

clearly raised. Evidence that the appellant gave false or different stories about his contacts with John Apps did not disprove that John's death was caused by 'accident' ... The burden of disproof that rested on the Crown was substantial, not merely formal. To establish that the appellant was the person who had the gun when the fatal shot was fired, the Crown relied, *inter alia*, on the admission he made to Leeanne Clack. The Crown had to take that statement as a whole so that the version of facts that it contained at once implicated and tended to exculpate the appellant. The evidence clearly raised the issues to which s 23(1) relates.

5.144 The trial had miscarried. The appeal was allowed and the conviction was quashed. The Crown did not seek a re-trial. Their Honours also referred to the following statement of the majority of the Court of Appeal about the Crown's onus of excluding the application of section 23:¹⁶⁹

Since there was no possible means of telling how the bullet came to be discharged, it is impossible to see how the Crown could have discharged such an onus and, if the jury took a direction placing the onus as to accident on the Crown seriously, the result must have been an acquittal.

5.145 Deane and Toohey JJ agreed that the directions to the jury were inadequate, and that the appeal should be allowed, but their Honours took a more serious view of the facts and concluded that the killing was at the very least the result of criminal negligence.

R v Taiters¹⁷⁰

5.146 This was a reference by the Attorney-General under section 669A(2) of the Criminal Code (Qld). The Attorney-General sought the Court of Appeal's consideration and opinion of the following questions:¹⁷¹

1 Whether when a person is charged with manslaughter it is necessary for the Crown to prove beyond reasonable doubt that an ordinary person in the position of the accused could have foreseen that death was a probable or likely consequence of his or her actions?

2 Whether when a person is charged with manslaughter it is a correct direction of law that an accused is not responsible for a death which follows from his or her actions if death was such an unlikely consequence of his or her actions that an ordinary person could not reasonably have foreseen it?

5.147 On Christmas Eve 1993, Taiters and Cooper got into a fight in the street. Taiters struck Cooper. He fell heavily and struck his head on the cement footpath. Cooper was taken to hospital, but he was allowed to leave. Certain symptoms persisted and, upon his return to hospital, it was discovered that his skull had been fractured. Despite treatment, he died on 3 January 1994.

¹⁶⁹ Ibid 551.

¹⁷⁰ [1997] 1 Qd R 333.

¹⁷¹ Ibid 333–4.

5.148 Taiters was charged with manslaughter. The Crown led its evidence. The trial judge said he would direct the jury that Taiters should be acquitted on the basis that it was not open to them to be satisfied beyond reasonable doubt that the accused was guilty of manslaughter. At that indication, the Crown sought a return of the indictment, entered a *nolle prosequi* and referred the questions above to the Court of Appeal.

5.149 It was suggested at the reference that trial judges experienced difficulty giving correct and clear directions to juries about accident. The Court (Macrossan CJ, Pincus JA and Lee J) reviewed the relevant authorities, and the history of the section and said:¹⁷²

It has to be said that an event cannot qualify as an accident within the meaning of s 23 simply because a reasonable person, although regarding the consequences as being a likely outcome, would have thought it more probable that it would not happen than that it would The discussion may be carried further and instances at either end of the spectrum looked at. If the outcome of some action is regarded as certain or even more probable than not it cannot legitimately be called accidental. Even if there is a substantial likelihood although something less than a preponderance of probability that a particular outcome will occur and the risk of the outcome is voluntarily accepted by the one acting, it should not, if it results, be called accidental. On the other hand, something which a reasonable man might think of as no more than a remote possibility which does not call to be taken into account and guarded against can when it happens, be fairly described as accidental.

The references which have been made in the cases to 'reasonably' and 'ordinary person' in the context under discussion, give an emphasis to the fact that the relevant test calls for a practical approach and is not concerned with theoretical remote possibilities. It directs inquiry to what would be present in the mind of an ordinary person acting in the circumstances with the usual limited time for assessing probabilities, this being a factor which is applicable to a great deal of human activity. However, it should not be accepted that some real risk of an outcome which an ordinary person in the circumstances would have been conscious of, can be disregarded by the doer of the action, yet still, if it eventuates, be called accidental within the meaning of the section. In the subjective part of the expression ... ('an event which occurs by accident') ie when it is necessary to consider 'foreseen' by the accused, the same degrees of likelihood will be regarded as those discussed in connection with the objective test.

5.150 In summary, the Court held that the applicable onus would be sufficiently stated if the jury were told:¹⁷³

The Crown is obliged to establish that the accused intended that the event in question should occur or foresaw it as a possible outcome, or that an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome.

172 Ibid 338.

173 Ibid.

5.151 The questions referred were answered 1 'No'; and 2 'Yes'. Accordingly, to be guilty of manslaughter, the jury did not have to be satisfied beyond reasonable doubt that Cooper's death was a *probable or likely* consequence of Taiters' blow – just that his death was reasonably foreseeable as a *possible outcome* of the blow.

5.152 Taiters pleaded guilty to assault occasioning bodily harm on 19 June 1997 before Cullinane J. By inference, the Crown must have accepted that it could not exclude accident: that in the circumstances, the death of the deceased was such an unlikely consequence of the punch that an ordinary person could not reasonably have foreseen it.

R v West¹⁷⁴

5.153 West was convicted of doing grievous bodily harm. He pushed the female complainant to the footpath outside a nightclub. The complainant gave evidence that West pulled her to him, then pushed her, causing her to fall backwards onto the footpath. She saw his right foot being lifted as if to kick her in the face. She put her right arm up to protect her face, and his leg hit her right arm, fracturing it. Such an injury amounts to grievous bodily harm.

5.154 He appealed against his conviction to the Court of Appeal, arguing that the trial judge should have directed the jury on accident, in accordance with *Taiters*.

5.155 Pincus JA and Lee J concluded that nothing sensible could have been said by the trial judge about foreseeability. West aimed a very hard kick at the complainant's head. The kick was hard enough to caused fractures to her arm. The result was foreseeable. Fryberg J agreed. Section 23 was not raised on the facts.

R v Auld¹⁷⁵

5.156 Auld was convicted of unlawful wounding. The facts are summarised succinctly in the judgment of McPherson JA:¹⁷⁶

[U]sing a Wiltshire Staysharp knife, the appellant inflicted a cut (which required suturing) on the calf of the complainant's right leg. Before doing that, he had said he was going to kill her, and had drawn the knife across her throat, but without breaking the skin, and threatened to cut off her fingers.

At the time of the offence, the complainant was sitting down. The appellant was standing in front of her. He turned around, she said, and faced away from her. As he did so, she lifted her right leg up and crossed it over her left leg. He then

174 [1996] QCA 472.

175 [1997] QCA 202.

176 *Ibid* 1.

turned back again and, bringing his hand down, struck her with the knife in the leg causing the wound complained of. Before he did that, the knife, she said, was in his hand held up near his head. He brought it down upon her in what she described as 'one motion'. Her detailed testimony about how the knife struck her was not contradicted by the appellant, whose evidence was that he was absent when she was cut.

According to the complainant's account, when the appellant saw what he had done, he said 'I didn't mean to do it' ...

5.157 Auld appealed against his conviction to the Court of Appeal, complaining that the trial judge failed to direct the jury on accident.

5.158 McPherson JA considered that it may have been better had the trial judge directed the jury on accident, but the omission to do so could not be said to have deprived the appellant of a fair chance of acquittal. No ordinary person in Auld's position could possibly have been left in any doubt that wounding the complainant was a reasonably foreseeable outcome of bringing the knife down in her direction, seated as she was right in front of him. Her crossing her legs did not perceptively alter the risk that he would strike her when he turned around. It was not so unlikely a movement that an ordinary person would not have foreseen it. Accident was not fairly raised by the evidence at trial. The appeal was dismissed. The other members of the Court concurred.

R v Camm¹⁷⁷

5.159 Camm was convicted of doing grievous bodily harm to Ronald Nethercott. Nethercott was employed by Camm as a caretaker on a grazing property. He had the right to live in a house on the property with his wife and daughter.

5.160 Nethercott and his family left the property for a couple of weeks in January 1997. When they returned on 25 January 1997, he found that someone had used the house, and left it dirty and untidy. His daughter's bed had been slept in, his food had been eaten, and dirty utensils were in the kitchen sink. Camm was asleep in his lounge chair, with his boots on the coffee table. Another of Camm's employees was asleep on the lounge room floor.

5.161 Nethercott went over to Camm. They had a heated argument. At one stage, Nethercott was standing in a doorway which led from the lounge room to outside. There were steep steps down to the ground about a metre below. There was a concrete pathway at the foot of the steps.

5.162 They argued again. Camm placed one hand on Nethercott's left shoulder, and another on his left hip. He lifted him and threw him out the door. Nethercott landed on the concrete driveway. Nethercott's daughter gave evidence that he was pushed down the stairs.

177

[1999] QCA 101.

5.163 Nethercott fractured his left hip in the fall. As at June 1997, he had a 20 per cent reduction in the range of movement of his left hip.

5.164 Camm appealed against his conviction to the Court of Appeal, arguing that the trial judge should have directed the jury to consider whether the broken hip was an event which occurred by accident.

5.165 Fryberg and Muir JJ found that the test from *Van den Bemd*¹⁷⁸ admitted of only one answer. Nethercott was thrown or pushed with force from a doorway a metre off the ground. There were steep steps outside the doorway, and a concrete path below. The possibility of a broken hip was something which an ordinary person would reasonably foresee – it was far from an unlikely consequence of Camm's acts. The trial judge did not err in failing to leave accident to the jury. The appeal was dismissed. McMurdo P agreed with their Honours. Her Honour said, 'any issue about foreseeability was only theoretical and not real. In those circumstances, the trial judge was not obliged to direct upon it'.¹⁷⁹

R v Watt¹⁸⁰

5.166 Watt was convicted of doing grievous bodily harm to his 3 year old step-son. The child suffered a serious head injury which caused internal bleeding, and which must have been the result of a very severe blow to the little boy's skull. At trial, Watt denied having applied any force at all to the child.

5.167 He appealed against his conviction, arguing that accident ought to have been left to the jury. He was unsuccessful. The force necessary to cause that injury excluded any possibility that the injury suffered by the child would not have been a reasonably foreseeable consequence of the use of that force. The circumstances did not raise a defence that, if Watt did the act, its consequences could be accidental.

5.168 This case simply illustrates that the excuse of accident will not be available where it is absurd to suggest that the outcome of a willed act was not foreseeable.

R v Fitzgerald¹⁸¹

5.169 Fitzgerald was convicted of murder after a trial. He had pleaded guilty to burglary and armed robbery in company with personal violence.

¹⁷⁸ Whether grievous bodily harm was such an unlikely consequence that an ordinary person could not reasonably have foreseen it.

¹⁷⁹ [1999] QCA 101, [4].

¹⁸⁰ CA No 490 of 1998, 4 June 1999.

¹⁸¹ [1999] QCA 109.

5.170 Larry Street, Michael Turner and Alexandra Doran were living at a house at East Brisbane. On 25 January 1997, at about 11 pm, Fitzgerald came to their front door and demanded to be let in. He was with two others. He demanded marijuana. He forced his way into the house. He was carrying a sawn-off shotgun which was loaded and ready to fire.

5.171 There was shouting and confusion, and Fitzgerald ordered Street, Turner and Doran to lie on the floor. He pulled Street to his feet, and forced him into the dining room. He repeatedly struck him about the head with the butt of the gun while screaming 'Where is it? Where is it? Where are the drugs? Where is the money? Where is it? I want it now'. Street produced some money and cannabis. Then Fitzgerald clubbed him with the gun until he was knocked unconscious.

5.172 Meanwhile, Turner and Doran were on the floor of the lounge room. Doran was holding her dog, which was barking. One of the intruders said 'Shut the dog up, or we will shoot it'. Fitzgerald approached Doran and said 'See this' – indicating his shot gun. She gave him the finger and told him to 'fuck off'. Fitzgerald poked the gun at the left side of Doran's head. It suddenly went off and she was killed by a single shot which destroyed her head.

5.173 Fitzgerald told police that he was the one who fired the shot. He said he did not mean it – the gun just went off – he was not a killer. He said he had only intended to scare Doran. He admitted that the gun was loaded and ready to fire, and that his finger was on the trigger when he put the gun to Doran's head. He did not remember pulling the trigger.

5.174 Fitzgerald appealed against his conviction for murder, arguing that the summing up contained misdirections, including misdirections on accident.

5.175 Fitzgerald may have been convicted of murder under section 302(1)(a) of the Criminal Code (Qld): killing, intending to kill or do some grievous bodily harm to another, or under section 302(1)(b) of the Code: death caused by an act done in the prosecution of an unlawful purpose, which act is of such a nature as to be likely to endanger human life.

5.176 McPherson JA, with whom Davies JA and White J agreed, explained that, on a charge of murder under section 302(1)(a), the Prosecution had to prove the requisite intention, and accident was of no relevance to a charge of murder in this form. A death cannot be regarded as an event which occurs by accident if death or grievous bodily harm was intended by the offender.¹⁸²

It is true that, after the incident, the appellant said he did not mean to kill Ms Doran and that his doing so was an accident. There was also evidence from Mr Turner, who saw what happened, that the shooting appeared to him to be an accident. But that, as Latham CJ explained in *R v Mullen* (1938) 59 CLR 124, 128–129, did not raise a claim to exemption from criminal responsibility based

182

Ibid [10]–[11].

on 'accident' within the meaning of s 23(1)(b). Speaking of s 23 (as it then was) his Honour said (at 128–129):

'In some case this section may operate so as to provide an excuse for an act which would otherwise be criminal, but it is unnecessary to have recourse to the section in the case of wilful murder, where by the statutory definition itself, intention is expressly made a necessary element in the offence ... It is sufficient to ask what rule is to be applied when a defence of accident is raised to a charge of murder. A defence of accident in a murder case is really a contention that the Crown has not proved the essential element of intention of the crime charged.'

...

The appellant's claim that the firearm discharged, and that Ms Doran was killed 'by accident', was in relation to the charge of murder under s 302(1)(a), therefore not something that raised a claim to be excused under s 23(1)(b) of the Code. His statement that what had happened was accidental nevertheless amounted to evidence for the jury to consider in deciding whether the Crown had succeeded in proving beyond doubt that the appellant had intended to cause death or grievous bodily harm to the victim.

5.177 His Honour explained that, if the jury were not satisfied beyond reasonable doubt that there was such an intention, then they had to consider murder under section 302(1)(b). There was no doubt that Fitzgerald was 'in the prosecution of an unlawful purpose' (armed robbery) when Doran was killed. What remained to be proved was that her death was caused by means of an act of such a nature as to be likely to endanger human life. The relevant act was Fitzgerald's presenting the loaded firearm, with his finger on the trigger, to the head of Ms Doran. Section 23(1)(a) fell to be considered in relation to that act – but there was no evidence which suggested that that act was something which occurred independently of the exercise of Fitzgerald's will.

5.178 His Honour then considered the application of section 23(1)(b) to murder under section 302(1)(b):¹⁸³

For my part, I have some difficulty in seeing how s 23(1)(b) and s 302(1)(b) can be read in conjunction in a case like this. The intention of s 302(1)(b) seems rather to be that, once it is established that an act was done of such a nature as to be likely to endanger human life, then the offender is guilty of murder if death is caused 'by means of' that act, irrespective of whether or not the ensuing event or result (ie the death) occurs by accident, subject always to proof of the element that the act was done in the prosecution of an unlawful purpose. My impression of what was said by Pincus JA in *Hind & Harwood*¹⁸⁴ is that he adopted the same view of the matter in saying, as he did there, that it would have been perverse of the jury, once satisfied that Hind's act of pointing the loaded firearm was of a nature likely to endanger human life, to find that the ensuing death was nevertheless so unlikely a consequence that an ordinary person could not reasonably have foreseen it. Once the firearm (for whatever

183 Ibid [17].

184 (1995) 80 A Crim R 104.

reason) discharged, it was, at that range, practically inevitable that death would be caused to the person to whom it was pointed. There was therefore very little room for the application of s 23(1)(b) to the facts of the present case. On any view of it, death was a foreseeable outcome, which, briefly stated, is the test that is now to be applied in relation to 'accident' under s 23(1)(b).

There is, however, binding authority to the effect that s 23(1)(b) is capable of operating in conjunction with s 302(1)(b). ...

... it remained a matter that it was for the jury to determine ...

5.179 The jury had to address the question whether the death that resulted from the discharge of the firearm was an event that occurred 'by accident' by an objective assessment of the likely danger to human life of presenting a loaded firearm, with the safety catch off and a finger on the trigger, to the head of another person, and from only a short distance away. His Honour said,¹⁸⁵ 'The event in this instance was the death of Ms Doran. To my mind, there could have been only one answer to that question'. The verdict was inevitable, and the appeal was dismissed.

R v Francisco¹⁸⁶

5.180 Francisco was convicted of doing grievous bodily harm. He was a bouncer at the nightclub of the Mooloolaba Hotel. The complainant was a drunk patron. He had previously been evicted, and was attempting to re-enter the nightclub.

5.181 The hotel entry was a fairly wide opening, with two brick steps leading from the footpath to an open foyer. Francisco was approached from behind by the complainant. He said that out of the corner of his eye, he saw the complainant approach him in an intimidating manner. He said he just flung his arm back at the complainant. It connected, and the complainant was propelled backwards. The back of his head hit the footpath, and he suffered an extra dural haematoma which amounted to grievous bodily harm.

5.182 At trial, Francisco relied upon self-defence, not accident. He appealed to the Court of Appeal against his conviction, arguing that the trial judge should have left the accident defence to the jury. His appeal was not successful.

5.183 The Court said that the issue of accident does not properly arise for a jury's consideration if there is nothing in the evidence to suggest that there was a reasonable possibility that the event occurred by accident. Francisco's blow was a willed act. Plainly an ordinary person in his position must have been reasonably able to foresee as a possible outcome that a deliberate blow to the head, with sufficient force to propel the complainant from the raised level onto

185 Ibid [28].

186 [1999] QCA 212.

the footpath, might result in the complainant falling backwards down the stairs and suffering an injury like the one he received.¹⁸⁷

R v Grimley¹⁸⁸

5.184 Grimley was convicted of doing grievous bodily harm. The Crown case was that, for no good reason, Grimley punched the complainant Zidar in the jaw, breaking it. Zidar said the blow was forceful enough to knock him down, and break his jaw in two places. The Crown led evidence that Grimley told police that he hit Zidar once. At trial, Grimley's instructions, revealed by the cross-examination of the complainant, were that he had not punched Zidar at all.

5.185 Grimley appealed against his conviction, arguing that the defence of accident should have been left for the jury. Pincus and Davies JJA said that if the jury accepted that Grimley struck Zidar on the jaw with a blow hard enough to break it, then the hypothesis that the injury was caused by accident was fanciful. The judge was right in not directing the jury about it, and the appeal against conviction was dismissed.

5.186 McPherson JA said:¹⁸⁹

It is, with respect, absurd to suggest that breaking the complainant's jaw was not a foreseeable consequence of punching him, or that it was in any sense an 'accident' in terms of s 23(1)(b). The foreseeability of that consequence was perhaps one that should, and no doubt would, have been left to the jury if it had been raised in that form at the trial; but there is only one answer that could have been, or can be returned to it. As is shown by the fact in *R v Taiters*,¹⁹⁰ s 23(1)(b) does not require a minute analysis of the precise extent of the consequence, or of the exact chain of circumstances that produces the 'event' or result giving rise to the offence charged. Here there was, objectively speaking, an obvious risk that punching the complainant might break his jaw or inflict some other form of grievous bodily harm on him.

R v Day¹⁹¹

5.187 Day was a prisoner. He, and two other prisoners, entered the cell of the deceased, Topping. Paper was placed over the cell window. A cord was pulled from the television set. It was used to garrotte Topping, who died in the presence of his attackers. Day and the two other prisoners were tried for murder. Day was convicted of murder. The other two were acquitted.

187 Ibid [10].

188 [2000] QCA 64.

189 Ibid [17].

190 [1997] 1 Qd R 333.

191 [2000] QCA 313.

5.188 Day gave evidence at his trial. He said he went to Topping's cell to sort out the 'friction' between them. He said, essentially, that he put the cord around Topping's neck to threaten him. The issue of accident was left to the jury.

5.189 Day appealed against his conviction. In one of his grounds of appeal, he suggested that the case was a finely balanced one, because there was a serious issue whether the Crown had negated accident.

5.190 Thomas JA, with whom Pincus and Davies JJA agreed, said that the trial judge erred in favour of Day in leaving accident to the jury. Any ordinary person in Day's position must have been reasonably able to foresee death as a possible outcome of his violent activity. At best, Day's evidence implied that he did not intend to kill Topping. It did not come close to the area of reasonable foreseeability. No question of accident arose.

R v Stott & Van Embden¹⁹²

5.191 Stott and Van Embden were tried for murder, but convicted of the manslaughter of Jason Bettridge.

5.192 Bettridge was 27 years old. He flew from Clermont to Brisbane on 1 February 1999, for an appearance at the Mental Health Review Tribunal ('MHRT') the next day. He did not attend at the MHRT. His body was found in the Brisbane River below a bridge near Fernvale at 10 am on Wednesday 3 February 1999. The post mortem examination showed that Bettridge died of a heroin overdose. On each of his arms was a recent puncture mark.

5.193 He had travelled from the airport to Stott and Van Embden's flat at Ipswich. People were there using drugs. Bettridge said he wanted to 'score' some heroin. He complained that the heroin he had already used was having no effect, and he wanted more.

5.194 Without going into the detail of the evidence, on the Crown case, Stott and Van Embden were guilty of manslaughter because they (a) injected Bettridge with the heroin that killed him, or (b) supplied him with the heroin with which he injected himself.

5.195 In relation to the first basis upon which the jury could find the defendants guilty of manslaughter, the trial judge directed the jury that a hypodermic syringe containing a strong dose of heroin was a dangerous thing within the meaning of section 289 of the Criminal Code (Qld). If the appellants caused Bettridge's death by using the syringe to inject heroin into his bloodstream, they could be found guilty of manslaughter under section 289.¹⁹³

192 [2002] 2 Qd R 313.

193 Section 289: Duty of Persons in charge of dangerous things.

5.196 The trial judge directed the jury in accordance with appropriate authority¹⁹⁴ that criminal responsibility attached only if there was ‘criminal’ or ‘gross negligence’. The trial judge’s directions to the jury about section 289 were not challenged on appeal.

5.197 The trial judge’s directions about the second basis of liability for manslaughter were criticised on appeal. The trial judge told the jury that the Crown would be obliged to establish that the person who supplied the heroin foresaw the deceased’s death as a possible outcome of his action, or that an ordinary person in the position of the person who supplied the heroin would reasonably have foreseen his death as a possible outcome. It was argued that section 289 also applied to the second basis of liability – and the trial judge erred in leaving the Crown case of manslaughter on a basis other than criminal negligence.

5.198 This argument was not successful. McPherson JA, with whom Muir J agreed, Atkinson J concurring in the order made, said:¹⁹⁵

In the present case ... it was the provisions of s 23(1)(b), and not of s 289, that applied to the second basis for a manslaughter conviction ... It predicated that the appellants had given the syringe filled with heroin to Bettridge, rather than that they had themselves injected the heroin. Once the syringe was delivered to him for his use, they no longer had the charge or control of it, and the issue of criminal responsibility for the ensuing death of Bettridge was governed not by s 289 but by s 23(1)(b) of the Code.

5.199 The directions to the jury were therefore correct.

R v Charles¹⁹⁶

5.200 Charles was convicted of unlawfully doing grievous bodily harm to the complainant. Charles owned the nightclub at which the offence occurred. He wanted to eject the complainant (a former employee of his) from the nightclub. He pushed her into a wall and into fire doors. Charles appealed against his conviction. There was an issue about whether the injury suffered by the complainant was grievous bodily harm. Charles also argued that accident should have been left to the jury.

5.201 The Court of Appeal held that accident was not raised on the evidence:¹⁹⁷

194 *Callaghan v R* (1952) 87 CLR 115.

195 [2002] 2 Qd R 313, 321.

196 (2001) 123 A Crim R 253.

197 *Ibid* 255–6 (the Court).

If the jury concluded that the appellant forcibly pushed the complainant on several occasions into a wall so that her upper back, neck and head came into contact with the wall, the only question would have been whether or not that conduct caused the grievous bodily harm. It could hardly be contended that a reasonable person in the position of the accused would not reasonably have foreseen an injury to the upper spine as a possible outcome of such conduct.

5.202 Because of the state of the evidence about the injury, the verdict of grievous bodily harm was quashed, and a verdict of guilty of assault occasioning bodily harm was substituted for it.

R v Seminara¹⁹⁸

5.203 This case was described by McPherson JA as ‘more than usually tragic’.¹⁹⁹ Seminara and the deceased had been drinking at a surf club on the Gold Coast. The deceased was drunk. He argued with bar staff and offered gratuitous insults to a group of people, including Seminara. He was told to leave – but no action was taken to make him go. Seminara decided to remove him. He took the deceased from the bar entrance to a short flight of steps close to the entrance and pushed him down them. The step was 1.2 metres above ground. The steps were 2.2 metres long. The deceased hit his head on the tiled floor at the bottom of the stairs. He sustained a skull fracture and a subdural haemorrhage which resulted in his death. Seminara was convicted of manslaughter.

5.204 Seminara appealed against his conviction. One of his arguments concerned the trial judge’s directions to the jury on accident. During those directions, the trial judge had used the expression ‘you or me’, and this was the subject of complaint:²⁰⁰

... you’d have to ask whether an ordinary person in the position of this accused would reasonably have foreseen the death as a possible outcome or result of what he did. And in relation to that issue, you’d have regard to ... the dimensions and make-up of the stair case; the steepness ... the hard surface of the edge of the steps; carpet elsewhere; the hard surface at the foot of the steps; the distance covered by the body; the apparent state of intoxication of the deceased; and your view on the evidence of the degree of force with which the deceased was propelled to the bottom. Now, you look at those sorts of issues – you may look at those sort of issues in your assessment of whether an ordinary person – you or me – in the position of the accused that night looking at this situation would see, reasonably in advance, as it were, would reasonably foresee the death as a possible outcome or a result of what he did.

5.205 Later, the trial judge directed the jury in the following terms, which were complained of because it invited the jury to apply the ordinary man test in an artificial way:

198 [2002] QCA 131.

199 Ibid [1].

200 Ibid, as extracted from the trial transcript at [8].

So, put yourself in the position of the accused at the top of the staircase that night. You're about to push the deceased down the staircase. You pause and ask yourself being reasonable about this, what could happen? It is reasonably possible that Mr Smith [the deceased] could fracture his skull in this serious way, imperilling his brain and his life?

5.206 Both of these criticisms were rejected. McPherson JA, with whom Byrne and Philippides JJ agreed, said:²⁰¹

The question for the jury was not whether the reasonable man of the civil law of negligence would have done what the appellant did, but whether, in pushing the deceased down the stairs, an ordinary person would reasonably have foreseen the possibility that the death of the deceased might result from doing so. Because capacity to foresee depends on an individual's personal knowledge and experience, it will no doubt vary to some extent from one individual to another; but it is precisely because such variations do exist that 12 jurors randomly drawn from different walks of life are invited to use their common knowledge and experience in deciding questions of fact like that in issue here. All knowledge is empirical, and, apart from their own individual knowledge and experience, jurors have no source or standard of reference by which to divine what an ordinary person would foresee as a possible consequence of conduct like that of the appellant in the present case.

It was therefore legitimate for his Honour to direct the jury to test foreseeability by reference to an ordinary person 'like you and me' ...

5.207 Of the approach said to be artificial, his Honour said:²⁰²

His Honour was plainly not suggesting to the jury that the ordinary person would or should in fact pause and ask himself the questions suggested. It was simply a means and perhaps the only feasible means, of focusing the jury precisely on the legal point at issue, which was ... whether an ordinary person in the position of the appellant would reasonably have foreseen the possibility of death from his act of pushing the deceased down the stairs ...

5.208 The appeal against conviction was dismissed.

R v Reid²⁰³

5.209 Reid was convicted of an offence under section 317(b) of the Criminal Code (Qld), that between 1 January 2003 and 4 March 2003, with intent to transmit a serious disease to the complainant, he transmitted a serious disease to the complainant. The serious disease was the virus HIV. If left untreated, it leads to AIDS and to death within about eight years. If prescribed medication it taken regularly, the progress of HIV can be controlled. Otherwise, it is fatal.

201 [2002] QCA 131, [14], [15].

202 Ibid [16].

203 [2006] QCA 202.

5.210 From about 16 January 2003, Reid and the (male) complainant had anal sexual intercourse three or four times a week. They did not use condoms. The complainant gave evidence that Reid assured him he was not HIV-positive. Reid knew that was false. The complainant would not have had sexual intercourse with Reid had he known he was HIV-positive.

5.211 Reid appealed against his conviction. His main arguments concerned the directions to the jury about whether he had *intentionally* transmitted the HIV infection to the complainant. He argued that he might have been ‘completely irresponsible’ or ‘stupid in the extreme’ in deceiving the complainant about his HIV-status, but there was no evidence of his ill-will towards the complainant, and no evidential basis upon which the jury could have concluded that he was motivated by a desire to transmit the disease to him. Keane JA, with whom Chesterman J agreed, rejected that argument. Intent must not be confused with motive or desire. What Reid did was apt to achieve the result that the complainant would become infected. He appreciated the lethal risk of having unprotected sex with the complainant – and when he engaged in unprotected sex with the complainant, he intended the risk to come home.²⁰⁴

5.212 McPherson JA dissented. His Honour did not think the jury were properly directed about the meaning of ‘with intent to transmit’ in section 317(b). His Honour considered that Reid’s conviction ought to be quashed, and a retrial ordered. Reid had been charged in the alternative with doing grievous bodily harm. His Honour considered that alternative charge, and section 23’s application to it.²⁰⁵ His Honour illustrated the way in which the excuse might apply in these circumstances, namely, section 23(1)(b) would not operate to exempt the accused from criminal responsibility for passing on HIV if an ordinary person in his position would have realised that that result, consequence or outcome might possibly ensue.²⁰⁶

5.213 The reasonably foreseeable consequence test is flexible, in the sense that it enables the finder of fact to take into account the state of knowledge of the community at the relevant time. Consider the present case: the possibility of transmission of HIV through unprotected sexual intercourse was unknown 50 years ago, but well known now. To take another example: the possibility of dangerous behaviour under the influence of the drug Stilnox was unknown two years ago, but *may* be considered now a reasonably foreseeable outcome or consequence of the administration of that drug. The reasonably foreseeable consequence test allows finders of fact to determine foreseeability by reference to the understanding of the ordinary person in the community, as understanding changes over time.

204 Ibid [55].

205 Sexual intercourse with the complainant was clearly a willed act, and s 23(1)(a) had no application.

206 [2006] QCA 202, [16].

R v Stevens²⁰⁷

5.214 Stevens was tried for the murder of his friend and business partner, Murray Brockhurst. At his first trial, the jury were unable to agree.²⁰⁸ He was convicted at his second trial.

5.215 Brockhurst was killed by a gunshot to the head, fired from a rifle when the muzzle of it was in partial contact with his forehead. The rifle was owned by Stevens, but Brockhurst had access to it. Only Stevens and the deceased were present in the deceased's office when the shot was fired. Immediately after the shooting, Stevens called an ambulance. He said that a man had been shot in the head. When asked what happened, he said he was 'going to call it an accident for the moment'.

5.216 There was evidence that on the day of his death, the deceased was planning to tell Stevens that he wished to end their business relationship. Stevens had arranged to meet with the deceased in the deceased's office. Stevens said that when he arrived, the deceased was behind his desk, holding the rifle. Stevens said the deceased had his eyes closed, as if he was sort of 'clinching'. Stevens took that as a signal to grab the gun. He said he lunged forward, across the desk, whacked in to the gun and tried to grab it. The gun went off, and the deceased was killed. Stevens said essentially that he was trying to stop the deceased from killing himself. There was evidence of a defect in the rifle's firing system. It had a propensity to discharge if it was hit.

5.217 The case was presented to the jury as one of murder or nothing. The trial judge did not direct the jury on accident. His Honour considered that those directions were subsumed into his directions on intention, and the case was presented to the jury as one in which either Stevens intended to kill the deceased or he did not. Stevens unsuccessfully appealed against his conviction to the Court of Appeal (2:1). From that decision, he was granted special leave to appeal to the High Court. That appeal was successful (3:2). His conviction was quashed, and a re-trial was ordered.

5.218 The majority of the High Court considered that the separate defence of accident ought to have been left to the jury. Callinan J set out what the trial judge might have said to the jury.²⁰⁹ McHugh and Kirby JJ, the other members of the majority, generally agreed with it.²¹⁰ The direction follows:²¹¹

207 (2005) 227 CLR 319.

208 Ibid 371 (Callinan J).

209 Ibid 370.

210 Ibid 332 (McHugh J), who agreed with the direction but thought that it should include a direction on manslaughter; 346 (Kirby J), who considered that the substance of the direction was required.

211 Ibid 370–1.

Another possible way of viewing Mr Brockhurst's death is as an event that occurred by accident. 'Accident' does have a particular meaning however in the criminal law of this State. An event, here the death of Mr Brockhurst, could only be regarded as an accident if the accused neither intended it to happen nor foresaw that it could happen, and if an ordinary person in his position at the time would not reasonably have foreseen that it could happen. There is evidence before you which raises the possibility of accident you may think raises accident as a reasonable explanation of Mr Brockhurst's death. The accused's account of what happened, which involved little or no time for him to act other than instinctively and suddenly, his description of the events as an accident to the ambulance officer, Dr Vallati's evidence that the rifle could discharge in certain circumstances of which these could be an instance, and the evidence that the trigger was worn and, because of that could more readily operate, constitute part of that evidence. It also included the accused's statement to the ambulance service that he was 'going to call it an accident for the moment'; the expert evidence that striking the rifle in a 'karate-chop style' caused it to discharge once in five times; the expert evidence that 'energy applied to one end of the rifle could transfer to the other end through vibration, allowing the sear to disengage and the gun to discharge, and the friendly relationship between the two men.' That evidence may also raise the possibility that neither the accused nor an ordinary person could reasonably have foreseen that the fatal rifle shot would not have occurred in the circumstances. Even if you reject the accused's accounts that he gave to the police and in the witness box, you could find that these additional matters made accident a reasonable explanation of the death.

This should also be said. The accused is under no obligation to prove any of these matters. Before you can convict, you must be satisfied by the prosecution on whom the onus lies, beyond reasonable doubt, that the death was not an accident. That is, not an event which occurred as a result of an unintended and unforeseen act or acts on the part of the accused; and that it would not have been reasonably foreseeable by an ordinary person in his position.

Remember too, that although you cannot engage in groundless speculation, it is not necessary for an accused in order to be acquitted, to establish any facts, matters or inferences from them. You must acquit him if you think that, on the evidence as a whole, accident in the sense I have explained is a reasonable explanation for the death of Mr Brockhurst. As I told you earlier, you must be satisfied beyond reasonable doubt that the evidence is inconsistent with any rational conclusion other than the guilt of the accused. And you could not be satisfied beyond reasonable doubt of his guilt if you think that the evidence on the whole does not negate beyond reasonable doubt accident as a reasonable explanation for Mr Brockhurst's death.

5.219 Stevens was acquitted at his retrial on 27 July 2006.

R v Trieu²¹²

5.220 Trieu was convicted of unlawfully doing grievous bodily harm to Anthony Seeto. He appealed against that conviction. His main complaints concerned self-defence. Section 23 was not the subject of any of his written grounds of appeal, but it was raised at the hearing.

212

[2008] QCA 28.

5.221 Trieu and Seeto lived in adjoining, separate rooms in a boarding house. On the Crown case, Seeto heard an argument involving his friend Kennedy, and he went (downstairs) to investigate. Trieu was there and Seeto asked him what the problem was. Trieu punched Seeto in the chin. Seeto returned one punch.

5.222 Trieu went into the kitchen. He came out with a meat cleaver raised above his head. He swung it downwards towards the complainant, who put up his left arm to protect himself. His arm was cut with the cleaver. Seeto restrained Trieu in a bear hug. They fell through a doorway onto a patio and rolled out onto a grassed area. Trieu was on top of Seeto, threatening to kill him. Seeto called for help, and Kennedy hit Trieu with the mop (and perhaps threatened him with a chair). Trieu withdrew.

5.223 Trieu's account was that Kennedy swore at him and assaulted him. He went inside the boarding house, only to be confronted by Seeto, who punched him. Trieu returned the punch, then went and got the knife. He told Seeto to back off. Seeto must have been cut while they were on the grass. Trieu believed Kennedy and Seeto were armed with a stick and a chair. He had the knife to protect himself.

5.224 de Jersey CJ considered whether section 23(1)(b) arose on the facts:²¹³

Taking the best position for the defence, that is, the position which arose on the appellant's own evidence, the appellant was lying on his back on the ground, in the dark, waving a meat cleaver about in the course of a continuing scuffle, where the appellant (*sic, quaere* complainant) was 'almost in front' of him ...

The question to be addressed under s 23 is would an ordinary person in the position of the appellant have reasonably foreseen the suffering of this grievous bodily harm (the 'event') as a possible outcome of the circumstances briefly summarized in the last paragraph – that is, something which could happen, excluding remote or speculative possibilities ... The answer would necessarily have been 'yes', so that s 23 did not arise.

5.225 McMurdo P, for the same reasons, concluded that section 23(1)(b) did not arise on the evidence taken at its most favourable to Trieu.²¹⁴ Fryberg J said that had he been the trial judge, he might have left section 23(1)(b) to the jury. His Honour considered the circumstances in which the event occurred in some detail (on Trieu's version²¹⁵) and commented:²¹⁶

There is a degree of vagueness in his description of the struggle, but the picture which emerges is one of the complainant and the appellant wrestling on the ground in the darkness, with the appellant waving the cleaver in an attempt to scare the complainant and Mr Kennedy.

213 Ibid [31]–[32].

214 Ibid [50].

215 Ibid [82].

216 Ibid [83].

5.226 Fryberg J concluded (after some uncertainty) that the jury would necessarily have decided that an ordinary person in Trieu's position would reasonably have foreseen the infliction of grievous bodily harm on Seeto as a possible outcome of waving the cleaver. No direction on section 23 was required.²¹⁷

OBSERVATIONS ABOUT THE CASES POST *VAN DEN BEMD*

5.227 Generally, the following observations may be made about the cases post *Van den Bemd*.

5.228 Courts robustly reject suggestions that the accident defence is applicable in circumstances where it is fanciful to suggest that the outcome was unforeseen, or where the outcome is the inevitable consequence of a willed act: *West, Auld, Camm, Watt, Francisco, Grimley, Day, Charles and Trieu*.²¹⁸

5.229 It is only in rare cases that a person who fires a weapon can raise accident: *Fitzgerald*, and see also the pre *Van den Bemd* cases of *O'Halloran* and *Hansen*. *Stevens* appears to be such a rare case.

5.230 Where the deceased or victim is thrown from a height, and death or injury is a result of their impact with the ground, a jury convicted (and rejected the defence) (*Seminara*) and the Court of Appeal concluded the defence was not available (*Camm*), which may suggest that the excuse of accident would not be available in those circumstances.

5.231 These are the only trends observed. The cases otherwise provide illustrations of the application, or refusal of the application, of the excuse.

5.232 *Van den Bemd* provides an example of different verdicts achieved on the same facts under different tests of criminal responsibility. In *Van den Bemd*, the impact of the punch itself led to death. A jury asked to consider whether death was the immediate and direct consequence of the punch convicted the defendant. On re-trial, a jury asked to consider whether death was reasonably foreseeable by an ordinary person acquitted the defendant.

217 Ibid [84]–[85].

218 Other examples of this robust, or common sense, approach may be found in the following cases:

- *R v Bojovic* [2000] 2 Qd R 183, where the defendant delivered five heavy blows to the face which killed the deceased;
- *R v Skerritt* [2001] QCA 31, in which it was considered 'absurd' to suggest that someone who applied a high degree of force to the deceased's abdomen with a kick would not reasonably have foreseen death as a possible outcome;
- *R v Katsidis* [2003] QCA 82, where Katsidis, a professional boxer, punched the complainant in the face, causing double fractures of his jaw (grievous bodily harm);
- *R v Jasser* [2004] QCA 14, in which it was said to be 'inconceivable' that an ordinary person could not reasonably have foreseen that to swing an arm, the hand of which contained a glass, at another's face would not wound him.

5.233 In *Taiters* the Crown accepted a plea to assault occasioning bodily harm after the trial judge indicated that he would direct the jury to acquit on the basis that death was unforeseeable. In *Taiters* the deceased died from injuries sustained when he fell, not from injuries caused directly by the punch.

5.234 In a circumstantial case, it may not be possible for the Crown to negative accident: *Griffiths v R*.

THE DECISION OF THE HIGH COURT IN *R V VAN DEN BEMD*²¹⁹

5.235 The facts of this matter appear above.²²⁰ Van den Bemd sought special leave to appeal to the High Court from the decision of the Court of Appeal. By majority, special leave was refused. The majority (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ) held that the words of section 23 (as then drafted) were inherently susceptible of the meaning placed upon them by the Court of Appeal. Their Honours added:²²¹

The interpretation given to that section by that Court is one which favours the individual and reflects accepted notions of culpability for criminal conduct. Moreover, it is an interpretation which derives support from comments made in some judgments of this Court, particularly Gibbs J (with whom Stephen J agreed) in *Kaporonovski v R*.

5.236 Brennan and McHugh JJ dissented. Brennan J said:²²²

Death as an 'event' for the purposes of s 23

The present case does not raise the problem of classifying the accused's conduct. The relevant act was the delivery of the blow to the left side of the deceased's neck. The relevant 'event' was the death of the deceased. The blow caused the death, but the accused would not be criminally responsible for the death (and hence would not be liable to conviction for manslaughter) if the death occurred 'by accident'. The relevant question is whether the evidence, in particular the evidence of a pre-disposition of the deceased to suffering his fatal subarachnoid haemorrhage, raised an issue of accident which ought to have been submitted to the jury. In my opinion, that question was authoritatively decided against the accused by *Mamote-Kulang v The Queen*. That case confirmed the earlier decision of the Queensland Court of Appeal in *Reg v Martyr*, a case hardly to be distinguished from the present. (notes omitted)

5.237 His Honour considered *Mamote-Kulang*, *Martyr*, *Timbu Kolian* and *Kaporonovski* in detail. Of *Kaporonovski*, his Honour said:²²³

219 (1994) 179 CLR 137.

220 See [5.126] above.

221 (1994) 179 CLR 137, 139.

222 Ibid 142.

223 Ibid 147–9.

With respect, *Kaporonovski* has nothing to do with the problem in the present case. In *Kaporonovski* there was no occasion to consider the physiological or pathological relationship between the trauma inflicted by the offender and the bodily harm suffered by the victim. Therefore where a physiological reaction (such as vagal reflex) or a pathological condition (such as a ruptured aneurism) is triggered by trauma and produces death, *Kaporonovski* affords no legal guidance. In such a case, the relevant points of reference are *Mamote-Kulang* or *Martyr*. To the extent that the judgment of Gibbs J in *Kaporonovski* throws any light on the problem in the present case, it affirms the approach taken in *Martyr* and *Mamote-Kulang*. Leaving aside the judgment of Menzies J in *Mamote-Kulang*, each of the passages cited by Gibbs J to support the *Vallance* criterion of an event which occurred by accident shows that the cited Judge accepted (in the passage cited or in the passage immediately following) the correctness either of the decision in *Martyr* or of the decision in *Mamote-Kulang*.

The propositions advanced by the majority in *Mamote-Kulang*, by Windeyer J in *Timbu Kolian* and by the Court of Criminal Appeal in *Martyr* are inconsistent with the decision of the Court of Appeal in this case. It has never been thought hitherto that, under the Code, a death which is caused by the deliberate (or 'willed') infliction of a fatal blow is 'accidental' merely because the death was not foreseen or intended and was not reasonably foreseeable by an accused or a lay bystander. A deceased whose death is facilitated or accelerated by some bodily infirmity not known to the accused or to such a bystander has not been thought to have died accidentally. It has been said both in the United Kingdom and in Canada that offenders 'must take their victims as they find them'. Nor has the chain of causation between the blow and the death been regarded as severed for the purposes of criminal responsibility.

That is the only practical approach to the operation of the criminal law. It would be absurd to invite a jury either to assume the knowledge of a physiologist or a pathologist in determining whether the chain or causation between trauma to and the death of the victim was reasonably foreseeable, or to assume ignorance of specialist knowledge in determining the question. If, as a matter of fact, the trauma inflicted by an accused does cause the death of the victim and nothing has intervened between the trauma and the death, there is no factor that warrants the treating of the death as accidental.

The Court of Appeal, in my respectful opinion, misunderstood the cases to which they referred. Their conclusion that the victim's death might be an accidental event if it were the uninterrupted result of trauma deliberately inflicted is inconsistent with the judgment of this Court in *Mamote-Kulang*. Their Honours correctly perceived that the *Vallance* test of accident is generally relevant to events which follow upon an accused's willed act, but, in my respectful opinion, they failed to see that the test is not satisfied merely because an accused, ignorant of the physiological or pathological relationship between the trauma and the death, does not foresee and a reasonable bystander, equally ignorant of that relationship, would not foresee the death. This misconception was contributed to by their Honours' reliance on a dissenting judgment in the Court of Criminal Appeal²²⁴ which ran counter to what had been said in this Court in *Mamote-Kulang*. Their Honours did not distinguish between the applicability of the second limb of s 23 to events which occur between the doing of an act and the infliction of fatal trauma and the inapplicability of that provision to a death following without interruption and

224

Namely, Hanger J's judgment in *R v Dabelstein* [1966] Qd R 411.

caused by trauma deliberately inflicted.²²⁵ This is the distinction which is critical in this case. The interpretation of s 23 is not in issue so much as its application to the results of trauma deliberately inflicted. (some original notes omitted)

5.238 Brennan J considered that the refusal of special leave threw the law into confusion. The conflict between *Mamote-Kulang* and the judgment of the Court of Appeal should have been resolved by the High Court. His Honour would have granted special leave.

5.239 McHugh J, also in dissent, would have granted special leave to appeal. His Honour considered the Court of Appeal had seriously erred in holding that it was open to the jury to find that the deceased had died 'by accident'. His Honour said:²²⁶

While the statement by Gibbs J in *Kapronovski* as to the effect of the second limb of s 23 of *The Criminal Code* is an extremely helpful guide as to whether or not an event occurs by accident, the decision in *Mamote-Kulang* shows it cannot be regarded as an exhaustive definition of the term 'accident'. If a person intentionally punches another person and kills him or her, it would not be in accordance with ordinary speech to describe the death as an accident even if the death would not have occurred but for some weakness in the physical condition of the deceased.

5.240 The significance of Brennan J's dissent is that it nominates as the matter crucial to the determination of criminal responsibility the distinction between death following trauma without interruption and death which results because an event occurs between the trauma and death. In his Honour's view, section 23 only applies where an event occurs between the willed or intentional act and the infliction of fatal trauma. In his Honour's view, section 23 does not apply to a death which follows without interruption upon a trauma deliberately inflicted.

5.241 McHugh J drew the same distinction. The Commission has considered this distinction in its discussion of *Martyr* above.

5.242 Although it is not as clear as it could be, it does not appear that their Honours considered the unusual fragility of the victim to have any bearing on the inapplicability of the excuse. The excuse is inapplicable where death follows trauma, uninterrupted. If this interpretation of the judgments is right, then the exception created by section 23(1A) does not achieve the position endorsed by the dissenting judges, and it did not reverse *Van den Bemd* as intended.

5.243 In *R v Moody* and *R v Little*, two of the three cases which prompted the DAG Discussion Paper, there was no interruption between the punch thrown and death. In *Moody*, one of the punches delivered by the defendant broke the

225

His Honour inserted a footnote at this point, observing that the distinction had been appreciated by the Court of Criminal Appeal of Western Australia in *Ward v The Queen* [1972] WAR 36.

226

(1994) 179 CLR 137, 153.

deceased's nasal bridge and rendered him unconscious. He died from the aspiration of blood from the nasal injury. On Brennan J's approach, accident would not be available to excuse Moody of criminal responsibility *if* the aspiration is not considered an intervening occurrence.

5.244 Similarly, in *R v Little*, the fatal blow was a punch which caused a rupture of the left vertebral artery. It was inflicted with moderate force. Little was charged with murder. On Brennan J's approach, accident would not be available to the defendant.

5.245 Brennan J supported his statement that in the United Kingdom and Canada, offenders 'must take their victims as they find them' with reference to two cases: *R v Blaue*²²⁷ and *Smithers v R*.²²⁸ Those cases are worth considering in detail.

5.246 The issue in *Blaue* was causation – not accident. Blaue stabbed a young woman. The knife penetrated her lung. She required surgery and a blood transfusion to save her life. In accordance with her religious beliefs, she refused that treatment and died. In refusing an appeal against a conviction for manslaughter, the Court of Appeal observed that it had long been the policy of the law that those who use violence on other people must take their victim as they find them: this means the whole person, not just the physical person, and includes the victim's religious beliefs.²²⁹ The physical cause of death was the bleeding into the pleural cavity from the penetration of the lung. The fact that the victim refused treatment which would have saved her life did not break the causal connection between the act and death.

5.247 Under current Queensland law, accident would not apply to the facts in *Blaue*.

5.248 The issue in *Smithers* was primarily causation. Smithers was 16 years old. The deceased (Cobby) was 17. They were each the best players in their opposing hockey teams. 'The game was rough, the players were aggressive and feelings ran high'.²³⁰ Cobby and other members of his team subjected Smithers to racial insults. Cobby and Smithers exchanged profanities, and were ejected from the game. Smithers threatened to 'get' Cobby. Cobby was scared. Smithers challenged him to a fight as he left the arena at the end of the game. Cobby did not take up the challenge. He hurried to a waiting car. Smithers caught up with him and punched Cobby to the head. Some of Cobby's team mates restrained Smithers. Cobby doubled up. Smithers delivered a kick to his stomach area. Cobby groaned, staggered, fell to the

227 [1975] 1 WLR 1411.

228 1977 N R LEXIS 1072, Supreme Court of Canada, 17 May 1977.

229 [1975] 1 WLR 1411, 1415.

230 *Ibid* [2].

ground on his back, and gasped for air. Within five minutes he appeared to stop breathing. He was dead on arrival at hospital.

5.249 Cobby died from the aspiration of his stomach contents. Normally, when a person vomits, the epiglottis folds over to prevent the regurgitated stomach contents from entering the air passage. Cobby's protective mechanism failed.

5.250 The Crown case was that the kick caused the vomiting (or perhaps the kick in combination with Cobby's fear of Smithers caused the vomiting). The defence suggested that Cobby may have spontaneously aspirated. The three doctors who gave evidence agreed that the kick probably caused the vomiting, but they could not *positively* state that it did. Spontaneous aspiration was a rare and unusual cause of death in a healthy teenager.

5.251 Smithers was convicted of manslaughter. He unsuccessfully appealed against his conviction to the Court of Appeal for Ontario. He then appealed to the Supreme Court of Canada. He argued that there was no basis upon which the jury could find beyond a reasonable doubt that the kick caused death.

5.252 Dickson J delivered the judgment of the Supreme Court, dismissing the appeal. In response to this argument, his Honour said:²³¹

...[T]here was a very substantial body of evidence, both expert and lay, before the jury indicating that the kick was at least a contributing cause of death, outside the *de minimis* range, and that is all that the Crown was required to establish. It is immaterial that the death was in part caused by a malfunctioning epiglottis to which malfunction the appellant may, or may not, have contributed. No question of remoteness or incorrect treatment arises in this case.

...

The Crown was under no burden of proving intention to cause death or injury. The only intention necessary was that of delivering the kick to Cobby. Nor was foreseeability in issue. It is no defence to a manslaughter charge that the fatality was not anticipated or that death ordinarily would not result from the unlawful act.

5.253 Smithers also argued that there was no evidence upon which the jury could conclude beyond reasonable doubt that the kick caused the vomiting *and* the aggravated condition of aspiration. His Honour said:²³²

A person commits homicide, according to s 205(1) of the Code, when directly or indirectly, by any means, he causes the death of a human being. Once evidence had been led concerning the relationship between the kick and the vomiting, leading to aspiration of stomach contents and asphyxia, the contributing condition of a malfunctioning epiglottis would not prevent conviction

231 Ibid [16]–[17].

232 Ibid [19].

for manslaughter. Death may have been unexpected, and the physical reactions of the victim unforeseen, but that does not relieve the appellant.

5.254 Dickson J referred to the 'well-known principle' that one who assaults another must take his victim as he finds him, and gave as an extreme example the case of *Blaue*.

5.255 On this approach, the issue is whether the blow contributed, in something more than a minimal way, to death, even if the blow alone would not have caused death.

5.256 Under current Queensland law, accident would not apply to these facts. Whether death was or was not such an unlikely consequence of the kick that an ordinary person in the position of the defendant would not have foreseen it, section 23(1A) would not allow Smithers to rely upon accident (taking the malfunctioning epiglottis as the defect). Nor would accident apply on Brennan J's approach because death followed trauma, without interruption.

5.257 In his Honour's decision in *Van den Bemd*,²³³ Brennan J referred in a footnote to *Ward v The Queen*,²³⁴ a decision of the Court of Criminal Appeal of Western Australia, as a case in which the Court appreciated the distinction between a death that follows a deliberately inflicted trauma without interruption and an event which intervenes between an act and the infliction of fatal trauma.

5.258 Ward was convicted of manslaughter. The deceased (Lindsay) had been in the company of Ward and his wife as they travelled to various towns in Western Australia. Lindsay died from a cerebral infarction, which was the result of a skull fracture he suffered when he fell onto a concrete floor at a roadhouse at which the group stopped to re-fuel.

5.259 On the Crown case, Ward punched Lindsay, intending to do him some harm. The punch caused Lindsay to fall. He fractured his skull on the concrete, and died.

5.260 Ward gave evidence to the effect that Lindsay threw a punch at him. He bent his elbow to deflect the blow, and Lindsay fell onto the concrete.

5.261 Ward's counsel at trial sought a direction on accident. He asked the trial judge to direct the jury that, even if they were satisfied that Ward's blow to Lindsay was intentional, he was not criminally liable for manslaughter unless he could have reasonably foreseen that Lindsay was likely to fall to the ground and fracture his skull. The trial judge refused to give such a direction.

233 (1994) 179 CLR 137, 149.

234 [1972] WAR 36.

5.262 Virtue SPJ delivered the judgment of the Court of Criminal Appeal. His Honour reviewed the Queensland authorities *R v Callaghan*,²³⁵ *R v Martyr*,²³⁶ *R v Knutsen*,²³⁷ *R v Tralka*²³⁸ and *R v Dabelstein*,²³⁹ and the decisions of the High Court in *R v Mamote-Kulang*²⁴⁰ and *Timbu Kolian v R*.²⁴¹ His Honour said:²⁴²

In the light of the authorities mentioned it would appear that the trend of authority is in favour of the conclusion that in cases under the Code in Queensland or Western Australia where following on an act intended to cause some bodily harm to another some unexpected occurrence supervenes which is the immediate cause of injury to the person struck from which he dies, then if that occurrence was not intended or foreseen and was unlikely the death of such person would not be an accident within the meaning of s 23 and the act in question would not amount to manslaughter.

As I have already said where the injury is the direct and immediate result of a blow intending to cause harm it is immaterial from the point of view of criminal responsibility that death only results because of some constitutional defect unknown to the person responsible for the blow.

But if there is in fact some supervening occurrence between the striking of the blow and the deceased sustaining the injury causing the death, the jury, as well as being directed that they must be satisfied that the infliction of the blow caused the death, must be directed that they should acquit unless they are satisfied that the death was not an event occurring by accident in accordance with the provisions of s 23.

And they should be directed that the death would be an accident if it was not intended by the accused, was not foreseen by him nor reasonably to be foreseen as a consequence of a man's conduct.

5.263 The Court concluded that the trial judge was in error in not acceding to the request of counsel to put the question of accident to the jury. The conviction was quashed, and a new trial ordered.

5.264 On the approach in *Ward*, where the impact of the blow causes death, it cannot be said that some unexpected occurrence has supervened, and accordingly accident does not arise for consideration. There is no reference to the deceased's defect, weakness or abnormality. This approach treats the fall as a supervening occurrence between the blow and death (or injury).

235 [1942] St R Qd 40.

236 [1962] Qd R 398.

237 [1963] Qd R 157.

238 [1965] Qd R 225.

239 [1966] Qd R 411.

240 (1964) 111 CLR 62.

241 (1969) 119 CLR 47.

242 *Ward v The Queen* [1972] WAR 36, 46–7.

5.265 It may be that the intention of the amendment of section 23 by the insertion of section 23(1A) was to achieve this distinction between the situation where a blow (or other act of a defendant) was the immediate cause of death or injury and the situation where there was a supervening event, which was the immediate cause of death or injury. However, the amended section does not as drafted make such a distinction. Instead it distinguishes liability on the basis of the health of the victim. It may have been thought that where death occurs as the result of a blow, the deceased inevitably has a defect, weakness or abnormality. But that is not always the case. There are many situations where a moderate blow has caused death in a deceased without defect, weakness or abnormality. The cases of *Moody* and *Little* are obvious examples.

5.266 The section as drafted, with its focus on the health of the victim, may lead to some awkward results. The section does not explain the extent to which the defect, weakness or abnormality must contribute to death or grievous bodily harm before the excuse becomes unavailable.

5.267 A defendant's moderate punch might cause a person to stumble and fall onto a hard surface. The injury sustained in the fall, in combination with a certain weakness of the deceased, might be the cause of death as revealed upon post mortem examination. On one view, accident would not be available to such a defendant because death 'resulted' – at least in part – 'because' of the deceased's weakness. However, death may have been the inevitable result of the injury itself. The injury was non-survivable, but in the circumstances of the particular case, the weakness in fact also contributed. It is not clear whether the excuse of accident is available in these circumstances or not. Accident would be available to a defendant who threw the same punch causing the same consequence (that is, a non-survivable injury) in a person with no weakness, defect or abnormality.

Chapter 6

Jury directions

INTRODUCTION	86
GENERAL DIRECTION ON ACCIDENT	86
DIRECTION FOR OFFENCE INVOLVING A FATAL PUNCH	87
DIRECTION WHERE THERE IS A CONCEALED DEFECT, WEAKNESS OR ABNORMALITY	88
DOES THE LANGUAGE IN THE BENCHBOOK DIRECTIONS ACCURATELY COMMUNICATE THE FORESEEABILITY TEST?	89

INTRODUCTION

6.1 The Supreme and District Court Bench Book for Queensland sets out a model direction to be given to the jury, during the judge's summing up, when the defence of accident is raised. The model directions contain footnotes which, generally, provide an explanation of, or a reference to the source of, a particular part of the direction. Those footnotes have been repeated here, but re-numbered in accordance with their position in the Discussion Paper as a whole.

GENERAL DIRECTION ON ACCIDENT

6.2 The model direction begins with the trial judge reading the section to the jury. That is followed by a general direction on the defence:²⁴³

An event can only be regarded as an accident if the defendant neither intended it to happen nor foresaw that it could happen, and if an ordinary person in the defendant's position at the time would not reasonably have foreseen that it could happen.

It is settled law that an event occurs by accident within the meaning of that section if it was a consequence which was not in fact intended or foreseen by the defendant and would not reasonably have been foreseen by an ordinary person.²⁴⁴ The prosecution must prove that he intended that the event²⁴⁵ in question should occur or foresaw it as a possible outcome or that an ordinary person in the position of the defendant would reasonably have foreseen the

243 *Supreme and District Court Bench Book*, Accident s 23(1)(b), [75.1] <<http://www.courts.qld.gov.au/2265.htm>> at 16 April 2008.

244 *Kaporonovski v R* (1973) 133 CLR 209, 231 (Gibbs J).

245 In *R v Stuart* [2005] QCA 138 this direction was approved at [18] and [19].

event as a possible outcome.²⁴⁶ In considering the possibility of an outcome, you should exclude possibilities that are no more than remote and speculative.

6.3 After providing for the judge to refer to the relevant evidence in the particular case, the model direction continues:²⁴⁷

That evidence raises for your consideration the possibility that neither the defendant nor an ordinary person could reasonably have foreseen that (the event) would occur.

If the defendant did not intend or foresee the [serious injury,²⁴⁸ bodily harm, etc] of [the complainant] as a possible outcome of his actions [eg kicking him, hitting him with a bat], and if an ordinary person in the position of the defendant would not have foreseen that as a possible outcome of those actions, then the defendant would be excused by law, and you would have to find him not guilty. It is not for the defendant to prove anything. Unless the prosecution proves beyond reasonable doubt that an ordinary person in the position of the defendant would reasonably have foreseen [serious injury, etc,] as a possible outcome of his actions, or that the defendant intended or foresaw that, you must find him not guilty.

Even if you reject the defendant's account of what happened, you must consider the possibility of an event which occurred by accident. The defendant is under no obligation to prove any matters, and before you can convict him you must be satisfied by the prosecution, beyond reasonable doubt, that the [death, grievous bodily harm, unlawful wounding, etc,] was not an accident, that is, not an event which was unintended and unforeseen by the defendant, and that it would not have been reasonably foreseen by an ordinary person in the defendant's position.²⁴⁹

DIRECTION FOR OFFENCE INVOLVING A FATAL PUNCH

6.4 The Bench Book contains the following suggested direction for an offence of murder or manslaughter, involving a fatal punch:²⁵⁰

On the evidence, you may decide that Ben Brown punched John Smith in the head in the course of argument between them in the street; that Ben Brown fell back and hit his head on the kerb; that he was taken to hospital and received treatment there; but that he died some 36 hours later.

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In *Murray v R* (2002) 198 ALR 40 the appellant succeeded because the trial judge had not separated the concept of a willed act in 'discharging the gun' from the concept of doing so with the intent to kill a person or do that person grievous bodily harm. Hence the necessity for the separation of the concepts in the direction. Further, Kirby J (at [94]–[102]), Callinan J (at [103]–[155]), and Gaudron J (at [1]–[24]) concluded that a direction on s 23 was required in a trial on a charge of murder even where intention was the major issue on the trial where the evidence raised its application.

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Supreme and District Court Bench Book, Accident s 23(1)(b), [75.2].

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The effect of the decision in *R v Stuart* is that the Crown does not need to prove that an ordinary person would have foreseen the exact nature of the injury or the mechanics involved in its causation. The prosecution must prove that an ordinary person in the position of the defendant would have reasonably foreseen the serious degree of injury which constitutes grievous bodily harm.

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These directions are taken in part from the direction suggested by Callinan J in *R v Stevens* (2006) 22 ALR 40 at 81; McHugh J agreed with those.

250

Supreme and District Court Bench Book, Accident s 23(1)(b), [75.3]–[75.4].

If you are satisfied beyond reasonable doubt that when he punched Smith, Ben Brown intended to cause his death or do him grievous bodily harm, then you may find Brown guilty of murdering Smith. For that purpose, the question is not whether Brown meant to punch Smith – you may think he certainly did – but whether in punching him he intended²⁵¹ to kill him.

If you are not satisfied Brown had such an intention so as to make him guilty of murder, then you must go on to consider whether or not he is guilty of manslaughter. Manslaughter in circumstances like these is killing another human being but without having the intention to kill or having any excuse in law for doing so.²⁵²

In law a killing is excused if an ordinary person in the position of the accused Brown in this case would not have foreseen the death²⁵³ of Smith as a possible outcome²⁵⁴ or result of his punching him in the head. In order to convict the Crown must satisfy you beyond reasonable doubt that an ordinary person in the defendant's position would reasonably have foreseen (Smith's) death as a possible outcome of punching him in the way he did. Unless the Crown so satisfies you, you must find the defendant not guilty of manslaughter.

DIRECTION WHERE THERE IS A CONCEALED DEFECT, WEAKNESS OR ABNORMALITY

6.5 The Bench Book also provides a suggested direction in the case of a concealed defect, weakness or abnormality.²⁵⁵

The present case is, however, complicated by the medical evidence we have heard at this trial. Dr Tong, who examined Smith's body after death, said he found that what, in his opinion, had caused death was the rupturing or bursting of an aneurism, which is like a bubble on a blood vessel in the brain. He told us here that it was likely that the aneurism burst when Smith's head struck the kerb. He also said that Brown, or anyone else, could not have known that Smith had such an aneurism or bubble in his brain. Indeed, even the victim Smith himself would not have known that he suffered from such a condition.

That might well lead you to think that no reasonable person would have foreseen the possibility that Smith would die as a result of being punched in the way he was.

251 The onus of excluding s 23(1)(a) rests on the prosecution: *Taiters, ex parte A-G* [1997] 1 Qd R 333, 336. The 'event' in s 23(1)(b) refers to the consequences of the act, and not to the physical action itself: *Taiters*, 335. See standard direction in this Bench Book on s 23(1)(a), (Automatism) notes 1 and 2.

252 Authority and justification are not relevant here.

253 In this instance, the death is the 'event', result or consequence of the punch, which is the act and not the event or result: *Van den Bermd affg* [1995] 1 Qd R 401; *Taiters*, 337. Note that 'accident' under s 23(1)(b) is not relevant to an offence of which intention to cause a particular result (eg death or grievous bodily harm in the case of murder) is an element: *Taiters*, 336; *Mullen* (1938) 59 CLR 124, 128. See also notes 1 and 2 to standard direction on s 23(1)(a). See also, on s 23(1)(b), *Fitzgerald* (1999) 106 A Crim R 215.

254 *Taiters* 338.

255 *Supreme and District Court Bench Book, Accident s 23(1)(b)*, [75.4].

However, I am bound to tell you that in law this may not matter in this instance. That is so because under our law a person is not excused of manslaughter if the death of the victim is the result of a defect, weakness or abnormality from which the victim suffered.²⁵⁶ If, therefore, you are satisfied beyond reasonable doubt that the aneurism of which Dr Tong told you was a 'defect, weakness or abnormality' from which Smith suffered, and also that Smith's death resulted because of it, then it is open to you as the jury to find Brown guilty of unlawfully killing Smith, even though no reasonable person would or could have foreseen his death as a possible result of the punch delivered by Brown. In that event, you may return against Brown a verdict of manslaughter.

6.6 The model directions contained in the Bench Book are not intended to limit the way in which a trial judge sums up a case to the jury. Ideally, the model directions would be adapted to the facts of a particular trial, and elaborated upon where necessary.

DOES THE LANGUAGE IN THE BENCHBOOK DIRECTIONS ACCURATELY COMMUNICATE THE FORESEEABILITY TEST?

6.7 Gibbs J, in *Kaporonovski v R*,²⁵⁷ citing *Vallance v R*,²⁵⁸ *Mamote-Kulang v R*,²⁵⁹ *Timbu Kolian v R*,²⁶⁰ and *R v Tralka*²⁶¹ held:²⁶²

It must now be regarded as settled that an event occurs by accident within the meaning of the rule if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person.

6.8 Within the criminal trial the Prosecution carries the onus of negating any claim of accident raised. Stating the test for the jury literally involves the use of a double negative. For example, the Court of Appeal in *R v Van den Bemd*²⁶³ stated the question for the jury in the following words:

In the present context that means that the relevant question was whether the jury were satisfied beyond reasonable doubt that Bankier's death was not such an unlikely consequence of the punches delivered by the accused that it could not have been foreseen by an ordinary person in the position of the accused.

²⁵⁶ See s 23(1)(a) (sic – quare s 23(1A)). This subsection is apparently intended in effect to reinstate the decision in *Martyr* [1962] Qd R 398, as regards cases falling within its scope.

²⁵⁷ (1973) 133 CLR 209.

²⁵⁸ (1961) 108 CLR 56.

²⁵⁹ (1964) 111 CLR 62.

²⁶⁰ (1968) 119 CLR 47.

²⁶¹ [1965] Qd R 225.

²⁶² (1973) 133 CLR 209, 231.

²⁶³ [1995] 1 Qd R 401.

6.9 In order to simplify the direction, the Court of Appeal in *R v Taiters, ex-parte Attorney-General*²⁶⁴ recast the test in positive terms:²⁶⁵

By way of summary and looking at the matter from the point of view of the prosecution, it can be said that if the circumstances of the case call for the s 23 defence of accident, ie that based on the words 'an event which occurs by accident', to be excluded, the applicable onus will be sufficiently stated if the jury is told that:

'The Crown is obliged to establish that the accused intended that the event in question should occur or foresaw it as a possible outcome, or that an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome.'

As explained above, this formulation of the test is the basis of the model directions in the Bench Book.

6.10 The transition is from a direction that the jury must be satisfied that the event is *not* one that could *not* reasonably have been foreseen by an ordinary person in the position of the defendant, to a direction that the jury must be satisfied an ordinary person in the position of the accused *would* reasonably have foreseen the event as a possible outcome. There are contexts in which a change from a double negative to a positive statement is associated with a shift in meaning. The question should therefore be asked whether the transition in stating the test has resulted in any change in meaning.

264 [1997] 1 Qd R 333.

265 Ibid 338.

Chapter 7

DJAG Discussion Paper and community expectations

THE DJAG DISCUSSION PAPER	91
<i>R v Little</i>	92
<i>R v Moody</i>	93
THE CONCLUSIONS OF THE DJAG AUDIT	94
Murder trials	94
Manslaughter trials	95
COMMUNITY EXPECTATIONS	97

THE DJAG DISCUSSION PAPER

7.1 The terms of reference require the Commission ‘to have particular regard to the results of the Attorney-General’s audit of homicide trials on the nature and frequency of the use of the excuse of accident and the partial defence to murder of provocation’ in conducting its review.²⁶⁶

7.2 The review of cases by the Commission has been limited to appellate decisions concerning (in all but two cases) defendants who had been convicted. Generally, the defendants were complaining that the defence of accident had not been left to the jury, or that the jury had been inadequately directed on it. The Attorney-General’s audit reviewed *trials* in which the accident excuse was raised. The Commission has the benefit of the DJAG Discussion Paper, which contains the audit results.

7.3 The DJAG Discussion Paper contains the results of the Department of Justice and Attorney-General’s audit of homicide trials which sought to ‘ascertain the nature and frequency of the reliance on the excuse of accident ... and the partial defence to murder of provocation’.²⁶⁷

7.4 The DJAG Discussion Paper explains that the audit was:²⁶⁸

precipitated by three recent cases – Jonathan James Little, who was acquitted of murder in relation to the death of David Stevens; Ryan William Moody, who was acquitted of the death of Nigel Lee; and Damien Karl Sebo, who was acquitted of murder, but convicted of manslaughter, in relation to the death of Taryn Hunt.

266 The terms of reference are set out in Appendix 1 to this Discussion Paper.

267 Queensland Department of Justice and Attorney-General, *Audit on Defences to Homicide: Accident and Provocation*, Discussion Paper (October 2007) 1.

268 *Ibid* 1.

7.5 It explains that its purpose was:²⁶⁹

to provide information about the nature and frequency of the use of [accident and provocation], as well as some broader contextual information, in order to provide an opportunity for stakeholders to comment on the operation and use of these defences.

7.6 The Commission's review is broader than that undertaken by the Department of Justice and Attorney-General, as reflected in its terms of reference.²⁷⁰

7.7 The Department of Justice and Attorney-General received 34 written submissions in response to its Discussion Paper. The Department sought the consent of the author of each submission to its use by the Commission for the purposes of this review. If consent has been given for a particular submission, then the Commission has received a copy of it.

7.8 During the consultation part of this review, the Commission will consider the submissions to the Department which have been provided to it with consent. The authors of those submissions are welcome to make further submissions to the Commission. Submissions from other sources in response to the issues raised in this review are invited.

7.9 The Department's audit was conducted by way of a review of a selection of murder and manslaughter trials conducted during the period between July 2002 and March 2007. Of the 131 defendants charged with murder in that period, 101 were tried by jury. The audit team analysed 80 of those trials. Of the 116 defendants charged with manslaughter during that period, 32 were tried by jury. The audit team analysed 20 of those 32 trials. The trials analysed included those of *Little*, *Moody* and *Sebo*. *Little* and *Moody* are discussed in detail below. *Sebo* will be discussed in the Commission's forthcoming discussion paper on provocation. The facts of these matters are taken from the DJAG Discussion Paper.

R v Little

7.10 Little was charged on indictment with the murder of David Stevens. Little was walking in the Valley Mall in the early hours of a Sunday morning, arguing with his girlfriend on his mobile phone.

7.11 Stevens approached him. Eye witness accounts vary. One witness said Little and Stevens were pushing each other. Another witness said Stevens confronted Little, was 'in his face' and blocking his path.

269 Ibid 1.

270 See Appendix 1.

7.12 Little assaulted Stevens. He punched him in the head, which caused him to drop to the ground. When Stevens was down, Little kicked him in the back of the head.

7.13 Stevens died two or three days later from a subarachnoid haemorrhage which occurred as a consequence of a traumatic rupture of the left vertebral artery. The post mortem examination revealed that the deceased had a very high blood alcohol concentration.²⁷¹

7.14 It was more likely that the fatal blow was the punch, rather than the kick. The artery tore because it was overstretched. Overstretching occurs only in an intoxicated victim. On the medical evidence, the punch was thrown with moderate force.

7.15 In relation to murder, the defence argued that the Crown had not proved beyond reasonable doubt that Little intended to kill Stevens or to do him grievous bodily harm. In relation to manslaughter, the defence argued that the Crown could not negative or overcome accident: that an ordinary person in Little's position could not reasonably have foreseen death as a consequence of a single moderate punch.

7.16 The jury were also directed on self-defence,²⁷² section 304 provocation and intoxication.

7.17 The jury returned a verdict of not guilty of murder or manslaughter.

R v Moody

7.18 Moody was charged on indictment with the manslaughter of Nigel Lee.

7.19 Lee and his friends were waiting in a cab queue in the early hours of the morning. A cab pulled up at the back of the queue, and Moody, his brother and two friends began to get into it. Others in the queue accused Moody and his companions of queue-jumping.

7.20 Moody was in the front of the cab. A female friend was in the back. His brother was standing at the rear passenger door when he was approached by Lee and two other males. There was a fight between Lee and Moody's brother. The evidence was not clear as to who threw the first punch. Moody pushed into the group, and a general melee broke out. Two males were fighting in the back of the cab. Moody's brother was fighting someone between the cab and the footpath, and Moody and Lee were fighting next to the cab.

271

The deceased's blood alcohol concentration was 0.277%. The pathologist called by the Prosecution at trial gave evidence that this level of intoxication contributed to death: the rupture injury is associated with heavy intoxication.

272

This defence was based on a comment made by Little to police in his interview, in which he alleged that he had been hit by the deceased. The deceased had previous convictions for offences of violence.

7.21 Moody and Lee's fight moved out onto the road. They were both throwing punches. At some point, Moody karate-kicked Lee. Then he threw a punch to his face. That punch broke Lee's nasal bridge and caused immediate unconsciousness. Lee aspirated blood from the nasal injury and died.

7.22 Post mortem examination of the deceased revealed that he had a high blood alcohol level.²⁷³ His intoxication may have contributed to his death by impairing or hindering the reflexes which would have protected him from aspiration.

7.23 The audit team observed that self-defence was an 'equally important issue' for the jury's determination.²⁷⁴

7.24 The jury returned a verdict of not-guilty of manslaughter.

7.25 The audit team noted that this was the second time Moody had been on trial for this offence. At his first trial, the jury were unable to reach a verdict, and they were discharged.

THE CONCLUSIONS OF THE DJAG AUDIT

7.26 The conclusions of the review team drawn from the audit were as follows:

Murder trials

- In the 80 murder trials reviewed, section 23 (either or both limbs) was raised in 18.
- In 14 of those 18 trials, other defences were also raised.
- In four of those 18 trials, section 23 was the only defence considered by the jury (section 23(1)(b) in three trials, and section 23(1)(a) in one trial).
- In those four trials:
 - one defendant was acquitted of murder (and manslaughter);
 - one defendant was acquitted of murder, but convicted of manslaughter; and
 - two defendants were convicted of murder.

273 The deceased's blood alcohol concentration was 0.196%.

274 Queensland Department of Justice and Attorney-General, *Audit on Defences to Homicide: Accident and Provocation*, Discussion Paper (October 2007) 5.

- In the trial which led to a complete acquittal, the real issue was the identity of the killer.
- In the trial in which the defendant was acquitted of murder, but convicted of manslaughter, the real issue was the liability of the defendant as a party to the offence. The defendant's conviction of manslaughter indicated that the jury rejected accident.
- It appeared to the audit team that the accident excuse (section 23(1)(b)) was not the conclusive issue in these four trials.
- In the remaining 14 cases, four accused were acquitted, but as a number of other defences were raised, the audit team could draw no firm conclusions as to the success or otherwise of the accident defence.
- The DJAG Discussion Paper states: 'the only case in which the foreseeability of death assumed such significance was the case of Little'.²⁷⁵

7.27 Generally, it appeared to the audit team that for murder trials in which accident was the only defence raised (4 trials), accident was not the conclusive issue, although the audit team felt unable to make that observation with any certainty, because of the confidentiality of jury deliberations.²⁷⁶

7.28 In murder trials in which accident was one of several defences left to the jury (14 trials), it was only of significance in one.²⁷⁷

Manslaughter trials

- 20 manslaughter trials were reviewed.
- Section 23 was raised in 14 of those trials.
- Section 23 was the only defence left in four of those 14 cases.
- In those four trials, two defendants were acquitted, and two were convicted.
- In one of the two trials which led to an acquittal, the issue was whether the defendant was a party to the offence.
- In the other trial which led to an acquittal, the issue was who caused the fatal injury, and the audit team concluded that accident was not the deciding factor.

275 Ibid 35.

276 Ibid 33.

277 Ibid 35.

- In the remaining 10 cases, accident and a number of other defences were raised.
- In those 10 cases, 8 defendants were acquitted.
- The audit team could draw no conclusions about the success or otherwise of the accident defence.

7.29 As the audit team explained, the review had its limitations. Only a low number of manslaughter trials were able to be reviewed. Where more than one defence was raised, as in the 10 cases referred to, no certain conclusions could be drawn about whether a particular defence was successful or not. Because jury deliberations are confidential, it is not possible to know the issues which the jury in each case regarded as significant.²⁷⁸

7.30 Generally, in manslaughter trials in which accident was the only defence raised (4 trials), it did not appear that it was the factor which led to the two acquittals.

7.31 In manslaughter trials in which accident was one of several defences left to the jury (10 trials), accident was a significant issue in Moody's case and in 7 other cases. Of the 8 cases in which the audit team considered accident significant, 5 defendants were acquitted.

7.32 The audit team made the point that the same combination of defences might result in an acquittal in one case, and a conviction in another. The success or otherwise of a defence or combination of defences depended upon the jury's view of the facts.²⁷⁹

7.33 The facts of the manslaughter trials (other than Moody's trial) in which foreseeability of death 'appeared to be a significant issue' were considered by the audit team.²⁸⁰ The following cases (adopting the audit team's numbering) resulted in a verdict of not guilty of manslaughter:

- MA 11: The deceased was punched in a scuffle by someone other than the defendant. He was involved in another scuffle and punched once by the defendant. He fell to the ground and lost consciousness. He was conscious when the ambulance arrived to take him to hospital. He declined medical treatment and discharged himself against medical advice. He was readmitted to hospital six days later, and died. The cause of death was a closed head injury, causing bleeding and brain swelling.

278 Ibid 33.

279 Ibid 38.

280 Ibid.

- MA 12: The deceased was struck once in the head and died from a subarachnoid haemorrhage. Self-defence was an issue at trial. Foreseeability of death was a significant issue at trial.
- MA 22: During an argument between the defendant and the deceased, the deceased hit the defendant with a chain and threatened to hit him again. The defendant struck the deceased's arm with a knife. An artery was severed and the deceased bled to death.
- MA 25: The defendant and the deceased were arguing. The defendant punched the deceased in the head four to seven times. There was conflicting medical evidence about the cause of death. Either it was caused by a blow which caused a subdural haemorrhage, or it was possible that the deceased had a pre-existing aneurism and it was possible that the altercation could have caused a rise in blood pressure sufficient to burst it. Causation was a significant issue at trial. The jury were directed that if they were satisfied of causation, to consider the foreseeability of death, given the weakness of the blows.
- MA 32: The defendant punched the deceased once, claiming that the deceased threatened to hit him first. The deceased fell over. He suffered an injury to the back of his head. Causation was an issue, the defence argued that other later falls and manhandling by others may have caused the fatal injury. The punch was not particularly forceful, and the jury were asked to also consider the foreseeability of death.

7.34 The following cases (adopting the audit team's numbering) resulted in a verdict of guilty of manslaughter:

- MA 14: The defendant punched the deceased. He fell and fractured his skull. He died in hospital 20 hours later. The defendant claimed to be acting in self-defence of his brother.
- MA 20: The defendant and the deceased were arguing, and pushing and shoving each other. The defendant gave one big push, which caused the deceased to fall over and hit the back of his head. He suffered a subdural haemorrhage and died.

COMMUNITY EXPECTATIONS

7.35 The terms of reference require the Commission to consider whether the current excuse of accident reflects community expectations. The Commission expects that the consultation phase of its review will provide information relevant to this issue. At this stage, the Commission is able to make some observations.

7.36 Juries sometimes do return ‘merciful’ verdicts as that term is used in the authorities, and these verdicts are generally accepted as a valid exercise of a jury’s function. See for example, the joint judgment in *Mackenzie v R*²⁸¹ which quoted from *R v Kirkman*:²⁸²

Sometimes juries apply in favour of an accused what might be described as their innate sense of fairness and justice in place of the strict principles of law ...

7.37 The outcome in a criminal trial will often leave one side disappointed. In the case of an acquittal, it is not unexpected that the family of the victim or deceased may feel let down by the system, and, at least in a high profile case, it is expected that their disappointment, sense of injustice and anger will be reported in the media. But the extent to which an outcome genuinely provokes outrage or concern in the wider community about the state of the law is very difficult to judge. It depends in the first instance on the amount of media coverage a case receives. It also depends on the accuracy of the media coverage.

7.38 Some research in a related area was done in England and Wales by Barry Mitchell.²⁸³ Mitchell conducted a public opinion survey in which 822 respondents were asked to rank eight homicides in order of severity, using a scale of 1 to 20, where 20 stood for the worst possible scenario.²⁸⁴

7.39 The respondents ranked the eight scenarios in the following order of severity:

- *A killing in the course of a burglary*: A burglar was disturbed by the owner of the house, a 25 year old woman. He panicked, and hit her over the head with an ashtray, killing her.
- *A duress killing*: A group of terrorists threatened a man with his own life if he did not agree to kill a local businessman within a week. He was told that he would be shot if he went to the police. Scared for his own life, he could see no alternative, and killed the businessman.
- *Making no attempt to save a drowning woman*: A young woman slipped and fell into a lake. A passer-by saw her drowning. He could swim, but instead of trying to save her, he walked on and she drowned.

281 (1997) 190 CLR 348, 367 (Gaudron, Gummow and Kirby JJ).

282 (1987) 44 SASR 591, 593 (King CJ giving the judgment of the Court).

283 And is referred to at some length in the report of the Law Reform Commission of Ireland: *Homicide: Murder and Involuntary Manslaughter*, published in January 2008.

284 B Mitchell, ‘Public Perceptions of Homicide and Criminal Justice’ (1998) 38 *British Journal of Criminology* 453.

- *A killing in self-defence:* Two men were arguing at work. A fight developed. One picked up a screwdriver and lunged at the other. Fearing that he would otherwise be stabbed, the other grabbed a spanner and in self-defence hit the other man over the head, killing him.
- *A battered spouse killing:* A woman was physically and sexually abused by her husband for three years. He came home one night and started hitting her again. She felt she could not stand it any more. She waited until he was sleeping, then hit him over the head with a saucepan, killing him.
- *A 'thin skull' scenario:* A man gently pushed a woman in the course of an argument about who was first in a supermarket queue. She tripped unexpectedly, and bumped her head against a wall. Because of her unusually thin skull, she died from her injuries.
- *A necessity killing:* Two mountain climbers were roped together. One of them slipped and fell. The other tried to hold on to the rocks – but he knew that if he did not cut the rope, they would both die. He cut the rope and the other climber fell to his death.
- *A mercy killing:* A terminally ill woman, in great pain, begged her husband to 'put her out of her misery' for months. Eventually he gave in and suffocated her as she slept.

7.40 The thin skull scenario was ranked sixth in order of gravity. The respondents viewed it of relatively low severity because 'the death was accidental, there was no fault on the part of the killer, no intent to kill – the killer could not have foreseen the consequences of his actions'. More than 60 per cent of the respondents considered that the killer bore no fault. Fifty-eight per cent of respondents gave this scenario no more than 5 out of 20 in terms of severity and some respondents gave it 1 out of 10.

7.41 Killing in the course of a burglary was considered the most severe and 69 per cent of the respondents scored it at 15 out of 20 or more. Mercy killings were considered the least severe, and 77.8 per cent of respondents scored it at 4 out of 20 or less.

7.42 This summary of the results of Mitchell's research is necessarily brief. The results of the survey were subjected to detailed and careful analysis, beyond the scope of this reference. Mitchell's observations about the thin skull scenario are of some relevance to this review.²⁸⁵

The thin skull scenario ... also received a 1 rating from a number of respondents, and this represents the kind of homicide which the Law Commission (1996) recently recommended should cease to be treated as meriting a conviction for manslaughter, largely on the ground that the killer

lacks sufficient moral culpability. This type of homicide was rated generally slightly higher than the mercy killings scenario, and was scored very similarly to the case of the mountain climbers ... where the essential issue was whether the circumstances adequately justified or excused the killing. Bearing in mind that there was then a gap to the ratings of the next group of scenarios – [drowning woman, battered spouse and self-defence] – it may be that respondents would not regard the thin skulls' and mountain climbers' homicides as crimes but would regard higher rated scenarios as offences. Obviously, though, this is a matter which requires further examination.

Chapter 8

Suggested new offence

INTRODUCTION	101
THE CRIMINAL CODE (ASSAULT CAUSING DEATH) AMENDMENT BILL 2007 (QLD)	101
Indicting on the proposed new offence	102
Section 576	103
Directions to juries where the proposed new offence is included as an alternative count to murder or manslaughter.....	104
Sentencing issues	104
THE WESTERN AUSTRALIAN BILL	104
THE RECOMMENDATIONS OF THE LAW REFORM COMMISSION OF IRELAND	105

INTRODUCTION

8.1 The most significant recent development in Queensland was a proposal to introduce a new offence into the Criminal Code entitled 'assault causing death', an offence to which the excuse of accident would not apply.

8.2 A Bill providing for a similar offence has been introduced in Western Australia.²⁸⁶ The Law Reform Commission of Ireland also recommended the introduction of a similar offence, although, as discussed below,²⁸⁷ in Ireland such an offence would operate as an alternative to manslaughter by unlawful and dangerous act.

THE CRIMINAL CODE (ASSAULT CAUSING DEATH) AMENDMENT BILL 2007 (QLD)

8.3 On 9 August 2007, the Shadow Attorney-General and Shadow Minister for Justice, Mr Mark McArdle MP, introduced into the Queensland Legislative Assembly, as a private member's Bill, the Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld). The Bill proposed that a new provision for the offence of 'unlawful assault causing death' be inserted into the Criminal Code (Qld) in these terms:

286 See [9.22] below.

287 See [8.21] below.

341 Unlawful assault causing death

- (1) Any person who unlawfully assaults another causing the death of the other person is guilty of a crime, and is liable to imprisonment for 7 years.
- (2) The person is not excused from criminal responsibility for the death of the other person because the offender does not intend or foresee or can not reasonably foresee the death.

8.4 The Explanatory Notes to the Bill explained that the purpose of the proposed new offence was to provide an alternative to murder or manslaughter charges where an unlawful assault causes death, but the elements of the more serious charge cannot be established.²⁸⁸

8.5 In introducing the Bill, Mr McArdle referred to the cases of *R v Little* and *R v Moody* and explained that the Bill sought to respond to ‘community concern’ in relation to ‘one punch’ cases.²⁸⁹

8.6 The Queensland Bill failed on 13 February 2008. In the Second Reading debate on the Bill, the Attorney-General outlined the Government’s reasons for opposing the new offence of assault causing death:²⁹⁰

firstly, it adds nothing to the existing range of offences – to which significant penalties apply – able to be charged as alternatives to murder and manslaughter; secondly, the attempt to modify the accident defence may have an unintended effect on the availability of other defences; and, thirdly, it is premature to create a new offence or to consider any other changes to existing laws given that I am already reviewing the accident defence in homicide cases and am consulting on this issue.

Indicting on the proposed new offence

8.7 The Queensland Bill did not propose the introduction of the new offence as a statutory alternative to murder or manslaughter. Therefore, whether it would be included as an alternative charge on an indictment for murder or manslaughter would be a matter for the discretion of the Director of Public Prosecutions (DPP). Presumably, the tactical considerations which inform the decision to proceed to trial on murder or manslaughter only (and to provide for no alternative verdict of assault) would similarly inform the decision to indict on this charge in the alternative or not.

²⁸⁸ Explanatory Notes, Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld) 3.

²⁸⁹ Second Reading Speech, Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld): *Queensland Parliamentary Debates*, 9 August 2007, 2465 (Mr Mark McArdle, Shadow Attorney-General and Shadow Minister for Justice). Mr McArdle also noted that the Coalition had considered amending s 23 of the Criminal Code (Qld) to limit its application to special circumstances but it was recognised that this could cause legislative uncertainty.

²⁹⁰ Second Reading Speech, Criminal Code (Assault Causing Death) Amendment Bill 2007 (Qld): *Queensland Parliamentary Debates*, 14 November 2007, 4311 (Hon Kerry Shine, Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland).

Section 576

8.8 One question which naturally arises at this point is whether section 576 of the Code should be amended to allow a jury to return a verdict on any appropriate alternative charge when considering a murder/manslaughter charge.

8.9 The position under the Code is governed by section 576, which provides:

576 Indictment containing count of murder or manslaughter

- (1) Upon an indictment against a person containing a count of the crime of murder, the person may be convicted on that count of the crime of manslaughter if that crime is established by the evidence but not on that count of any other offence than that with which the person is charged except as otherwise expressly provided.
- (2) Upon an indictment against a person containing a count of the crime of manslaughter the person can not on that count be convicted of any other offence except as otherwise expressly provided.

8.10 The question in practical terms is whether grievous bodily harm and assault (or assault causing death) should be available for consideration by a jury as statutory alternatives on a charge of murder or manslaughter.

8.11 The question of alternative verdicts is not without practical importance to both prosecutors and defenders. On the one hand, there is the idea that if an alternative verdict is left open to the jury, it may place the jury under pressure to compromise.

8.12 On the other hand, another risk identified is that a jury, faced with a choice between convicting a defendant:²⁹¹

whose behaviour was on any view utterly deplorable, and acquitting him altogether, the jury may unconsciously, but wrongly, allow its decision to be influenced by considerations extraneous to the evidence and convict of the more serious charge rather than acquit altogether. In such circumstances to omit directions about a possible lesser alternative verdict may therefore work to the defendant's disadvantage.'

8.13 Accordingly, if an alternative verdict is fairly open on the evidence, it is the duty of the trial judge to tell the jury about it and to equip them with appropriate directions to consider the alternative verdict. A failure to do so may result in a successful appeal.²⁹²

²⁹¹ *R v Foster* (2007) EWCA Crim 2869, 614.

²⁹² *R v Coutts* [2006] 1 WLR 2154.

Directions to juries where the proposed new offence is included as an alternative count to murder or manslaughter

8.14 A trial on an indictment charging murder with assault causing death as an alternative would involve complicated directions to the jury. Consider the circumstances of *Little*. For the charge of murder, a jury would receive directions about provocation under section 304, self-defence and intoxication. For the statutory alternative of manslaughter, a jury would receive directions about accident (which is not excluded by the new provision on a charge of murder), and self-defence. For the indictment alternative of assault causing death, a jury would receive directions about self-defence and provocation under sections 268 and 269: provocation differently defined from section 304 provocation.

Sentencing issues

8.15 The family of the deceased may achieve some solace in a defendant's conviction for the proposed offence, because by its terms it contains an acknowledgment of the defendant's contribution to the deceased's death.

8.16 The maximum penalty for the proposed new Queensland offence of assault causing death was no higher than the current maximum penalties for wounding or assault occasioning bodily harm (each offence carrying a maximum penalty of seven years' imprisonment), and lower than the maximum penalties available for assault occasioning bodily harm while armed or in company (10 years' imprisonment), or grievous bodily harm (14 years' imprisonment).

THE WESTERN AUSTRALIAN BILL

8.17 On 19 March 2008, the Criminal Law Amendment (Homicide) Bill 2008 (WA) was introduced, similarly proposing a new offence of assault causing death. Section 12 of the Bill inserts a new section 281 (unlawful assault causing death) into the Criminal Code (WA). The offence is intended to deal with 'one punch' cases.²⁹³ Under the proposed new section 281, a person is liable to imprisonment for 10 years:

281. Unlawful assault causing death

- (1) If a person unlawfully assaults another who dies as a direct or indirect result of the assault, the person is guilty of a crime and is liable to imprisonment for 10 years.
- (2) A person is criminally responsible under subsection (1) even if the person does not intend or foresee the death of the other person and even if the death was not reasonably foreseeable.

²⁹³

Criminal Law Amendment (Homicide) Bill 2008 (WA) s 12. Also see Attorney General, James McGinty, 'New laws to deal with "one punch" deaths' (Media Statement, 15 March 2008).

8.18 In the second reading speech of the Bill, the Attorney General, Mr James McGinty, stated:²⁹⁴

This new offence reinforces community expectations that violent attacks, such as a blow to the head, are not acceptable behaviour and will ensure that people are held accountable for the full consequences of their violent behaviour.

8.19 Although the Bill implements a number of changes recommended by the Law Reform Commission of Western Australia in its recent report, *Review of the Law of Homicide*, the new offence was not one of the Commission's recommendations.²⁹⁵

8.20 Debate on the Bill by the Legislative Council of Western Australia was adjourned on 15 May 2008.

THE RECOMMENDATIONS OF THE LAW REFORM COMMISSION OF IRELAND

8.21 The Law Reform Commission of Ireland (LRCI) has recently reviewed the law of homicide and it considered the introduction of a similar new offence at length in its final report, which was published on 29 January 2008.²⁹⁶ Their discussion covers and enlarges upon many of the issues raised in this Discussion Paper. Their discussion is thought provoking, and paragraphs of it follow (notes omitted):²⁹⁷

... the Commission is still of the opinion that the most problematic aspect of unlawful and dangerous act manslaughter is that it punishes very harshly people who deliberately perpetrate minor assaults and thereby unforeseeably cause death, due perhaps to an unexpected physical weakness in the victim. The Commission thinks that minor acts of deliberate violence (such as the 'shove in the supermarket queue' scenario) which unforeseeably result in fatalities should be removed from the scope of unlawful and dangerous act manslaughter because where deliberate wrongdoing is concerned they are truly at the low end of the scale. In many 'single punch' type cases there would be no prosecution for assault had a fatality not occurred; prosecution for manslaughter following a minor assault hinges on an 'accident' – the chance outcome – of death.

The Commission does, however, appreciate that the occurrence of death is a very serious consequence of unlawful conduct and should, therefore, be marked accordingly. It might well be traumatic for the families of victims who died as a result of deliberate assaults, albeit those which were minor in nature, if the perpetrator of the assault were only charged with, convicted of and

²⁹⁴ Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 March 2008, 1210 (Mr James McGinty, Attorney General).

²⁹⁵ Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (Project 97, September 2007).

²⁹⁶ Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter*, Report (2008) Chapter 5 *Involuntary Manslaughter: Options for Reform* [5.03]–[5.36].

²⁹⁷ *Ibid* [5.39]–[5.43].

sentenced for assault, rather than the more serious sounding offence of manslaughter. Thus, the Commission believes that rather than prosecuting such defendants with assault, as was the provisional recommendation in the *Consultation Paper*, it would be more appropriate to enact a new offence such as ‘assault causing death’ which would be below involuntary manslaughter on the homicide ladder, but which would clearly mark the occurrence of death in the offence label.

... It would make more sense to treat this offence as a distinct new homicide offence below manslaughter. The fact of death should be captured within the label, as is the case in the road traffic offence of ‘dangerous driving causing death’. The offence should only be prosecuted on indictment and have a higher sentencing maximum than for assault *simpliciter*. The Commission does not believe that the occurrence of death necessarily increases the culpability of the accused, but a fatality does undoubtedly give a much more serious dimension to the offence. Consequences matter. Accordingly, judges should be able to take into account the fact that a death (rather than merely a cut lip) was caused by a punch when imposing sentence.

... it must be established that death was a wholly unforeseeable consequence of the accused’s assault. If a reasonable person would think that death was a likely consequence of the particular assault, then unlawful and dangerous act manslaughter should be charged and not this lesser offence.

For the new offence to come into play the culpability of the accused should be at the lowest end of the scale where deliberate wrongdoing is concerned. It is vital that a reasonable person in the defendant’s shoes would not have foreseen death as a likely outcome of the assault. The main purpose of introducing a new statutory offence of ‘assault causing death’ would be to mark the fact that death was caused in the context of a minor assault. Recognising the sanctity of life by marking the death may be of benefit to the victim’s family in dealing with their grief. (note omitted)

8.22 The LRCI recommended the following definition of ‘assault causing death’:²⁹⁸

Assault causing death occurs where an accused commits an assault which causes death and a reasonable person would not have foreseen that death or serious injury was likely to result in the circumstances.

8.23 Of course, the LRCI was considering this issue in the context of the criminal law of Ireland, and manslaughter by unlawful and dangerous act, which has a different fault element from that which applies in Queensland. In that context, the LRCI’s focus was on ensuring that those who kill ‘accidentally’ are justly punished, in a way which appropriately marks the severity of the consequences of their actions.

8.24 The LRCI did not recommend that the offence of ‘assault causing death’ be a statutory alternative to manslaughter (or murder). It recommended that a choice be made by the relevant prosecuting authorities, in accordance with certain guidelines, about the charge upon which a defendant should be indicted.

298

Ibid [5.46].

8.25 As noted above, the LRCI's final report was published in January of this year. Its recommendations have not yet been implemented.

Chapter 9

The position in other jurisdictions

INTRODUCTION	108
NEW SOUTH WALES	108
NORTHERN TERRITORY	109
TASMANIA	110
WESTERN AUSTRALIA	111
AUSTRALIAN CAPITAL TERRITORY	114
SOUTH AUSTRALIA AND VICTORIA	114
COMMONWEALTH.....	115
MODEL CRIMINAL CODE	115
RECENT DEVELOPMENTS IN ENGLAND AND WALES	117
RECENT DEVELOPMENTS IN IRELAND.....	118

INTRODUCTION

9.1 In New South Wales, the Northern Territory, Tasmania and Western Australia, the relevant legislation includes an excuse of accident.

9.2 In South Australia and Victoria, the common law rules of criminal responsibility apply.

9.3 The Commonwealth legislation provides a limited excuse of accident for manslaughter only (based on a provision of the Model Criminal Code).

9.4 No specific provision is made for an excuse of accident in the ACT legislation.

9.5 The rules of criminal responsibility for homicide have been recently reviewed in several jurisdictions.

9.6 This chapter outlines the current position in each of the Australian jurisdictions and recent developments in Western Australia. It also includes some discussion of recent developments in England and Wales, and Ireland.

NEW SOUTH WALES

9.7 In New South Wales, the offences of murder and manslaughter are defined in section 18 of the *Crimes Act 1900* (NSW), and within that section is a subsection which excuses a defendant from criminal responsibility for murder if

the deceased is killed 'by misfortune only', which reflects the position historically at common law.²⁹⁹

18 Murder and manslaughter defined

- (1) (a) Murder shall be taken to have been committed where the act of the accused, or thing by him or her omitted to be done, causing the death charged, was done or omitted with reckless indifference to human life, or with intent to kill or inflict grievous bodily harm upon some person, or done in an attempt to commit, or during or immediately after the commission, by the accused, or some accomplice with him or her, of a crime punishable by imprisonment for life or for 25 years.
- (b) Every other punishable homicide shall be taken to be manslaughter.
- (2) (a) No act or omission which was not malicious, or for which the accused had lawful cause or excuse, shall be within this section.
- (b) No punishment or forfeiture shall be incurred by any person who kills another by misfortune only.

NORTHERN TERRITORY

9.8 Under the Criminal Code of the Northern Territory, murder is defined as conduct causing death, done with an intention to cause death or serious harm.³⁰⁰ Manslaughter is defined as conduct causing death, where the defendant is reckless or negligent as to causing the death.³⁰¹ These offence provisions are based on the Model Criminal Code offences of murder and manslaughter.

9.9 Section 31 of the Criminal Code (NT) contains a provision equivalent to section 23 of the Criminal Code (Qld):

31 Unwilled act etc. and accident

- (1) A person is excused from criminal responsibility for an act, omission or event unless it was intended or foreseen by him as a possible consequence of his conduct.
- (2) A person who does not intend a particular act, omission or event, but foresees it as a possible consequence of his conduct, and that particular act, omission or event occurs, is excused from criminal responsibility for it if, in all the circumstances, including the chance of it occurring and its nature, an ordinary person similarly circumstanced and having such foresight would have proceeded with that conduct.

299 See [4.10] above.

300 Criminal Code (NT) s 156.

301 Criminal Code (NT) s 160.

...

9.10 With some exceptions, section 31 appears to be of general application.³⁰²

9.11 The Criminal Code (NT) was amended in 2005 and 2006 to incorporate the general criminal responsibility provisions, and homicide offence provisions, of the Model Criminal Code.³⁰³ Those amendments did not substantially alter section 31.

TASMANIA

9.12 The Criminal Code of Tasmania provides that 'culpable homicide', committed with an intention to cause death or bodily harm 'which the offender knew to be likely to cause death in the circumstances', is murder.³⁰⁴ Culpable homicide that does not amount to murder is manslaughter.³⁰⁵

9.13 Section 13 of the Criminal Code (Tas) is similar to section 23 of the Criminal Code of Queensland:

13. Intention and motive

- (1) No person shall be criminally responsible for an act, unless it is voluntary and intentional; nor, except as hereinafter expressly provided, for an event which occurs by chance.
- (2) Except as otherwise expressly provided, no person shall be criminally responsible for an omission, unless it is intentional.
- (3) Any person who with intent to commit an offence does any act or makes any omission which brings about an unforeseen result which, if he had intended it, would have constituted his act or omission some other offence, shall, except as otherwise provided, incur the same criminal responsibility as if he had effected his original purpose.
- (4) Except where it is otherwise expressly provided, the motive by which a person is induced to do any act or make any omission is immaterial.

³⁰² Criminal Code (NT) ss 22, 31(3) are to the effect that s 31 does not apply to regulatory offences (with some exceptions) or to an offence under s 155 (Failure to rescue, provide help, & c). But see, for example, *Charlie v R* (1999) 162 ALR 463. For a critical discussion of s 31, see S Gray, 'A Class Act, an Omission or a Non-event? Criminal Responsibility Under Section 31 of the Criminal Code (NT)' (2002) 26(3) *Criminal Law Journal* 175.

³⁰³ See the *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* (NT) and the *Criminal Reform Amendment Act (No 2) 2006* (NT).

³⁰⁴ Criminal Code (Tas) s 157(1)(a), (b). Other circumstances in which culpable homicide is murder are set out in s 157(1)(c)–(f). 'Culpable homicide' is defined in Criminal Code (Tas) s 156(2).

³⁰⁵ Criminal Code (Tas) s 159(1).

9.14 As reflected in the case chronology in Chapter 5, the words ‘by chance’ have the same meaning as the words ‘by accident’ in section 23.³⁰⁶ An event occurs by chance if it was neither intended nor foreseen by the defendant (a subjective test) and would not reasonably have been foreseen by an ordinary person (an objective test).³⁰⁷

9.15 The precise scope of the exception in section 13(3) appears unsettled.³⁰⁸ On one view, it operates to ‘transfer malice’ where, through some chance, the intended offence is committed against a different person – for example, where a gun shot misses its intended target and hits a different person. On another view, the exception may also limit a person’s culpability where a different offence to the one intended results. It is unclear whether section 13(3) operates only if the offence is one for which intention is a specific element.

WESTERN AUSTRALIA

9.16 Under the Criminal Code of Western Australia, the offence of ‘wilful murder’ includes an intention to cause death.³⁰⁹ An unlawful killing that does not constitute wilful murder or murder is manslaughter.³¹⁰

9.17 Section 23 of the Criminal Code (WA) includes an excuse of ‘accident’ in the terms of section 23(1)(b) of the Criminal Code (Qld):

23. Accident etc., intention, motive

Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for an act or omission which occurs independently of the exercise of his will, or for an event which occurs by accident.

...

9.18 Section 23 applies to all offences against the statute law of Western Australia.³¹¹

³⁰⁶ See generally J Blackwood, ‘Humpty Dumpty Was Pushed Off the Wall, Humpty Dumpty Died From the Fall’ (1996) 15 *University of Tasmania Law Review* 306, 307–9.

³⁰⁷ *Kaporonovski v The Queen* (1973) 133 CLR 209, 231 (Gibbs J). See also *Vallance v The Queen* (1961) 108 CLR 56, 61, 65.

³⁰⁸ See generally J Blackwood, ‘Humpty Dumpty Was Pushed Off the Wall, Humpty Dumpty Died From the Fall’ (1996) 15 *University of Tasmania Law Review* 306, 319–22; and *R v Vallance* [1960] Tas SR 51; *Standish v The Queen* (1991) 60 A Crim R 364.

³⁰⁹ Criminal Code (WA) s 278. Note, intention (to do grievous bodily harm) is also a required element for two of the limbs of the offence of ‘murder’ under Criminal Code (WA) s 279(1), (3).

³¹⁰ Criminal Code (WA) s 280.

³¹¹ Criminal Code (WA) s 36.

9.19 The case of *Ward v The Queen* referred to above³¹² illustrates the way in which the excuse operated in Western Australia prior to the decision of the High Court refusing special leave in *Van den Bemd*. If the injury or death was the direct and immediate result of a willed act, the excuse of accident did not apply; some intervening occurrence between the defendant's act and the resulting injury or death was required to attract the excuse.³¹³ However, since the High Court decision in *Van den Bemd*³¹⁴ which removed this distinction, the position in Western Australia has been unclear.

9.20 The Criminal Code (WA) does not currently include a provision equivalent to section 23(1A) of the Criminal Code (Qld).

9.21 The Law Reform Commission of Western Australia recently reviewed the law in relation to homicide in that State. It recommended that a new section 23B be included in the Criminal Code (WA) to separate the excuse of accident from the rest of section 23, and to reinstate the 'eggshell skull' rule as an exception to the general test for accident:³¹⁵

The Commission agrees that even if an accused is not aware of a particular weakness or defect it is nevertheless reasonably foreseeable that the physical characteristics of some people will make them more prone to death or injury than others. When an accused directly causes the death of another person by the deliberate infliction of force, it would not be appropriate for the accused to be excused from causing the death solely on the basis that the victim was not as strong or healthy as another person.

9.22 A Bill to amend the Criminal Code (WA) in accordance with the recommendations of the Law Reform Commission of Western Australia was introduced into the Western Australian Parliament on 19 March 2008.³¹⁶ The Criminal Law Amendment (Homicide) Bill 2008 (WA) includes the following provision, based on the recommendation of the Law Reform Commission of Western Australia:³¹⁷

23B. Accident

- (1) This section is subject to the provisions in Chapter XXVII relating to negligent acts and omissions.
- (2) A person is not criminally responsible for an event which occurs by accident.

³¹² See [5.258] above.

³¹³ See *R v Martyr* [1962] Qd R 398; *Mamote-Kulang of Tamagot v The Queen* (1963) 111 CLR 62; *Ward v The Queen* [1972] WAR 36.

³¹⁴ (1994) 179 CLR 137.

³¹⁵ Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (Project 97, September 2007) 154. Also see 155, 156, 157 rec 21.

³¹⁶ See Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 March 2008, 1209 (Mr James McGinty, Attorney General).

³¹⁷ Criminal Law Amendment (Homicide) Bill 2008 (WA) s 4.

- (3) If death or grievous bodily harm—
 - (a) is directly caused to a victim by another person's act that involves a deliberate use of force; but
 - (b) would not have occurred but for an abnormality, defect or weakness in the victim, the other person is not, for that reason alone, excused from criminal responsibility for the death or grievous bodily harm.
- (4) Subsection (3) applies—
 - (a) even if the other person did not intend or foresee the death or grievous bodily harm; and
 - (b) even if the death or grievous bodily harm was not reasonably foreseeable.

9.23 The Law Reform Commission of Western Australia also considered the appropriateness of the excuse of accident on a charge of manslaughter in cases where there is an intervening occurrence between the defendant's conduct and death. It referred, for example, to a case where a victim had been pushed down a flight of stairs and had died as a result of hitting his head on the floor.³¹⁸

9.24 The Law Reform Commission of Western Australia considered the excuse of accident appropriate given that death will be reasonably foreseeable in some, but not all, cases involving an intervening occurrence.³¹⁹

It is not possible to say that death is reasonably foreseeable in all cases where the victim has fallen over after being assaulted in some way. Because the foreseeability of death will vary significantly depending upon the precise factual circumstances, these cases should be determined on a case-by-case basis. Therefore, the Commission believes that the current law is appropriate: the defence of accident is available, but if a jury decides that an ordinary person in the position of the accused would have reasonably foreseen that death was a possible outcome the accused will be convicted of manslaughter.

9.25 However, the Law Reform Commission of Western Australia also recommended that alternative verdicts to manslaughter should be available where death was not reasonably foreseeable, but there was deliberate application of force. It also considered 'essential' that relevant non-statutory alternative offences were 'charged separately on the indictment'.³²⁰

³¹⁸ *R v Seminara* (2002) 128 A Crim R 567.

³¹⁹ Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Final Report (Project 97, September 2007) 156.

³²⁰ *Ibid* 90–1.

9.26 As discussed in Chapter 8, the Criminal Law Amendment (Homicide) Bill 2008 (WA) provides for a new offence of ‘unlawful assault causing death’, to specifically deal with ‘one-punch’ cases.³²¹

AUSTRALIAN CAPITAL TERRITORY

9.27 In the Australian Capital Territory, the criminal law has been partly codified. As yet, the criminal responsibility provisions of the *Criminal Code 2002* (ACT), based on the Model Criminal Code, do not apply to the offence of murder.³²²

9.28 The offence of murder is provided under the *Crimes Act 1900* (ACT). It incorporates elements of intention and reckless indifference. A person is criminally responsible for murder if the person causes the death of another person intending to cause a person’s death or with reckless indifference to the probability of causing a person’s death.³²³ An unlawful homicide that is not murder shall be taken to be manslaughter.³²⁴

9.29 An additional excuse or defence of accident is not included in the legislation.

SOUTH AUSTRALIA AND VICTORIA

9.30 Criminal responsibility for murder and manslaughter in South Australia and Victoria is governed by the common law.³²⁵

9.31 The requisite mental element for murder, at common law, is intention to cause death or grievous bodily harm, or knowledge that the act will probably cause death or grievous bodily harm (‘malice aforethought’).³²⁶

9.32 All other unlawful homicides are manslaughter. For example, if homicide is the result of criminal negligence (involving a high risk of death or

321 Criminal Law Amendment (Homicide) Bill 2008 (WA) s 12. Also see Attorney General, James McGinty, ‘New laws to deal with ‘one punch’ deaths’ (Media Statement, 15 March 2008).

322 Unless the offence provision is omitted and remade, or another Act or subordinate law expressly provides for their application, the criminal responsibility provisions of the *Criminal Code 2002* (ACT) will not apply to the offence of murder, being a pre-2003 offence, until 1 July 2009, or another prescribed date. See *Criminal Code 2002* (ACT) ss 8, 10; *Crimes Act 1900* (ACT) s 7A.

323 *Crimes Act 1900* (ACT) s 12.

324 *Crimes Act 1900* (ACT) s 15.

325 A person convicted of murder or manslaughter is liable to punishment: *Criminal Law Consolidation Act 1995* (SA) ss 11, 13; *Crimes Act 1958* (Vic) ss 3, 5.

326 *R v Crabbe* (1985) 156 CLR 464.

grievous bodily harm) or an unlawful and dangerous act (carrying with it an appreciable risk of serious injury), it is manslaughter.³²⁷

COMMONWEALTH

9.33 Commonwealth criminal law is contained in the Criminal Code (Cth). The Criminal Code (Cth) provides for the offences of murder and manslaughter of an Australian citizen or resident, occurring outside Australia.

9.34 The offence of murder requires an intention to cause death, or recklessness as to causing death.³²⁸ The offence of manslaughter requires an intention that conduct will cause serious harm, or recklessness as to a risk that conduct will cause serious harm.³²⁹

9.35 One of the physical elements required for manslaughter is that the defendant's conduct causes another person's death. Absolute liability applies to this element.³³⁰ This enlivens the excuse provision contained in section 10.1 of the Criminal Code (Cth).

9.36 Section 10.1 of the Criminal Code (Cth) provides an excuse, in certain circumstances, from criminal responsibility for an 'intervening conduct or event'. It provides:

10.1 Intervening conduct or event

A person is not criminally responsible for an offence that has a physical element to which absolute liability or strict liability applies if:

- (a) the physical element is brought about by another person over whom the person has no control or by a non-human act or event over which the person has no control; and
- (b) the person could not reasonably be expected to guard against the bringing about of that physical element.

MODEL CRIMINAL CODE

9.37 The Model Criminal Code Officers Committee, established by the Standing Committee of Attorneys-General, has made recommendations for a Model Criminal Code. In 1992, it made final recommendations on provisions

³²⁷ *Wilson v The Queen* (1992) 174 CLR 313, 333 (Mason CJ, Toohey, Gaudron and McHugh JJ).

³²⁸ Criminal Code (Cth) s 115.1(1)(d).

³²⁹ Criminal Code (Cth) s 115.2(1)(d). Note, the general criminal responsibility provisions of the Criminal Code (Cth), taken from the Model Criminal Code, define what is meant by 'intention' and 'recklessness'.

³³⁰ Criminal Code (Cth) s 115.2(1)(b), (2).

dealing with general criminal responsibility and in 1998 it released draft provisions for fatal offences.³³¹

9.38 The Model Criminal Code Officers Committee has adopted a fault based approach to homicide offences.³³²

Unlike non-fatal offences, it is not possible to structure fatal offences using the extent of the harm inflicted by the defendant as a basis. This is obviously because in the case of fatal offences, the harm is always the same, namely, death. Rather, it is the defendant's state of mind at the time he or she causes the death that determines the culpability of the defendant. A guilty state of mind is the fundamental criterion of fault that the community understands and accepts as requiring the intervention of the criminal justice system.

9.39 It recommended that the law of homicide should continue to distinguish between murder – where there is intention to cause death, or recklessness as to causing death – and lesser unlawful homicide. It recommended that provision should be made for manslaughter where there is intention to cause serious harm, or recklessness as to a risk that serious harm will be caused.³³³ This approach has been adopted in the Criminal Code (Cth).

9.40 The Model Criminal Code Officers Committee has recommended that both constructive murder and manslaughter by unlawful and dangerous act be abolished.³³⁴ Consistent with its fault based approach, it considered that truly accidental deaths should not be equated with murder or manslaughter.³³⁵ It also noted that where death results, but a lesser offence was intended, 'the defendant can be prosecuted for the offence he or she intended to commit'.³³⁶

9.41 It recommended a new offence, 'dangerous conduct causing death', for circumstances in which a defendant is negligent about causing death.³³⁷

331 Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapters 1 and 2 General Principles of Criminal Responsibility*, Report (December 1992); Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 5 Fatal Offences Against the Person*, Discussion Paper (June 1998).

332 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 5 Fatal Offences Against the Person*, Discussion Paper (June 1998) 2. See also at 43.

333 Ibid 5, 11, 53, 59, 69. See Model Criminal Code ss 5.1.9, 5.1.10. Note that the general criminal responsibility provisions of the Model Criminal Code define what is meant by 'intention' and 'recklessness'. Intention, with respect to a result, means that the person 'means to bring it about or is aware that it will occur in the ordinary course of events': Model Criminal Code s 5.2(3). Recklessness, with respect to a result, means the person is aware of a substantial risk that the result will occur and having regard to the circumstances known to the person, it is unjustifiable to take the risk: Model Criminal Code s 5.4(2).

334 Model Criminal Code Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 5 Fatal Offences Against the Person*, Discussion Paper (June 1998) 65, 149.

335 Ibid 63, 145.

336 Ibid 63.

337 Ibid 155. See Model Criminal Code s 5.1.11.

5.1.11 Dangerous conduct causing death

A person:

- (a) whose conduct causes the death of another person; and
- (b) who is negligent about causing the death of that or any other person by that conduct,

is guilty of an offence.

Maximum penalty: Imprisonment for 25 years.

9.42 In such cases, the Model Criminal Code Officers Committee considered the person is ‘morally culpable, but not for manslaughter’.³³⁸

9.43 The Model Criminal Code also includes an excuse from criminal responsibility, for strict and absolute liability offences, for ‘intervening conduct or event’.³³⁹ Section 10.1 of the Criminal Code (Cth) is modelled on this provision.

RECENT DEVELOPMENTS IN ENGLAND AND WALES

9.44 The Law Commission of England and Wales recently reviewed the law of homicide in its jurisdiction. It recommended a new Homicide Act to clearly and comprehensively define offences for homicide, and their partial defences. The Law Commission took a ‘ladder’ approach to the structuring of homicide offences and recommended a graduated hierarchy of offences, based on degrees of seriousness of fault and harm, those offences being manslaughter, second degree murder and first degree murder.³⁴⁰

9.45 The Law Commission had made recommendations in an earlier Report about the substantive law of involuntary manslaughter.³⁴¹ In that Report, the Law Commission recommended that, as a matter of principle, a person should be held criminally responsible for unintentionally causing death in certain circumstances only.³⁴² It explained:³⁴³

338 Ibid 147.

339 Model Criminal Code s 10.1. See Criminal Law Officers Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapters 1 and 2 General Principles of Criminal Responsibility*, Report (December 1992) 62–3.

340 The Law Commission (England and Wales), *Murder, Manslaughter and Infanticide*, Report No 304 (2006) [1.63], [1.64], [3.6]–[3.8].

341 The Law Commission (England and Wales), *Legislating the Criminal Code: Involuntary Manslaughter*, Report No 237 (1996).

342 Ibid [4.43].

343 Ibid [4.39].

it is not clear *why* a person ought to be held criminally responsible for causing death if death or serious injury were the *unforeseeable* consequences of her conduct, just because she foresaw, or it was foreseeable, that *some* harm would result. Surely a person who, for example, pushes roughly into a queue is morally to blame for the foreseeable consequences of her actions – that a few people might get jostled, possibly even lightly bruised, and that people might get annoyed – but not for causing a death if, quite unexpectedly, she sets in train a series of events which leads to such an outcome. We consider that the criminal law should properly be concerned with questions of moral culpability, and we do not think that an accused who is culpable for causing *some harm* is sufficiently blameworthy to be held liable for the unforeseeable consequence of death.

9.46 The Law Commission therefore recommended that there should be a new offence of reckless killing and a new offence, to replace the existing offence of ‘unlawful act manslaughter’, of killing by gross carelessness, and that both of these offences should be available as alternative verdicts to murder.³⁴⁴ These proposed offences have been accepted by the Government.³⁴⁵

9.47 However, the Home Office (United Kingdom) considered that:³⁴⁶

there is an argument that anyone who embarks on a course of illegal violence has to accept the consequences of his act, even if the final consequences are unforeseeable.

9.48 It considered it may be appropriate to have an additional involuntary homicide offence ‘covering those situations where a minor injury is all that was intended but death, which was unforeseeable, occurs’.³⁴⁷

RECENT DEVELOPMENTS IN IRELAND

9.49 As discussed in Chapter 8, the Law Reform Commission of Ireland has also recently reviewed the law of homicide. It recognised that ‘[a]ssault manslaughter may involve varying degrees of culpability due to the varying degrees of violence which may be employed’.³⁴⁸ It also distinguished between the moral culpability of a person for an accidental homicide resulting from a serious unlawful act, on the one hand, and a minor act of violence, on the other.³⁴⁹

344 Ibid [5.13], [5.34], [5.55].

345 Home Office (United Kingdom), *Reforming the Law of Involuntary Manslaughter: The Government’s Proposals* (May 2000) 9.

346 Ibid [2.10].

347 Ibid 11.

348 Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter*, Report No 87 (2008) [4.16].

349 Ibid [5.08]. See also at [4.18]–[4.29].

9.50 The Law Reform Commission of Ireland therefore recommended that minor acts of deliberate violence which unforeseeably result in death should be removed from the scope of the 'unlawful and dangerous act' manslaughter offence. Given the seriousness of death as a consequence of unlawful conduct, it recommended a new offence of 'assault causing death', below involuntary manslaughter.³⁵⁰ This would remove the stigma of attaching the label of 'manslaughter' in cases of accidental homicide involving minor acts of violence, but would allow the seriousness of the consequence of death to be taken into account by providing a higher maximum sentence than that available for simple assault.³⁵¹

350 Ibid [5.38]–[5.39], [5.46].

351 Ibid [4.19], [5.41].

Chapter 10

Related issues

WHETHER CHANGING THE LAW WILL CHANGE OUTCOMES.....	120
An acquittal of manslaughter under common law.....	120
THE WORD 'ACCIDENT'.....	122
THE RESPONSE OF THE COURTS.....	122

WHETHER CHANGING THE LAW WILL CHANGE OUTCOMES

10.1 Our system of criminal justice operates on the premise that juries will use their collective common sense and life experience to arrive at verdicts based on the evidence which reflect the expectations of the community from which they are drawn. But the system is not infallible. From time to time there will be verdicts which, at least at face value, are difficult to understand. That will occur in all jurisdictions, under different systems of criminal law.

An acquittal of manslaughter under common law

10.2 The requirements for the offence of manslaughter at common law are discussed in Chapter 4 of this Discussion Paper. The Law Reform Commission of Western Australia's Final Report, *Review of Homicide*, contains an illustration of the difference between manslaughter under the Code and at common law, in the situation where a person has applied force to another, causing them to fall, and death results from the injury caused by the fall:³⁵²

It such a case it would appear easier to sustain a conviction for manslaughter at common law. Under the Code it is necessary for the prosecution to prove that death was reasonably foreseeable, but at common law an appreciable risk of serious injury will suffice. If, for example, the accused punched the deceased in the head it may be foreseeable that a serious injury such as a broken jaw would result. Whether the defence of accident excuses an accused from criminal responsibility for manslaughter in these types of cases will depend upon the factual circumstances (such as the degree and nature of the force used) and an assessment by the jury as to whether death was reasonably foreseeable in the circumstances.

10.3 However, as the Law Reform Commission of Western Australia immediately pointed out, a conviction at common law for manslaughter in those circumstances was not inevitable. It referred to *R v Baugh*,³⁵³ in which the accused punched the deceased once, causing him to fall onto the concrete. He

³⁵² Law Reform Commission of Western Australia, *Review of Homicide*, Final Report (Project 97, September 2007) Chapter 3: Manslaughter and other Homicide Offences, 89.

³⁵³ [1999] NSWCCA 131.

sustained head injuries and died. The accused was charged with manslaughter, but convicted of assault occasioning bodily harm. This case is worth studying in some detail, because on the facts described in the judgment, death arose out of an act of random violence, and the verdict, at least on its face, is surprising.

10.4 The offence occurred on a Saturday in October 1996. The deceased was a musician. Early in the evening, he played with the Sydney Portuguese Concert Band at a Community Club. Later that evening, he left the Club to catch a train from Sydenham Station to go to work in the city.

10.5 Baugh was 18. He was with two other youths, L aged 16 and Church aged 18. They were hanging around the station asking people for cigarettes. The deceased refused to give them one. Baugh followed the deceased, confronted him and punched him with considerable force. The deceased fell onto the concrete. L then kicked him in the head. At trial, Baugh falsely claimed he was acting in self-defence.

10.6 The Crown accepted from L a plea to assault occasioning bodily harm and did not pursue him for manslaughter. The Crown indicated prior to trial that it would not accept such a plea in Baugh's case, and he was tried for manslaughter, but acquitted of that charge.

10.7 There was evidence at trial from the Crown's pathologist that he considered the cause of death to be the deceased's fractured skull and brain injury suffered when he fell to the footpath, although he could not exclude as a possibility that L's kick may have contributed to the brain damage.

10.8 The matter came before the New South Wales Court of Criminal Appeal when the Crown appealed against the inadequacy of the sentence imposed upon Baugh for the assault of which he was convicted. Spigelman CJ observed how difficult it may be for the deceased's family to understand why neither Baugh nor L were to be punished for killing the deceased, when plainly one or both caused his death.³⁵⁴

10.9 The trial judge had considered that there were two explanations for the verdict. The jury may not have been satisfied beyond reasonable doubt that Baugh's punch to the deceased was unlawful and dangerous. Or the jury may not have been satisfied beyond reasonable doubt that Baugh had caused the death of the deceased.³⁵⁵

10.10 It is easy in hindsight to suggest that Baugh and L should have been jointly tried for manslaughter, or that in the face of the medical evidence, the Crown should not have accepted a plea from L to the lesser charge. It is not appropriate to suggest that there was anything unreasonable about the jury's

354 Ibid [8].

355 Ibid, Trial judge's explanation set out at [12].

verdict. As the trial judge observed, although the jury's verdict may have been based on a generous or benevolent view of the evidence, it was open to them.³⁵⁶

10.11 The Commission's purpose in referring to this case in detail is to illustrate that there will be cases from time to time which result in surprising verdicts. As observed in the DJAG Discussion Paper, just because a jury acquits in a particular case does not mean that the law is wrong. The fact that a result is considered surprising and produces outcry in so few cases suggests that the community has certain expectation about outcomes, which are met in all but a very few cases.

THE WORD 'ACCIDENT'

10.12 Some may consider the word 'accident' an inappropriate or inadequate description of a killing which occurs as the ultimate result of an unlawful blow. The word 'accident' may be thought to convey an occurrence which happens without fault – something tragic brought about by a random unexpected act. Under section 23(1)(b) of the Criminal Code (Qld), the word 'accident' has a different meaning (that is, an unintended, unforeseen and unforeseeable event), but that may not make it any easier for some to accept it as an explanation for a death which flows from an assault.

10.13 Finding a substitute for the short-hand description is not easy.

THE RESPONSE OF THE COURTS

10.14 The Chief Justice of the Supreme Court of Queensland, the Honourable Paul de Jersey, responded to the discussion in the media of the cases of *Little* and *Moody* in an article in *The Courier-Mail* in May 2007 entitled '*A Fair Balance of Law*'.³⁵⁷ Extracts from his Honour's article follow:

There is ultimate gravity about the loss of any human life. The ramifications are always immense. Where the death results from an act of feckless thuggery, the outrage is especially understandable. Two recent decisions have sparked debate over whether the accident defence should be available in killing cases.

In each, the jury conscientiously followed the trial judge's directions on the law, and we take it those instructions were correct. They were not challenged by prosecution or defence.

Families and friends of those victims probably do consider the outcome was unjust. But the charter of the courts is not to deliver justice of some idiosyncratic or subjective variety. It is to deliver justice according to law. Any critical debate should therefore focus on the law, not the process.

356

Ibid.

357

de Jersey CJ, 'A fair balance of law', *The Courier-Mail*, 5 May 2007, 70.

The conscientious discharge of a juror's duty is not necessarily an easy experience. A juror's experience should not be rendered even more difficult by unmeasured criticism, especially if based on an incomplete understanding of the issues.

There should be dispassionate analysis of all aspects of the work of the criminal courts. But criticism of jury verdicts should be circumspect, in part because the jurors have no right of reply. The publication of information about a jury's deliberations is itself a criminal offence.

10.15 His Honour then explained the defence of accident as it evolved historically, and referred to the decision of the High Court in *Van den Bemd*. His Honour continued:

The High Court had expressed this proposition: "It must now be regarded as settled that an event occurs by accident within the meaning of the rule if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person."³⁵⁸

Accordingly, the prosecution from that point on became obliged to exclude accident beyond reasonable doubt in such cases: to prove, in a case of death resulting from a punch, say, that a reasonable person would have foreseen death as a possible outcome. If not, the defence of accident precludes a conviction for manslaughter.

The Crown could charge grievous bodily harm, or another lesser charge, as an alternative count on an indictment for homicide, but generally does not do so.³⁵⁹ That is presumably to avoid offering a jury what might be considered a 'soft option', to compel the jury to confront the serious charge head-on. Yet the result, in cases where accident is the only issue, is that the accused may walk free and unpunished, even though in truth guilty of some other offence.

Although accident is a defence to doing grievous bodily harm, common sense suggests a jury would be less likely to conclude that serious injury was not reasonably foreseeable, even if death was, and convict. If so, there would be some sanction for the conduct.

On the other hand, where self-defence is made out, an accused is entitled to acquittal of homicide or a lesser count on the same indictment.

The essential facts of the Little case should be mentioned. Little punched the deceased who fell, and Little kicked the prone, unconscious victim. The trial judge was obliged to direct the jury on accident, and her direction accorded with the law: that to convict the accused, the prosecution had to establish beyond reasonable doubt that an ordinary person in his position would reasonably have foreseen death as a possible outcome of delivering what turned out to be the fatal blow.

358 This is the statement of Gibbs J in *Kapronovski*, discussed at [5.123] above.

359 See the discussion of alternative verdicts at [2.16] above.

The forensic evidence established the cause of death was a subarachnoid haemorrhage of the brain and that death was most probably caused not by the kick, but by the preceding punch. The issue for the jury was not whether death was a possible outcome of the kick, but whether it was a possible outcome of the punch.

There was other expert evidence that the punch was of moderate force, with the consequent hyperextension of the neck more likely to occur in an intoxicated victim.

Moody was not only an accident case. Accident arose because of the unusual cause of death, aspiration of blood from a smashed nose into the lungs. But self-defence was obviously the major issue. Moody was backing away onto a busy roadway, with the victim approaching him with a raised fist, apparently preparing to punch him. Moody then threw the fatal punch.

Lawmakers strive to secure a reasonable balance between the interests of victims and accused persons.

I acknowledge criticism that the balance tilts unduly in favour of the accused. No amount of comment from me will quell that criticism. Also, judges not infrequently warn of the dangers of alcohol-fuelled violence. The drink-sodden prospective assailant is not going to pause to reflect on a judge's advice.

As one senior judge said last year: 'All judges can do is to deal afterwards, according to law, with the tragic consequences.'

The editorial in Wednesday's Courier Mail, quoting those remarks, perceptively acknowledged the courts cannot solve this problem, only the community and the lawmakers. The ultimate challenge is for young adults in particular to refocus on values of moderation and individual responsibility. (notes added)

Chapter 11

Discussion and key questions

INTRODUCTION	125
OPTIONS FOR CONSIDERATION.....	126
Option 1: Retaining section 23(1)(b) in its present form	126
Option 2: Changing the scope of the excuse of accident	128
Option 3: Retaining, amending or repealing section 23(1A)	132
Option 4: Creating a new offence or new offences	134
KEY QUESTIONS	137

INTRODUCTION

11.1 On 30 March 2007, a jury found Jonathan Little not guilty of a charge of murder and not guilty of the alternative of manslaughter. A month later Ryan Moody was found not guilty of a charge of manslaughter by another jury. In each of these cases the death had occurred as a consequence of an intentional blow. In each trial one of the issues submitted to the jury was the excuse of accident. The verdicts of not guilty were widely criticised in the local media.³⁶⁰

11.2 The circumstances of these cases give rise to the question whether the operation of the current test of accident to the offence of manslaughter³⁶¹ means that some defendants are not punished in respect of killings that are regarded as morally culpable.

11.3 More generally, does the current test of accident (which is based, in part, on the reasonable foreseeability by an ordinary person of the outcome of an intentional act) actually reflect acceptable notions of culpability and responsibility for criminal conduct as the High Court has suggested? Are those concepts the appropriate paradigm for the determination of fault in criminal offences under the Criminal Code (or, indeed, under any other Act that creates offences to which the excuse of accident applies)? Or, in the case of an unlawful act, is the unlawfulness of the act sufficient moral fault to found criminal responsibility for the harm caused by the unlawful act?³⁶²

360 In the case of Little, who was charged with murder, it is implicit that the jury was not satisfied beyond reasonable doubt that he intended to kill or to do grievous bodily harm.

361 As explained at [11.11] below, accident does not excuse the offence of murder, which requires intent to kill or to do grievous bodily harm. The requirement of such an intention necessarily excludes accident.

362 This alternative paradigm may explain the reasoning underlying the endeavour in some of the cases discussed to develop a 'direct and immediate result' test of accident.

11.4 In this Discussion Paper, the Commission has examined the issue of criminal responsibility where death results from a person's intentional act. In this chapter, the Commission outlines four options for dealing with this issue:

- retaining section 23(1)(b) of the Criminal Code (Qld) in its present form;
- changing the scope of the excuse of accident under section 23(1)(b) of the Criminal Code (Qld);
- retaining, amending or repealing section 23(1A) of the Criminal Code (Qld); and
- creating a new offence or new offences.

11.5 These options, which are not all mutually exclusive, are considered below.

OPTIONS FOR CONSIDERATION

Option 1: Retaining section 23(1)(b) in its present form

11.6 The idea that conduct that is without moral fault should not be the subject of the criminal law underpins most systems of justice. Under the Criminal Code (Qld) the boundaries of criminal responsibility for the consequences of a person's intentional actions are fixed by section 23(1)(b). The broad principle embodied in the section is that a person is not criminally responsible for the accidental consequences of his or her actions. The excuse of accident in section 23(1)(b) is an excuse of general application. Although the Commission is particularly interested, in this review, in the application of accident to the offence of manslaughter, accident operates (subject to limited exceptions) as an excuse in relation to all offences created by the Criminal Code (Qld), as well as in relation to offences created by other statutes.

11.7 The test used in the courts is that an event occurs by accident if it was not intended or foreseen by the defendant as a possible outcome of the defendant's act and would not reasonably have been foreseen as a possible outcome by an ordinary person in the position of the defendant.³⁶³ In applying this test, possibilities that are no more than remote and speculative are disregarded.³⁶⁴ The test is one that allows shifts in community perceptions and values to be reflected in judgments about foreseeability.

³⁶³ *R v Taiters, ex parte Attorney-General* [1997] 1 Qd R 333.

³⁶⁴ *Ibid* 338 (Macrossan CJ, Pincus JA and Lee J).

11.8 Where death results from a defendant's intentional act, foresight of death as a possibility by either the defendant or an ordinary person in the position of the defendant provides the fault element for this form of manslaughter.³⁶⁵

11.9 The combined effect of the decisions of the High Court in *R v Van den Bemd*³⁶⁶ and *Wilson v The Queen*³⁶⁷ brought a broad consistency to the law of manslaughter throughout Australia. In *R v Van den Bemd*,³⁶⁸ the Court confirmed that foreseeability is the sole test of accident in Queensland; and in *Wilson v The Queen*,³⁶⁹ the Court reset the boundaries of manslaughter at common law by redefining a dangerous act as one that carries an appreciable risk of serious injury.³⁷⁰

11.10 In *R v Van den Bemd*,³⁷¹ the justices who joined in the majority when refusing special leave to appeal considered that the foreseeability test under the Code 'reflected accepted notions of culpability and responsibility for criminal conduct',³⁷² a comment that is thought to relate back to the Court's detailed examination of fault in *Wilson v The Queen*.³⁷³

11.11 Although technically accident is a legal excuse, the limits of its application effectively serve to define the underlying fault element in manslaughter. This is because accident cannot operate to excuse a killing if the person's death was foreseen by the defendant or could reasonably have been foreseen as a possible outcome by an ordinary person in the position of the defendant. The foreseeability of death (by either the defendant or an ordinary person) as an outcome of the defendant's intentional act provides the necessary fault element. Of course, if the person's death was actually intended by the defendant, accident will not apply and, in that circumstance, the defendant will be guilty of murder.³⁷⁴

365 Intention may in practice be disregarded for offences of manslaughter, as an intentional killing is murder.

366 (1994) 179 CLR 137.

367 (1992) 174 CLR 313.

368 (1994) 179 CLR 137.

369 (1992) 174 CLR 313.

370 Note, however, the difference between the two tests in terms of the event to which foresight relates. This difference is considered further at [11.32]–[11.36] below, where a closer alignment with the common law position is raised as an option for reform.

371 (1994) 179 CLR 137.

372 Ibid 139 (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

373 (1992) 174 CLR 313. See D Lanham, BF Bartal, RC Evans and D Wood, *Criminal Laws in Australia* (2006) 26 in relation to this suggestion.

374 Under s 302(1)(a) of the Criminal Code (Qld) a person who unlawfully kills another is guilty of murder 'if the offender intends to cause the death of the person killed or that of some other person or if the offender intends to do to the person killed or to some other person some grievous bodily harm'.

Arguments in favour of retaining section 23(1)(b) in its present form

11.12 There are two main arguments in favour of retaining section 23(1)(b) in its present form.

11.13 First, as explained above, the current excuse of accident embodies a flexible test of foreseeability, and is therefore capable of shifting to reflect changes in community perceptions.

11.14 Secondly, because accident applies generally to all criminal offences, and is not limited in its application to manslaughter, a change to the excuse of accident could have serious unintended consequences. At present, the existence of the excuse of accident plays a critical function in the way in which the Criminal Code (Qld) is structured. Accident, together with a number of other legal excuses in the Code, serves a similar purpose to the concept of *mens rea* under the common law.³⁷⁵ In the context of manslaughter, the abolition of the excuse of accident could have the effect that criminal responsibility was imposed on a person in respect of a lawful act that resulted in a person's unforeseeable death.

11.15 It should also be noted that the retention of section 23(1)(b) in its present form does not prevent the creation of a specific offence to which accident is not an excuse. That option is considered later in this chapter.

Argument in favour of abolishing accident

11.16 The main argument for abolishing the excuse of accident, at least in its application to the offence of manslaughter, is that it has the effect of excusing criminal responsibility in respect of an unlawful assault that has resulted in a person's death. On this view, the fact that the deceased's death was not foreseen by the defendant and was not reasonably foreseeable as an outcome by an ordinary person in the position of the defendant is not the appropriate test for determining criminal responsibility where a death has occurred.

Option 2: Changing the scope of the excuse of accident

11.17 The Commission raises for consideration three different ways in which the scope of the excuse of accident could be changed:

- the reinstatement of the direct and immediate result test, which would change the operation of the excuse of accident generally;
- the enactment of a pure causation test for criminal responsibility, which would also change the operation of the excuse of accident generally; and

375

The concept of '*mens rea*' is considered at [4.9] above.

- a more limited modification of the excuse of accident that would change its operation where it was raised in relation to an offence of manslaughter.

The direct and immediate result test

11.18 In *R v Van den Bermd*, both the Queensland Court of Appeal and the High Court, in upholding the foreseeability test for accident, rejected the alternative ‘direct and immediate result’ test. The term ‘direct and immediate’ describes the relationship between the assault and the fatal injury. According to this test, if the fatal injury is the ‘direct’ consequence of an assault, the injury has not been caused by accident.

11.19 An option that arises for consideration is whether the direct and immediate result test³⁷⁶ should be reinstated, so that criminal responsibility for the consequences of an intentional act does not depend on the foreseeability of the injury, but simply on whether the injury was the direct and immediate result of the act.

11.20 Analytically, the difficulty in the test is that directness is a test of causation,³⁷⁷ not a test of accident. Because directness is not a test of accident, it requires a limiting concept if it is to be used to quarantine fact situations that are then not to be treated as raising a claim of accident. In expositions of the test, the idea of immediacy (that is, the direct *and immediate* result) has been used as a limiting concept. However, the use of immediacy as a qualifier has no obvious logic.

11.21 This may be tested by asking whether there is any meaningful difference between the causal significance of a punch in circumstances where injury results from:

- the punch;
- an impact with the ground after the punch; or
- an impact with the ground after falling down a staircase after the punch.

376 This test is considered at [4.31]–[4.34] and [5.36]–[5.63] above.

377 This was recognised by the Court of Appeal in *R v Van den Bermd* [1995] 1 Qd R 401, 403 in the following passage:

Mamote-Kulang and *R v Hansen*, like *R v Martyr*, adopted an interpretation of s 23 that views its function as being primarily causal, meaning that under it a person remains criminally responsible for a consequence of his willed act if that consequence is “immediate and direct”, notwithstanding that, by reason of circumstances that were unknown and even unknowable, it was not reasonably foreseeable by a person of ordinary intelligence.

11.22 On any commonsense assessment of causality, the punch caused the injury in each case. However, under the direct and immediate result test, only the first injury described above would be considered to be the direct and immediate result of the punch.³⁷⁸

11.23 Further, quite apart from considerations of logic, causation is not obviously a measure of moral fault. To the extent to which causation replaces foreseeability, it has the capacity to erode the correlation between criminal responsibility and moral culpability.³⁷⁹

Argument in favour of the reinstatement of the direct and immediate result test

11.24 The main argument in favour of the reinstatement of the direct and immediate result test is that criminal responsibility would not be excused on the basis that an outcome that was the direct and immediate result of the defendant's act was not foreseen by the defendant and could not reasonably have been foreseen by an ordinary person in the position of the defendant. In particular, it rules out any argument that the death ensued because of a condition of the deceased that was not reasonably foreseeable.

Arguments against the reinstatement of the direct and immediate result test

11.25 Because accident is an excuse of general application, the reinstatement of the direct and immediate result test would have significant consequences to the law of criminal responsibility in Queensland. Such a change raises the same concerns that have been considered at paragraph [11.14] above.

11.26 Further, the application of the direct and immediate result test has the potential to produce what are arguably inconsistent outcomes in terms of criminal responsibility where death results from an intentional act. In some circumstances, the direct and immediate result test may have the effect that a defendant is not criminally responsible for the outcome of an intentional act, even though the defendant might be regarded as morally culpable for the outcome – for example, the second and third outcomes referred to in the scenario at [11.21] above. In other circumstances, the application of the direct and immediate result test may be thought to impose criminal responsibility where there is no clear moral culpability – for example, where the injury resulting from the punch in that scenario was not intended or foreseen by the defendant and was not reasonably foreseeable by an ordinary person in the position of the defendant.

³⁷⁸ See *R v Van den Bemd* (1994) 179 CLR 137, 148–9 (Brennan J).

³⁷⁹ See the discussion at [6.265]–[6.267] above.

A pure causation test for criminal responsibility

11.27 The above discussion of criminal responsibility for an outcome that is the direct and immediate result of an intentional act reflects the distinction drawn in the cases between a death or injury that directly results from the intentional act per se and death or injury that results from a supervening event that follows the intentional act, such as impact with the ground following a punch.

11.28 Another option is to base criminal responsibility solely on causation. Under this approach, in the scenario at [11.21] above, the question for the jury would simply be whether the defendant's punch was a cause of the resulting injury or death. This would expand criminal responsibility, as the defendant would most likely be held to be responsible for the second and third outcomes identified in that scenario.

11.29 It is useful to consider the application of this test of criminal responsibility in a scenario that involves what might generally be regarded as a less culpable intentional act than a punch. Suppose, for example, that a person pushes another person using a relatively low level of force after an argument at a queue in a supermarket, and the person pushed sustains a fatal head injury from slipping and falling. A foreseeability test allows a judgment to be reached about the moral culpability for an offence of manslaughter, having regard to the circumstances of the case; a pure causation test does not.

Argument in favour of a pure causation test

11.30 The main argument in favour of this option is that a person should be criminally responsible for the ultimate harm caused by his or her intentional acts, regardless of whether that harm is foreseeable or whether the act is the sole cause of that harm.

Argument against a pure causation test

11.31 The main argument against this option is that it imposes criminal responsibility beyond the intention that accompanied the act, which need not even be an unlawful act.

Changing the fault element for manslaughter: foreseeability of serious injury (or grievous bodily harm), rather than of death

11.32 The effect of section 23(1)(b) is that a person is not criminally responsible for an 'event' that occurs by accident. As a matter of logic, the 'event' on a charge of manslaughter is death and, in accordance with the framework of the Criminal Code, the necessary foresight that prevents the excuse of accident from operating must relate to death.

11.33 A comparison between the common law concept of manslaughter based on an unlawful and dangerous act and the relevant Criminal Code definitions exposes an important difference. At common law, the test of a dangerous act is whether the act carries an appreciable risk of *serious injury*. Under the Code, the test of accident in manslaughter is whether foresight of *death* is a reasonable possibility.

11.34 The question that arises is whether, by analogy with common law concepts, foresight of serious injury (or grievous bodily harm) provides a sufficient degree of moral culpability to found an offence of manslaughter. The further analogy to the intent sufficient to constitute a killing as ‘murder’ under the Code³⁸⁰ suggests that consideration should be given to amending the basic definitions so that foresight of some serious injury (or grievous bodily harm) is a sufficient fault element for manslaughter under the Code.

Argument in favour of changing the foreseeable event for the purpose of manslaughter

11.35 The main argument in favour of changing the foreseeable event when accident is raised as an excuse to manslaughter is, as explained above, one of consistency. Such a change will create greater consistency with the test of a dangerous act for the purpose of manslaughter under the common law. It will also create a greater alignment with the elements of the offence of murder. Under this option, foresight of death or serious injury (or grievous bodily harm) would effectively constitute manslaughter, thereby mirroring the fact that intent to kill or to do grievous bodily harm constitutes murder.

Argument against changing the foreseeable event for the purpose of manslaughter

11.36 The main argument against this change is that foreseeability of grievous bodily harm, where the offence is one of manslaughter, is logically inconsistent with the structure of section 23(1)(b). That section is concerned with criminal responsibility for an ‘event’ – in the case of manslaughter, a death. However, the proposed change would base criminal responsibility on foresight of a different event – namely, serious injury or grievous bodily harm.

Option 3: Retaining, amending or repealing section 23(1A)

11.37 Section 23(1A) of the Criminal Code (Qld) was inserted into section 23 by amendment in 1997.³⁸¹ The amendment was intended to reverse part of the decision in *R v Van den Bemd*³⁸² by removing accident as a defence when death results from ‘a defect, weakness, or abnormality’.

380 That is, an intent to cause death or grievous bodily harm.

381 The background to this amendment is considered at [4.43]–[4.47] above.

382 (1994) 179 CLR 137.

11.38 As part of this review, the Commission is considering whether section 23(1A) should be retained in its present form, or amended to overcome some of the practical and analytical difficulties with the provision, or repealed.

Argument in favour of retaining section 23(1A)

11.39 The main argument in favour of retaining section 23(1A) of the Criminal Code (Qld) is that it recognises that variation in health and strength is a normal incident of the human condition. As the Criminal Code Advisory Working Group observed, in recommending this provision in its 1996 Report.³⁸³

It must be remembered that while human anatomy is remarkably uniform, it obviously cannot be assumed that all human beings and their bodily parts and functions are of the same health and strength. Quite apart from congenital defects, the aging process and the vicissitudes of life make it inevitable that some people will have or develop defects not all of which will be visible and obvious. This is a fact of human existence known to all. It follows that the possibility of a defect making some person more vulnerable than others cannot be said to be unforeseeable for the purposes of the criminal law. It is no doubt with that human common sense that juries are reluctant to find accident in such cases.

11.40 It is therefore arguable that, where death or grievous bodily harm has resulted from a defendant's intentional act, it is appropriate that criminal responsibility is not excused on the basis that the defendant did not intend or foresee that outcome and it was not reasonably foreseeable by an ordinary person in the position of the defendant.

Arguments against retaining section 23(1A)

11.41 There are two criticisms that can be made of section 23(1A) in its present form.

11.42 The first is that the section inserts a different type of test, one ultimately based on causation, into the operation of section 23(1)(b). As explained above, section 23(1)(b) is based on a test of foreseeability. The fundamental problem with section 23(1A) is that it mixes two different types of test in the one concept of accident, a course that may produce anomalous results.

11.43 The problem is illustrated by an inconsistency that the amendment has introduced into the practical application of the section. The amendment has brought about an inconsistency in cases where death is caused by an intentional act (for example, a blow), as it denies the excuse of accident where death was 'because of' a 'defect, weakness, or abnormality', but allows accident to be considered in all other cases. The inconsistency breaches one of the essential features of formal justice – namely, that like cases should be treated equally.³⁸⁴ Where the act and the accompanying mental element are the same

³⁸³ Criminal Code Advisory Working Group, *Report of the Criminal Code Advisory Working Group to the Attorney-General* (1996) 19.

³⁸⁴ An idea stated by Aristotle in *Nicomachean Ethics*.

in two cases, it is difficult to see why the legal rule applicable to both cases should not be the same.

11.44 A second criticism is that section 23(1A) has introduced unnecessary and potentially distracting concepts into jury directions on accident (the concepts of ‘a defect, weakness, or abnormality’, and of causation).³⁸⁵

Option 4: Creating a new offence or new offences

Manslaughter based on an unlawful and dangerous act

11.45 Under section 23(1)(b) of the Criminal Code, a person is not criminally responsible for an event that occurs by accident. Although the section is concerned with a person’s criminal responsibility for an intentional act, it does not draw a distinction between lawful and unlawful acts.³⁸⁶

11.46 An option for dealing with criminal responsibility in respect of the outcome of an intentional act is to enact a new offence of manslaughter based on an unlawful and dangerous act, to which the defence of accident does not apply.³⁸⁷

11.47 This would result in four forms of manslaughter:

- (1) Manslaughter by operation of the partial defences of provocation or diminished responsibility;
- (2) Manslaughter based on criminal negligence (a category of manslaughter to which accident does not apply);
- (3) Manslaughter based on an act that is not unlawful or dangerous (to which accident would apply); and
- (4) A new category of manslaughter based on an unlawful and dangerous act (to which accident would not apply).

Argument in favour of creating a new category of manslaughter based on an unlawful and dangerous act

11.48 The main argument in favour of creating a new category of manslaughter based on an unlawful and dangerous act, to which accident would not apply, is that it would more appropriately reflect the degree of criminal

³⁸⁵ See the discussion at [4.48]–[4.52] above. The model jury direction where s 23(1A) applies is set out at [6.5] above.

³⁸⁶ See *R v Martyr* [1962] Qd R 398, 406 (Mansfield CJ); *Timbu Kolian v The Queen* (1968) 119 CLR 47, 66 (Windeyer J).

³⁸⁷ Although a defence of accident does not apply to the offence, the concept of a dangerous act as one that carries an appreciable risk of serious injury involves the use of a foreseeability test.

responsibility that should attach where death has resulted from a defendant's unlawful act.

Argument against creating a new category of manslaughter based on an unlawful and dangerous act

11.49 The main argument against creating a new category of manslaughter based on an unlawful and dangerous act, to which accident would not apply, is that, 'it punishes very harshly people who deliberately perpetrate minor assaults and thereby unforeseeably cause death, due perhaps to an unexpected physical weakness in the victim'.³⁸⁸ As the Law Reform Commission of Ireland observed in its recent review of murder and involuntary manslaughter:³⁸⁹

In many 'single punch' type cases there would be no prosecution for assault had a fatality not occurred; prosecution for manslaughter following a minor assault hinges on an 'accident' – the chance outcome – of death.

Assault occasioning death

11.50 Another option is to enact a new offence of assault occasioning death, to which accident does not apply. This course is one that is in the process of being adopted in Western Australia³⁹⁰ and that has been recommended in Ireland.³⁹¹

11.51 Technically, an offence of assault occasioning death could be enacted. On conviction for the offence, death could be taken into account on sentence as a circumstance of aggravation. A precedent already exists in the Code as death or grievous bodily harm may be taken into account when sentencing for dangerous driving (operating a motor vehicle dangerously) where death or grievous bodily harm is charged in the indictment as a circumstance of aggravation.

11.52 Proof of death as a circumstance of aggravation involves a simple causation test.³⁹²

Argument in favour of creating a new offence of assault occasioning death

11.53 The main argument for creating a new offence of assault occasioning death, is that the offence recognises that 'the occurrence of death is a very serious consequence of unlawful conduct and should, therefore, be marked accordingly'.³⁹³ In particular, the fact that death has resulted is clearly marked

³⁸⁸ Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter*, Report (2008) [5.39].

³⁸⁹ *Ibid.*

³⁹⁰ See [8.17]–[8.20] above.

³⁹¹ See [8.21]–[8.25] above.

³⁹² The test is whether the assault was, in a practical sense, a substantial cause of the death: *R v Cheshire* [1991] All ER 670.

³⁹³ Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter*, Report (2008) [5.40].

in the label of the offence.³⁹⁴

Argument against creating a new offence of assault occasioning death

11.54 A new offence of assault occasioning death may have a number of practical disadvantages.

11.55 First, if assault occasioning death is a statutory alternative to manslaughter,³⁹⁵ the judge may be required to sum up on the offence, even if both prosecution and defence do not want it left to the jury. In any particular case summing up on the offence could result in an increase in the number and complexity of jury directions.³⁹⁶ This has the potential to complicate the decision-making processes of the jury.

11.56 Secondly, if assault occasioning death is charged with, or is a statutory alternative to, murder or manslaughter, its availability as an alternative offence may place pressure on a jury to compromise when reaching a verdict – that is, to convict of the lesser offence, rather than convict of the more serious offence or acquit of the less serious offence.

11.57 Thirdly, if an indictment separately charges manslaughter and assault occasioning death, it may have the practical effect of reducing the likelihood that the defendant would otherwise make an early guilty plea to the more serious charge of manslaughter.

394 This was an important consideration for the Law Reform Commission of Ireland in recommending a provision of this kind: see Law Reform Commission of Ireland, *Homicide: Murder and Involuntary Manslaughter*, Report (2008) [5.40].

395 See the discussion of statutory alternatives at [2.21]–[2.24] and [8.8]–[8.13] above.

396 This issue is considered at [8.14] above.

KEY QUESTIONS***Option 1: Retaining section 23(1)(b) in its present form***

- 11-1 Should criminal responsibility for an unforeseen and unforeseeable consequence of a person's actions continue to be governed by section 23(1)(b) of the Criminal Code (Qld)?

Option 2: Changing the scope of the excuse of accident

- 11-2 Should the test of criminal responsibility under section 23(1)(b) of the Criminal Code (Qld) be changed, so that the excuse of accident does not apply if the event in question (for example, the injury) is the direct and immediate result of the defendant's intentional act?

- 11-3 Should the test of criminal responsibility under section 23(1)(b) of the Criminal Code (Qld) be changed, so that the excuse of accident does not apply if the defendant's intentional act contributes (not insubstantially) to the event in question (for example, the injury)?

- 11-4 Should the fault element for manslaughter, where accident is in issue, be widened so that foreseeability of the possibility of death or serious injury (or grievous bodily harm) is sufficient?

Option 3: Retaining, amending or repealing section 23(1A)

- 11-5 Should section 23(1A) of the Criminal Code (Qld) be retained in its present form, or amended, or repealed? If amended, how should it be amended?

Option 4: Creating a new offence or new offences

- 11-6 Should there be a new category of manslaughter, based on an unlawful and dangerous act, to which accident does not apply?

- 11-7 Should there be a new offence of assault occasioning death, to which accident does not apply?

- 11-8 If a new offence of assault occasioning death is created, should:

- (a) section 576 of the Criminal Code (Qld) be amended to allow the new offence to be considered by a jury as a statutory alternative to manslaughter; or
- (b) should it be necessary for the Prosecution to charge the offence separately on the indictment?

Community expectations

11-9 Will any proposed change to the law enjoy public confidence and reflect contemporary community standards and expectations?

Appendix 1

Terms of reference

A REVIEW OF THE EXCUSE OF ACCIDENT AND THE DEFENCES OF PROVOCATION UNDER THE CRIMINAL CODE

I, Kerry Shine, Attorney-General and Minister for Justice and Attorney-General and Minister Assisting the Premier in Western Queensland, having regard to:

- the need for the Criminal Code to reflect contemporary community standards;
- the need for the Criminal Code to provide coherent and clear offences which protect individuals and society;
- the need for concepts of criminal responsibility to be readily understood by the community;
- the need for the criminal law to provide appropriate offences and penalties for violent conduct;
- the need for the criminal law to provide appropriate and fair excuses and defences for all types of assault offences as well as for murder and manslaughter; and
- the existence of a mandatory life sentence for murder and the Government's intention not to change law in this regard;

refer to the Queensland Law Reform Commission (the Commission) pursuant to section 10 of the *Law Reform Commission Act 1968* (Qld), a review of the excuse of accident (section 23(1)(b) of the *Criminal Code*) and the defences of provocation (sections 268, 269 and 304 of the *Criminal Code*).

In undertaking this reference, the Commission is to have particular regard to:

- (a) the results of the Attorney-General's audit of homicide trials on the nature and frequency of use of the excuse of accident and the partial defence to murder of provocation;
- (b) whether the current excuse of accident (including current case law) reflects community expectations;
- (c) whether the partial defence of provocation (section 304 of the Criminal Code) should be abolished, or recast to reflect community expectations;

- (d) whether the complete defence of provocation (sections 268 and 269 of the Criminal Code) should be abolished, or recast to reflect community expectations;
- (e) the use of alternative counts to charges of manslaughter (for example, assault or grievous bodily harm), including whether section 576 of the Code should be redrafted;
- (f) whether current provisions are readily understood by a jury and the community;
- (g) whether there is a need for new offences, for example assault occasioning grievous bodily harm or assault causing death (to apply where accident would otherwise be a complete defence to a murder or manslaughter charge); and
- (h) recent developments and research in other Australian and overseas jurisdictions, including reviews of the law of accident and provocation undertaken in other jurisdictions.

In undertaking this reference, the Commission is to, where possible and appropriate, consult stakeholders.

The Commission is to provide a report to the Attorney-General and Minister for Justice and Minister Assisting the Premier in Western Queensland on the results of the review by 25 September 2008.

