Humpty Dumpty Was Pushed Off the Wall Humpty Dumpty Died From the Fall An Accidental Death or Manslaughter in Tasmania?

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Prior to the decision in *Van Den Bemd*,[1] Humpty Dumpty's assailant would have been convicted of manslaughter. His plea that the death of the 'egg-shell man' was an 'accident' or a 'chance event' for which he should not be held responsible under s 23 of the Queensland or Western Australia Criminal Codes or s 13(1) of the Tasmania Criminal Code[2] ('the Code') would have fallen on deaf ears. The reason 'accident' was no defence in cases of this type was explained by Taylor and Owen JJ in *Mamote-Kulang*:[3]

> If ... 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 the accused to assert that he is being sought to be made criminally liable for an 'event' occurring by accident.

It is arguable that the decision of the High Court in *Van Den Bemd* has changed the law in Queensland since *Mamote-Kulang*. The purpose of this article is to ascertain whether the position has also changed in Tasmania.

The following factual scenario[4] will be used in the article as a basis for discussion. The accused (D) and the victim (V) become involved in a bar-room brawl. D strikes V a moderately powerful blow to the head with his fist, causing V to fall to the ground, striking his head. V has an egg-shell skull, meaning his skull is more fragile than the average

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1 (1993) 70 A Crim R 489 (Qld Court of Appeal); (1993-94) 179 CLR 137 (HC).

2 The first schedule of the *Criminal Code Act* 1924 (Tas).

3 (1964) 111 CLR 62 at 70.

4 Based on the facts presented at the trial of Leslie Manning in October 1995 before Mr Justice Slicer in the Supreme Court of Tasmania; File No 221 of 1994.

person's, and he dies from a brain haemorrhage caused either by the blow or by the fall. According to medical evidence, death would normally be extremely unlikely but for the V's particular weakness.

The Elements of Section 13(1)

Section 13(1) of the Tasmania Code provides that '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'.

The section thus has two limbs. First, an accused will not be criminally responsible[5] unless his or her act was 'voluntary and intentional'. It has now been conclusively determined that:

- the word 'act' in s 13(1) means the physical act of the person charged and does not include the consequence or results of the act.[6]
- the words 'voluntary and intentional'[7] refer to 'a willed act; one which the person was aware he was doing and meant to do'.[8]

The question of whether the accused's act of punching the deceased was a voluntary and intentional act is usually not in issue in cases similar to our example.

The second limb of s 13(1) provides that, subject to an exception discussed below, an accused person will not be criminally responsible for 'an event which occurs by chance'. A corresponding provision in the Codes of Queensland and Western Australia (s 23(1)) refers to 'an event which occurs by accident'. No court has yet found any significance in this semantic difference.

Numerous Australian cases have considered the meaning of the words 'by chance' and 'accident' but not in an entirely consistent way.[9] It can now be taken as settled however that:

5 Defined in s 1 of the Code as meaning 'liable to punishment as for an offence; and the term "criminal responsibility" means liability to punishment as for an offence'.

6 *Falconer* (1990) 171 CLR 30 at 38, adopting the view of Kitto J in *Vallance* (1961) 108 CLR 56 at 64.

7 In *Vallance* [1960] Tas SR 51, Crisp J at 90 concluded that the word 'intentional' in s 13(1) 'is no more than an element in voluntariness'. This view was subsequently affirmed by the High Court in *Hawkins* (1994) 176 CLR 500.

8 Per Neasey J in *Williams* [1978] Tas SR 98 at 102. Adopted with approval by the High Court in *Hawkins*.

9 For a review of the authorities, see generally: J Blackwood, 'The Defence of Accident in the Tasmanian Criminal Code' (1981) 7 *University of Tasmania Law Review* 97; I Elliot, 'Mistakes, Accidents and the Will: The Australian Criminal

- the word 'event' means 'a consequence or result of action'. In *Falconer*,[10] Mason CJ, Brennan and McHugh JJ said that 'the first limb of s 23 requires the act to be willed; the second limb relates to events consequent upon the act'. In *Kaporonovski*,[11] Gibbs J said the second limb 'exculpates an accused from liability for the accidental *outcome* of his willed acts'.
- the words 'by chance' or 'accident' mean 'unintended, unforeseen and unforeseeable'. The leading statement of the test for 'by chance' is that of Gibbs J in *Kaporonovski*:[12]

  > 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.

The central issue under this test is *foreseeability*. All of the judges in the High Court in *Vallance*[13] regarded the test of accident as a test of foreseeability. The remarks of Kitto J are typical of the attitude taken by the High Court:

> '[B]y 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 an ordinary person, so that it is once a surprise to the doer and in itself a surprising thing.[14]

The test was subsequently confirmed in *Falconer*,[15] where the High Court stated that 'the second limb ... excludes from criminal responsibility consequences of an act which are not only unintended, but unlikely and unforeseen', and finally restated by the Court of Appeal in Queensland and the High Court in *Van Den Bemd*:[16]

> the test of criminal responsibility under s 23 is ... whether death was such an unlikely consequence of [the accused's act] that an ordinary person could not reasonably have foreseen it.[17]

Code' (1972) 46 *ALJ* 328; and O'Regan, *Essays on the Australian Criminal Code* (LBC, 1979) Ch 11.

10 (1990) 171 CLR 30 at 38.

11 (1973) 133 CLR 209 at 227. See also the authorities cited in the Queensland Court of Appeal decision of *Van Den Bemd* (1992) 70 A Crim R 489.

12 (1973) 133 CLR 209 at 231, citing as authority *Vallance* (1961) 108 CLR 56 at 61, 65, 82; *Mamote-Kulang* (1965) 11 CLR 62 at 69, 72, 85; *Timbu-Kolian* (1968) 119 CLR 47 at 67, 71; and *Tralka* [1965] Qd R 225 at 228, 233-234.

13 (1961) 108 CLR 56.

14 Id at 65.

15 (1990) 171 CLR 30 at 38.

16 (1993) 70 A Crim R 489; (1993-94) 179 CLR 137.

17 (1993) 70 A Crim R 489 at 193 (Queensland Court of Appeal).

While the test is clear, two issues remain. The first—the applicability of the test to all cases of manslaughter under the Code—is settled and is the subject of this article. The second, namely the meaning of the phrase 'reasonably foreseeable', remains unclear. The tests for 'accident' and 'by chance' set out above are expressed in general terms and are not entirely consistent.[18] But whichever way the test is formulated, the jury will have to decide whether the death of V was a reasonably foreseeable consequence of D's action. How do they determine that issue? Is it necessary to do more than restate the *Van Den Bemd* test?

Cullinane J in *Whiting*[19] thought (not telling the jury) that the questions were simply: 'did the accused kill the deceased? If he did, was death such an *unlikely consequence* of his actions that a reasonable person would not have foreseen it'?

The trial judge in *Ellem*,[20] on the other hand, thought additional explanation was required after the jury requested directions in 'relation to death being reasonably foreseeable'.[21] Speaking of an 'unlikely' consequence, his Honour said 'it does not mean it has to be a likely consequence, but [it must be] not an unlikely one, one that is a possibility ...'. He later framed the test as follows: 'would a reasonable person ... regard death as a reasonable possibility or likelihood, not necessarily a certainty, as distinguished ... from something which is remotely possible, fanciful or conjectural'?[22]

18 See N Morgan, 'Beware! Accident in the High Court! *The Queen v Van Den Bemd*' (1994) 24 *Western Australia Law Review* 253 at 259, who claims that there is more than a semantic difference between the test proposed by Gibbs J in *Kaporonovski* and that of Kitto J in *Vallance*. Morgan argues that the 'Kitto test' provides a narrower excuse than the more general formulation of Gibbs J, so that the event in question would need to be a more remote possibility to satisfy the language of *Vallance*.

19 Unreported, Court of Appeal, Queensland, 10th October 1994; File No 324 of 1994.

20 (1994) 75 A Crim R 370.

21 Id at 377.

22 Ibid. A similar situation occurred in *Manning*, note 4 above. Slicer J instructed the jury on the meaning of the words 'by chance' in conventional terms; eg 'was the death fortuitous or surprising in the sense that an ordinary person would not reasonably expect death to happen as a consequence of the blow to the head' (transcript at p 347). When pressed for a 'bit of a direction on ... foreseen and foreseeable' (at p 379), Slicer J initially likened what was foreseeable with what was likely (at p 381), but later contradicted this view, equating foreseeable with 'a possible outcome of the events—not a fanciful or farfetched but a possible consequence of the conduct' (at p 384).

The Court of Appeal decided these comments were conflicting and erroneous and ordered a new trial. It is clear that the Court regarded the use of the word 'possible', as distinct from 'probable' or 'likely', in describing the degree of forseeability as an error of law. McPherson J said that although

> it may be open to question whether the difference between probability and possibility is as widely appreciated by ordinary members of the public as it generally is by lawyers ... the distinction is a real one. [23]

It is submitted that the view of the Court of Appeal in Queensland is correct and that a 'likely' consequence is a *probable* one, not necessarily one that is merely 'possible'.

In *Boughey*[24] it was held that the

> determination of whether a reasonable person would have foreseen the happening of an event cannot be made *in vacuo*: the reasonable man must be placed in the defendant's circumstances, which circumstances will include any special knowledge or expertise possessed by the defendant.[25]

It is submitted that this statement is correct in principle. In *Vallance*, Kitto J, in referring to the nature of the objective element in the test for chance event, said the event 'must 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'.[26] It is clear that any special knowledge, attributes or expertise of the accused are to be taken into account and attributed to the ordinary man in assessing whether the relevant event was foreseeable.

The Elements of Manslaughter

In Tasmania a homicide is the killing of a human being.[27] A homicide may either be culpable or not culpable and a homicide which is culpable may be either manslaughter[28] or murder.[29]

The first question is whether the accused caused the victim's death. Section 153(2) of the Code requires the Crown to prove, inter alia, that the accused's act was 'directly and immediately' connected with

23 (1994) 75 A Crim R 370 at 377-378.

24 [1985] Tas R 1.

25 Id at 15 per Green CJ. See also to the same effect Cox J at 24.

26 (1961) 108 CLR 56 at 65. Emphasis added.

27 Code s 153(1).

28 Code s 159.

29 Code s 158.

the deceased's death. In the egg-shell skull scenario there seems little doubt that D's act of punching V causing him to fall and strike his head was 'directly and immediately' connected with V's death. The deceased's skull is thinner than normal, but this constitutional defect, although it may have made the deceased more susceptible to death than the ordinary person, will not break the chain of causation.[30]

Section 156(2) of the Code contains three paragraphs. The Crown can establish a culpable homicide and thus manslaughter by proving any one of the three. Only paragraphs (a) and (c) are relevant to the egg-shell skull scenario.[31] It is beyond the scope of this article to analyse the paragraphs in detail, but in summary the essential ingredients are as follows. Under s 156(2)(a) there must be an act intended to cause death or bodily harm, or an act commonly known to be likely to cause death or bodily harm and which act was not justified[32] under the provisions of the Code. Under s 156(2)(c) the Crown must prove an unlawful act which is also dangerous.[33]

In the egg-shell skull scenario it is likely that a jury would be satisfied beyond reasonable doubt that D's act (of punching V) was 'an act commonly known to be likely to cause bodily harm'. The words 'commonly known' impose an objective test of liability. As Windeyer J stated in *Phillips*,[34] the words 'refer to matters of common knowledge of men and are to be related to conduct to be expected of a reasonable man in the circumstances'.

30 In neither *Martyr*, *Mamote-Kulang* nor *Van Den Bemd* was the question of causation in issue. The Code in s 154 deems D to have killed V in a range of circumstances when D's act is not the direct and immediate or sole cause of V's death. None of the provisions of s 154 has any relevance in the egg-shell skull scenario.

31 Section 156(2)(b) provides for manslaughter by omission to perform a duty tending to the preservation of human life (see Chapter XVI for the list of duties), provided the omission amounts to culpable negligence.

32 Numerous justifications for an act causing harm are contained in the Code: eg self-defence (s 46), surgical operations (s 51), prevention of crime (s 39), consent (ss 53 and 182(4)), domestic discipline (s 50) and lawful arrest (ss 26 and 27). In addition, s 8 of the *Criminal Code Act* preserves common law defences that are not inconsistent with the Code, such as necessity and absence of hostility.

33 The word 'dangerous' does not appear in s 156(2)(c), which simply describes a homicide as culpable if it is caused by any unlawful act. However, there is no doubt that the additional element of a dangerous act is grafted onto the section: see *McCallum* [1969] Tas SR 73; *Rau* [1972] Tas SR 59; *Phillips* [1971] ALR 740; and *Boughey* (1986) 161 CLR 10.

34 [1971] ALR 740 at 758.

The words 'bodily harm' have been consistently defined in Tasmania and elsewhere as meaning 'any hurt or injury calculated to interfere with health or comfort. It need not be permanent but must be more than transient or trifling'.[35] This definition, given by Burbury CJ in *McCallum*,[36] clearly has its origins in the English case of *Donovan*,[37] where Swift LJ defined 'bodily harm' in identical terms. Lord Swift provided no authority for the definition other than to say the words have their 'ordinary meaning'.[38] This definition has been consistently accepted by trial judges in Tasmania, and is repeated in s 267(a) of the Canadian Criminal Code. (The meaning of the words 'comfort', 'transient' and 'trifling' were discussed in the Canadian case of *Dixon*.[39]) The weight of judicial authority is clearly against the acceptance or adoption of a more stringent test of, say, 'really serious injury'.

Similarly, for the purposes of s 156(2)(c), D's act in our scenario is clearly unlawful; at a minimum it is an assault.[40] But was his act also dangerous? The High Court in *Wilson*[41] considered the meaning of 'dangerous' and held that the test is satisfied if 'a reasonable person would have realised that he or she was exposing another to an appreciable risk of serious injury'.[42]

The test so explained is similar to the original formulation by Burbury CJ in *McCallum*, except that the word 'really' before 'serious' is deleted by the High Court. Although the decision in *Wilson* is a decision based on the common law, it is submitted that its authority clearly applies to the Code.[43]

35 Per Burbury CJ in *McCallum* [1969] Tas SR 73 at 88.

36 [1969] Tas SR 73.

37 [1934] 2 QB 497.

38 Id at 509.

39 (1988) 42 CCC (3d) 318.

40 Section 184 of the Code. Section 182 defines an assault, inter alia, as 'an act of intentionally applying force to the person of another ...'.

41 (1992) 66 ALJR 517.

42 Id at 524.

43 The concept of a 'dangerous act', in addition to an unlawful one, was imported from the common law by Burbury CJ in *McCallum* [1969] Tas SR 73, who was afraid that without a test of objective forseeability of the risk of harm, s 156(2)(c) would be construed as a provision allowing for constructive manslaughter (at 84-85, 87). His Honour's opinion has been consistently approved in subsequent cases. As Brennan J said in *Boughey* (1986) 161 CLR 10 at 35: 's 156(2)(c) states the common law in conventional terms and is to be construed accordingly'.

It is clear that paragraphs (a), (b) and (c) of s 156(2) provide three separate bases for a charge of manslaughter under the Code and are mutually exclusive. In principle, therefore, there is nothing to prevent the Crown from relying alternatively on each paragraph of s 156(2) to base an indictment for manslaughter.[44] On occasions however, judges called upon to consider the meaning of paragraphs (a) and (c) of s 156 have cast doubt upon whether the Crown can rely alternatively on the paragraphs where manslaughter by positive conduct is alleged. Burbury CJ in *McCallum* thought there was 'little, if any, practical difference between paragraphs (a) and (c) of s 156(2)',[45] while Windeyer J in *Phillips*[46] doubted whether it was 'necessary or wise for the Crown to invoke para (c) of s 156(2)' in that case. He continued:

> I am not persuaded that if a jury were to decide that the requirements of paragraph (a) of the subsection were not satisfied they could turn to paragraph (c) as an alternative, and by virtue of it find the homicide was culpable.[47]

However, as Brennan J pointed out in *Boughey*,[48] there is at least a semantic difference between the two provisions. Section 156(2)(a) does not require the Crown to prove that D's act was an unlawful act: it is sufficient if D's act was 'commonly known to be likely to cause death or bodily harm'. D will be convicted of manslaughter if death results, subject of course to any justification provided by the Code. In most cases, the justification, if accepted by the jury, will mean D's act was not unlawful for the purposes of paragraph (c), but nevertheless there is clearly a theoretical difference between the two paragraphs.

Chance Event and Manslaughter

It has never been disputed that s 13 potentially applies to the crime of manslaughter. There have been numerous cases where the accused has raised accident in response to that charge, and in none of those cases was it suggested that the specific provisions of s 156 or the equivalent Queensland or Western Australia sections precluded the operation of the section.

44 See *McCallum* [1969] Tas SR 73, where the Crown particularised a basis for manslaughter on all three subsections.

45 [1969] Tas SR 73 at 87.

46 [1971] ALR 740.

47 Id at 758.

48 (1986) 161 CLR 10 at 44.

In *Timbu-Kolian*,[49] the accused was charged with the manslaughter of his baby son. He threw a stick at his wife in the dark. Unknown to him, she was carrying their child in her arms, and the stick struck the child on the head causing its death. Justices Kitto, Menzies, Owen and Windeyer, albeit for different and contradictory reasons, held that the death of the child was an accident. Recently, in *Hawkins*,[50] the High Court said:

> there can be no liability to conviction for culpable homicide by an act which causes death unless the act is 'voluntary and intentional' and the death of the deceased is not an 'event which occurs by chance' within the meaning of these terms in s 13(1) of the Code.[51]

In the reported Tasmanian cases of *McDonald*,[52] *McCallum* and *Boughey*, the defence[53] of 'chance event' was raised (albeit unsuccessfully) but again there was no suggestion in those cases that in an appropriate case of manslaughter the defence would not be available.

Potentially, therefore, it is open to an accused person to argue on a charge of manslaughter that the 'event'—the death of the deceased—was a chance event. That is, applying the test of foreseeability, the death was unintended and unforeseen by the accused and unforeseeable by an ordinary person similarly circumstanced. Or, put another way, the death was 'both unexpected by the accused and not reasonably to be expected by an ordinary person, so that it is at once a surprise to the doer and in itself a surprising thing'.[54]

In the hypothetical scenario postulated it is open to the accused to argue that the death of the deceased was a complete surprise. He certainly did not intend to cause death, did not foresee it as likely and arguably an ordinary person would not have foreseen death as a likely consequence of his blow.

However two Australian cases in the early 1960s, *Martyr*[55] and *Mamote-Kulang*,[56] cast doubt on the universality of the foreseeability

49 (1968) 119 CLR 47.

50 (1994) 179 CLR 500.

51 Id at 508.

52 [1965] Tas SR 263.

53 Although chance event is described here for the purposes of exposition as a 'defence', there is of course no reversal of the onus of proof, which remains on the Crown.

54 *Vallance* (1961) 108 CLR 56 at 65 per Kitto J.

55 [1962] Qd 398.

56 (1964) 111 CLR 62 at 70.

test. The ratio of those cases was stated by McHugh J in *Van Den Bemd* to be:

> that death is not 'an event which occurs by accident' within the meaning of s 23 if no more appears than that the death was the immediate and direct result of an intentional blow to a person who had a constitutional defect, unknown to the accused, which made the deceased more susceptible to death than an ordinary person in good health.[57]

Brennan J in substance agreed with McHugh J when he said:

> It has never been thought hitherto that, under the Code, a death which is caused by a 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 the accused or by a lay bystander.[58]

A number of Tasmanian decisions, two by Burbury CJ in the early 1960s[59] and another by Green CJ in *Boughey*,[60] have confirmed the authority of *Mamote-Kulang* in this State. In *McCallum*, Burbury CJ said that:

> the second limb of s 13(1) cannot provide a defence in a case such as the present where a physical injury is caused directly by the intentional act of the accused and there is no accidental circumstance intervening between the act and death.[61]

The introduction of the 'supervening event' theory in *Martyr* and *Mamote-Kulang* reduces the test of accident to one of causation. The theory at best is a rather unbelievable fiction that should not be applied where accident is reasonably open on the facts and at worst should be limited to cases of manslaughter where death has been caused as a result of personal violence. However, if these cases are still good law, a trial judge faced with an egg-shell skull scenario would not be required to leave to the jury the question of whether the death of V was 'an event which occurred by chance'. The issue therefore is whether the cases cited above are still good law.

The Decision in *Van Den Bemd*

The facts of *Van Den Bemd* are atypical. There was a fight in a public bar between D and V. D struck V two blows to the face. Medical opinion was that V died from a 'traumatic subarachnoid haemor-

57 (1993-94) 179 CLR 137 at 151.

58 Id at 147.

59 *McDonald* [1965] Tas SR 263 and *McCallum* [1969] Tas SR 73.

60 [1985] Tas R 1.

61 [1969] Tas SR 73 at 82.

rhage' as a result of a bruise to the left side of his neck. There was evidence that V had a pre-disposition to such haemorrhaging because of natural infirmity or because of alcohol consumption. D argued accident pursuant to s 23 of the Queensland Code. The trial judge refused to leave the 'defence' on the basis of *Martyr* and *Mamote-Kulang*. The Court of Criminal Appeal disagreed, saying that s 23 was relevant and ordered a new trial.

The decision of the Queensland Court of Appeal in *Van Den Bemd*[62] is important in light of the comments of the majority in the High Court that the words of s 23 were 'inherently susceptible of bearing the meaning placed upon them' by the lower Court. The reasoning of the Court of Appeal may be briefly summarised:

- The reasoning in *Martyr*, *Mamote-Kulang* and cases that followed them 'is not easy to reconcile' and the authorities are 'in disarray'.[63]
- The decision in *Kaporonovski* is decisive and determinative. A close study of that decision showed that the only test for accident was one of foreseeability. *Martyr* was wrongly decided.[64]
- The ratio was as follows:

> 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 could not reasonably have foreseen it. In the present context that means that the relevant question was whether the jury was satisfied beyond reasonable doubt that [V's] death *was 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.*[65]

Subsequently the Crown appealed to the High Court. The High Court refused special leave. The decision of the Queensland Court of Appeal was confirmed.[66] The majority in the High Court said that:

> The words of the section [s 23] are inherently susceptible of bearing the meaning placed upon them by the Court of Appeal of Queensland. The interpretation given to the section by that Court is one which favours the individual and reflects accepted notions of culpability and responsibility for criminal conduct. Moreover, it is an interpretation which derives

62 (1993) 70 A Crim R 489.

63 Id at 491.

64 Id at 493.

65 Id at 493. Emphasis added.

66 (1993-94) 179 CLR 137.

> support from comments made in some judgments of this Court, particularly Gibbs J (with whom Stephen J agreed) in *Kaporonovski v The Queen.*
>
> In these circumstances, the case is not one in which it would be appropriate to grant special leave to enable the Crown to challenge an order of a State Court of Appeal quashing a conviction and ordering that there be a new trial. The consequence is that the interpretation placed by the Court of Appeal on s 23 remains unaffected in that State.[67]

Brennan J and McHugh J vigorously dissented. The dissenting judges discussed the applicable law in detail. The majority thought it unnecessary to do so.

What is the result of the High Court's decision in *Van Den Bemd*? In this writer's view, the decisions in *Martyr*, *Mamote-Kulang* and the relevant Tasmanian cases are no longer representative of the law. The test of chance event in all cases, including manslaughter, is a test of foreseeability. If the death of V could be regarded by the jury as unintended, unforeseen and unforeseeable, D is entitled to an acquittal, irrespective of the fact that V's death was the direct result of an intentional blow to a person who had a constitutional defect (such as an egg-shell skull).

Academic comment and subsequent cases in two Code States since *Van Den Bemd* generally support this view. Neil Morgan[68] argues that although the 'precise ramifications are unclear'[69] and the 'majority's failure to adequately address the issues of precedent leaves some scope for debate as to exactly what the case decided, juries must now consider in egg-shell cases as well as other situations, whether the death of V was an accident in terms of foreseeability'.[70] Graham Kenny,[71] while also critical of the majority's failure to address the issue of precedent—and going as far as asserting that on a strict application of those rules, the *minority* 'expressed the law correctly'[72]—nevertheless argues strongly that the result achieved by the Court of Criminal Appeal and the High Court is the preferred result.

The writer does not share the view of these commentators that the failure of the majority to address the issue of precedent in some way

67 Id at 139, per Mason CJ, Deane, Dawson, Toohey and Gaudron JJ.

68 Morgan, 'Beware! Accident in the High Court!', note 18 above.

69 Id at 253.

70 Id at 255.

71 G Kenny, 'Abrogation of the "Egg-Shell Skull" Theory in Queensland Criminal Law: *R v Van Den Bemd*' (1994) 18 *University of Queensland Law Journal* 121.

72 Id at 123.

weakens the authority of the decision. A strong argument can be mounted that cases like *Martyr*, *Mamote-Kulang* and *McCallum* were never correct in principle.[73] I have argued previously[74] that the requirement of some supervening occurrence in cases where death results from an intentional blow is contrary to precedent, logic and principle and merely distorts the true test of accident as explained in *Vallance*. Subsequent decisions of the High Court in *Timbu-Kolian* and *Kaporonovski* had left the authority of *Mamote-Kulang* in a weakened condition and only brief comment from the majority in *Van Den Bemd* was needed to deliver the fatal blow.

Subsequent cases in both Queensland and Tasmania have confirmed the undoubted authority of the majority in *Van Den Bemd*. In *Ellem*,[75] the Court of Appeal of Queensland ordered a new trial for an accused convicted of manslaughter, on the basis that the trial judge's directions to the jury on the issue of whether the victim's death was an accident were 'confusing' and in one or more respects 'erroneous'.[76] The jury should have been directed that the relevant question was whether the death of the victim was 'such an unlikely consequence' of the accused's action in punching him 'that an ordinary person would not have foreseen it'.[77] In the Tasmanian case of *Manning*,[78] Slicer J issued a written memorandum to the jury which read:

> An event which occurs by chance is one which was neither a foreseen nor foreseeable result of the act. It is fortuitous or surprising in the sense that an ordinary person would not reasonably expect it to happen as a consequence of what was done.[79]

This written memorandum is important because the facts of *Manning* are almost indistinguishable from those in *Martyr* and *Van Den Bemd*.

73 Both *Martyr* and *Mamote-Kulang* were previously regarded as authority for the concept of 'battery manslaughter' at common law. In *Wilson* (1992) 66 ALJR 517, the High Court rejected that form of manslaughter as a head of liability at common law, and thereby indirectly undermined the status of *Martyr* and *Mamote-Kulang*.

74 Note 9 above, at 105.

75 [1994] 75 A Crim R 370.

76 Id at 377.

77 Id at 376.

78 Note 4 above.

79 Written memorandum for the Jury in *Manning*, note 4 above, paragraph 2.4 under the heading 'Responsibility'.

Section 13(3): The Exception to Chance Event

Section 13(1) provides that 'except as hereinafter expressly provided' a person shall not be criminally responsible for a 'chance event'. The most obvious exception to s 13(1) in the Code is s 13(3), which reads:

> 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.

Until the recent Court of Criminal Appeal decision in *Standish*,[80] the section had been virtually ignored in Tasmania since *Vallance*,[81] and given its vague nature and imprecise drafting that is hardly surprising. Burbury CJ recognised in *Vallance* that the section poses 'difficult problems of interpretation and application'[82] and it is probably fair to comment that *Standish* has done little to alleviate these difficulties. But as Crisp J also recognised in *Vallance*, the section 'stands as part of the statute and cannot be ignored'.[83]

At first sight, s 13(3) appears to embody the common law doctrine of 'transferred malice'; the vexed question is whether it extends that doctrine. The doctrine of 'transferred malice' can be explained simply: if D shoots at V, intending to murder him, but misses and kills P, who (unknown to D) was standing close by, then even though in a sense it can be said that the death of P is 'unintended, unforeseen and (depending on the circumstances) unforeseeable', nevertheless D's 'malice' is transferred and D is guilty of murder.

At common law, the doctrine of transferred malice only operates when the *actus reus* and the *mens rea* of the crime intended and the crime committed coincide. The best known common law example of the doctrine is *Latimer*.[84] In that case, D had a quarrel in a public house with V. He took off his belt and aimed a blow at V which struck V lightly. Unfortunately, the belt bounced off and struck P, who was standing close by, and wounded her severely. Although the jury found that the striking of P was purely accidental and not such a consequence as the prisoner ought to have expected, it was held on a

80 [1991] 60 A Crim R 364.
81 [1960] Tas SR 51.
82 Id at 69.
83 Id at 93.
84 (1886) 17 QBD 359.

case reserved that Latimer was properly convicted of unlawfully wounding P.

As stated, s 13(3) has only been considered twice in Tasmania, in *Vallance* and *Standish*. As a result of those decisions it is possible to state some settled principles about the operation of the section:

- the phrase 'except as hereinafter expressly provided' in s 13(1) is a 'reference to the exception created by s 13(3) to the provision in s 13(1) exonerating a person from criminal responsibility where harm occurs by chance'.[85]
- the words 'unforeseen result' in s 13(3) have the same meaning as the words 'event which occurs by chance' in s 13(1).[86] This is implied by the interaction between the subsections: D may be criminally responsible by virtue of s 13(3) for an 'unforeseen result' which would otherwise be excused under s 13(1) as an event which occurred 'by chance'.
- Where the crime intended is the same as the crime committed, the section imposes liability for the second crime even though on the application of s 13(1) the second crime could be regarded as a chance event. If for example D, intending to assault V (by throwing a stick at him), misses and strikes P, D will be guilty of assaulting P. As Burbury CJ said in *Vallance*: 'where crimes A and B are of the same kind ... [s 13(3)] is easy of application'.[87]

Although the third of these principles seems clear from s 13(3), there is disagreement amongst the judges as to its applicability to all crimes in the Code. Burbury CJ and Crisp J in *Vallance*[88] and Zeeman J in *Standish*[89] would restrict the operation of s 13(3) to crimes that require a 'specific intent'—that is, 'an intention to bring about a specific result'[90]—such as murder under s 157(1)(a) or causing grievous bodily harm under s 170.

However, Crawford J in *Vallance*[91] and Wright J and Slicer J in *Standish*[92] maintain that the subsection may apply to any offence or crime where it can be established that the offender had an actual intent to

85 *Vallance* [1960] Tas SR 51 per Burbury CJ at 69, and per Crawford J at 113.

86 Ibid.

87 Id at 69. See also *Standish* [1991] 60 A Crim R 364 at 366 per Wright J and at 380 per Slicer J.

88 [1960] Tas SR 51 at 69 and 95.

89 [1991] 60 A Crim R 364 at 372.

90 See *Snow* [1962] Tas SR 271 per Burbury CJ and Cox J at 293; *Arnol* [1981] Tas R 157 per Neasey J at 968; and *Palmer* [1985] Tas R 138 per Nettlefold J at 148.

91 [1960] Tas SR 51 at 120.

92 [1991] 60 A Crim R 364 at 366 and 380 respectively.

commit some offence, whether or not by its definition the crime requires a specific intent. Wright J reasoned as follows:

> I have come to the conclusion that this subsection may apply to any offence or crime where it can be established that the alleged offender had an actual intent to commit some offence. It seems to me that whether a person has such an intent or not is clearly a question of fact and that one can have such an intent whether or not a specific intent to achieve a particular result is required as a matter of law.[93]

Clearly if the first view is correct, the section can have very little practical operation, for while there are some crimes in the Code which require a specific intent, most do not. In fact, both Burbury CJ and Crisp J in *Vallance* held that s 13(3) was irrelevant to the crime of unlawful wounding because the crime constituted by s 172 did not require a specific intent. If s 13(3) is to have any practical effect, albeit in a limited number of cases, the second view of the scope of the provision would have to prevail.

The more difficult question is whether s 13(3) applies as an exception to the chance-event excuse where crimes A and B are different. If D, intending to assault V (Crime A), brings about V's death (Crime B), which was arguably unforeseen because V had an egg-shell skull, is D guilty of murder?

Burbury CJ thought s 13(3) could apply where crimes A and B were different,[94] but only if both crimes required a specific intent. If that view is correct, D could not be convicted of manslaughter in our scenario as neither the crimes of assault nor manslaughter require a specific intent.

Crawford J in *Vallance* specifically denies the application of s 13(3) to the situation where the crime intended is different from the crime committed.[95] He said:

> If a person does an act with intent to commit a simple offence which causes an unforeseen result which if he had intended it would have constituted the act a crime, he is not liable to conviction for the crime, because there is no liability for the crime but only for the offence *and that is irrelevant*. The same applies if the intent was to commit a crime of a different kind from the one committed. In other words, s 13(3) means exactly what it says, but it does not operate as an exception to s 13(1) unless

93 Id at 366.

94 [1960] Tas SR 51. See his Honour's observations at 69-70, and the curious result reached in relation to s 170 of the Code.

95 *Vallance* [1960] Tas SR 51 at 115-121.

> the offence as for which it imposes criminal responsibility is the offence charged.[96]

Only Slicer J in *Standish* raised the issue of disparate crimes. As stated above, he believed the section could create liability where crimes A and B were the same (in that case, wounding) but:

> It [s 13(3)] certainly could not operate to create liability for a crime involving specific intent, when the intent of the actor was a general intent ... [W]hether it could operate to create liability for different crimes involving the same intent (general or specific) is another matter ... It may operate to limit culpability so that a different or more serious crime could not be committed by virtue of the application of the sub-section.[97]

The Tasmanian decisions leave unresolved the issue of liability for a more serious crime when a less serious crime was intended. The subsection clearly mirrors the 'transferred malice' cases at common law—of which *Latimer* is the best known example—but whether it goes further in its application can only be regarded as unsettled.

The writer's view is that the weight of authority is against any extension of the principle of 'transferred malice' to cases other than where crimes A and B are the same.[98] If s 13(3) were to be extended to cases where the crimes are different, there would be little or no scope for a successful plea of chance-event, which can hardly be what the draftsman intended.

Conclusion

Despite its brevity, the judgment of the majority in *Van Den Bemd* has effected a significant change in the law of homicide in Queensland and, it is submitted, also in Tasmania. Prior to the High Court's decision there had been a consistent refusal by Supreme Courts in the Code States to recognise that the test for accident was whether the relevant event was unintended, unforeseen and unforeseeable. Con-

96 Id at 116.

97 [1991] 60 A Crim R 364 at 382-383.

98 This view is supported by the position at common law, where if D, with the *mens rea* of one crime (eg assault), does an act which causes the *actus reus* of a different crime (eg manslaughter), he cannot as a general rule be convicted of either offence. A common law example is *Pembliton* (1874) LR 2. In that case, D was involved in a fight outside a public house and as a result was charged with maliciously breaking a window. The facts found were that D threw a stone which broke a window, but that he threw it at the people that he had been fighting with intending to strike one or more of them but with no intention of breaking the window. His conviction was quashed because there was no finding that he had the *mens rea* of the crime the *actus reus* of which he had caused.

sequently, juries were rarely asked to consider in a manslaughter trial whether the death of V was 'such an unlikely consequence of D's blow that V's death could not have been foreseen by an ordinary person in D's position'. In most trials for manslaughter, V's death was usually caused by the deliberate (or willed) infliction of a fatal blow and thus, on the supposed authority of *Martyr* and *Mamote-Kulang*, the question of whether V's death was foreseeable was irrelevant.

All that has now changed. It took an enlightened decision of the Supreme Court of Queensland not to overrule *Mamote-Kulang*—that was unnecessary as well as impossible—but rather to recognise that the basic interpretation of s 23 (s 13(1) in the Tasmanian Code) adopted 36 years ago in *Vallance* applied universally, whatever the relevant 'event' or the nature of the charge against the accused.

As far as Tasmania is concerned, the position now is that on every trial of an accused for manslaughter where it is alleged that V's death was brought about by some positive conduct on D's part, the Crown will be required to prove, beyond reasonable doubt, that V's death was either intended or foreseen by D, or would have been foreseen by an ordinary person similarly circumstanced. The result is that for practical purposes an additional element has been introduced into the crime of manslaughter under either s 156(2)(a) or (c) of the Code. As well as establishing that D's act was either:

- intended or commonly known to be likely to cause bodily harm (s 156(2)(a))

or

- an unlawful and dangerous act (s 156(2)(c)),

the Crown must in addition prove:

- that the death of V was not unforeseeable.

The final recognition of the authority of *Vallance* after so many years is welcomed by this writer, who has consistently argued[99] that the interpretation of 'accident' or 'by chance' adopted in the early Queensland cases[100] and accepted in *Mamote-Kulang* was unwarranted, unnecessary, and wrong in principle. The adoption of the foreseeability test in all cases of manslaughter will finally remove the last vestiges of constructive manslaughter from the Tasmanian Code. It is

99 Note 9 above.

100 A notable exception is the dissenting judgement of Hanger J in *Dalbestein* [1966] Qd R 411, who refused to recognise any difference in law between a death caused 'accidentally' by an upturned pitchfork or falling debris and a constitutional defect such as an egg-shell skull.

draconian to impose liability for such a serious offence where D's act is merely 'commonly known to be likely to cause bodily harm' or amounts to 'an unlawful act'. The jury's attention must now be directed to the consequence of D's actions—the death of V—and if that consequence was not foreseeable, the accused should be entitled to an acquittal.[101]

101 The case of *Manning*, note 4 above, illustrates that despite a favourable direction on 'chance event', the jury will not automatically accept that V's death was unforeseeable where V has a constitutional defect. Manning was found guilty of manslaughter and sentenced to 12 months imprisonment.