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# Causation in Criminal Law

## **Abstract**

Despite difficulties associated with the law of causation, it could be much clearer than it is. The aim of this paper is to present a framework which provides an acceptable explanation of, and justification for, the pattern of the cases and the statutory provisions. The discussion is intended to cover the criminal law of Australia, Canada, England and New Zealand.

## **Keywords**

criminal law, causation

## CAUSATION IN CRIMINAL LAW



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### INTRODUCTION

In offences involving injury to the person, and especially in homicide offences, there may be a degree of remoteness between the act or omission of an accused and the result which is alleged to constitute an offence. The eventual result may be the product of additional factors which are more directly connected than is the conduct of the accused. The function of the law of causation is to identify the conditions under which the result may nevertheless be attributed to the accused.

Causation is widely regarded as presenting very difficult issues for criminal law. Indeed, in one official report, it was said: 'There is no more intractable problem in the law than causation'.<sup>1</sup> One source of difficulty can be readily identified. Since attributing causation to an accused can involve weighing her contribution against other causal factors, the enterprise has a partly quantitative character. Outcomes may therefore turn on marginal differences in the magnitude of causal contributions and the pattern of the cases may be difficult to rationalise.

Another source of difficulty lies in some fundamental features of the culture of criminal law in the common-law world. A distinction has traditionally been drawn between the material elements and the mental elements of offences, with issues of fault or culpability being identified with the latter rather than the former. Under this approach, the material elements are taken to prescribe the harms which the criminal law seeks to prevent or at least reduce; the mental elements then prescribe the culpability which justifies exposing actors to measures of penal liability. This scheme, however, obscures the role of certain general principles and rules respecting material elements, such as those which pertain to causation. Attribution of causal responsibility is a preliminary step towards the eventual attribution of criminal culpability to the accused. The goals of the enterprise as a whole must structure the handling of the preliminary step. Principles and rules of causation in criminal law are therefore not independent of issues of culpability. The function of these principles and rules is to identify persons who may be held guilty of offences in the event that the mental elements are also established.<sup>2</sup>

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1 Criminal Law and Penal Methods Reform Committee of South Australia, Fourth Report, *The Substantive Criminal Law* (1977), p 50.

2 See *Campbell* (1980), 2 *A Crim R* 157 (WACCA), per Burt C J: 'It would seem to me to be enough if juries were told that the question of cause for them to decide is not a philosophical or scientific question, but a question to be determined by them applying their common sense to the facts as they find them, they appreciating that the purpose of the enquiry is to attribute legal responsibility in a criminal matter'. See also *Timbu Kolian v The Queen* (1968) 119 CLR 47 (HC), per Windeyer J at 69. For an analysis of how causation in the law of torts relates to the overall objectives of the law of torts, see Fleming *The Law of Torts* (7th ed, 1987) p 182.

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These difficulties perhaps explain the paucity of statutory provisions on causation. Even in jurisdictions where an attempt has been made to codify criminal law completely, most matters of causation have tended to be left to the common law.<sup>3</sup> Moreover, these difficulties perhaps explain the diffidence shown by judges in tackling the law of causation. Unfortunately, the courts have often retreated into *ad hoc* judgments. They have tended to avoid discussing the conceptual and theoretical issues. The cases do not present overall frameworks for handling matters of causation.

Despite the difficulties, the law of causation could be much clearer than it is. The aim of this paper is to present a framework which provides an acceptable explanation of, and justification for, the pattern of the cases and the statutory provisions. The discussion is intended to cover the criminal law of Australia, Canada, England and New Zealand.

## CAUSAL CONNECTION

It can be helpful to draw an initial distinction between problems of causal connection and of causal responsibility. The initial step in a causation analysis is to ask whether there is any connection between a person's conduct and the result alleged to constitute an offence. If the answer to this first question is positive, then the next step is to ask whether the connection is sufficiently strong to justify attributing causal responsibility to that person. Causal connection is sometimes called 'factual causation', in contrast to causal responsibility which is sometimes called 'imputable causation' or 'legal causation'. As the contrast between the terms 'factual' and 'legal' causation indicates, the major difficulties in the law of causation arise in relation to causal responsibility. The prior question of causal connection can usually be given a straightforward answer. If the result would not have occurred without (ie 'but for') the conduct of the accused, then a causal connection is present. Conversely, if the result would have occurred whatever the accused did or did not do, then there is no causal connection. The relative simplicity of the 'but for' test lies behind the suggestion that causal connection is a matter of fact rather than of law. Nevertheless, legal clarification of some matters may be useful. In addition, the law sometimes recognises causal connections without the 'but for' test being satisfied and it ignores some connections which would be established under that test.

Death is, of course, inevitable. The issue in homicide cases is therefore whether the death would have occurred as soon as it did 'but for' the conduct of some person.<sup>4</sup> It makes no difference that the conduct merely hastened a death which would have later occurred in any event. Thus, this aspect of the law of causation provides no defence to a 'mercy-killer'. Moreover, it makes no difference that the conduct resulted in death merely because it worsened an already existing condition. This

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<sup>3</sup> Some codes specify generally that, for the purposes of homicide offences, death may be caused 'directly or indirectly': see *The Criminal Code* (Qld) s 293; *The Criminal Code* (WA) s 270; *Crimes Act 1961* (NZ) s 158; *Criminal Code* (Can), RSC 1985, c C-46, s 222(1). These provisions merely indicate that someone can be held to have caused a result despite a degree of remoteness. They do not provide a general formula for determining when causation occurs.

<sup>4</sup> See, for example, *R v Evans and Gardiner (No 2)* [1976] VR 523 at 527-528 (Full Court).

still follows from a straightforward application of the 'but for' test. The framers of criminal codes have, however, often included specific provisions for the purpose of clarifying these situations. The standard formulation is that a person who inflicts an injury from which death results causes the death even though the injury merely accelerates or hastens a death from a disease or disorder arising from another cause.<sup>5</sup>

A more difficult issue is presented when an act would ordinarily have accelerated death but, due to special circumstances, it happened to prolong life. Consider a hypothetical posed by Hart and Honoré: 'A poisons B so that B is too ill to sail on a voyage and B dies of the poison the day after the ship is lost with all aboard'.<sup>6</sup> Hart and Honoré suggest that under some special circumstances an actor may be held to have caused a death even though her conduct actually happened to prolong the life. This seems intuitively correct. The rationale, however, is not easy to expound. One possibility is to substitute the formulation 'the death would not have occurred when it did' for the formulation 'the death would not have occurred as soon as it did'. Indeed, the former formulation is found in s.153(2) of the Tasmania *Criminal Code*, which provides: 'Killing is causing the death of a person by an act or omission but for which he would not have died when he did . . .'.<sup>7</sup> Under this formulation, one person causes the death of another when her conduct determines the moment of death, which could come before or after the death which would otherwise have been expected. The formulation would, however, cover persons who administer medical treatment seeking to prolong life and managing to do so. It would violate ordinary understandings of causation to say that such persons 'cause' the eventual death. The better approach is to recognise the need for an exception to the 'but for' condition. The exception could be formulated in this way: if a person does something which would ordinarily shorten life and the death occurs, then the person causes the death notwithstanding that the conduct fortuitously happens to prolong life.

'Multiple sufficient causation' is another exceptional situation where a person can be held to have caused a death which would have occurred even without her contribution. Multiple sufficient causation occurs where two actors each do things which would cause the result, so that the contribution of neither of them was necessary for the outcome, and the effects of their contributions cannot be separated. The problem is that either both must cause the result, or neither do. Suppose that A and B both inflict fatal wounds on V. If one wound can be isolated as the operative cause of death (eg where a bullet through the brain takes effect before a stab in the abdomen), then whoever inflicted that wound would have solely caused the death. The act of the other was neutralised.<sup>8</sup> It may be, however, that the effects of the two wounds cannot be isolated (eg where two fatal stab wounds were inflicted). The accepted view here

5 See *The Criminal Code* (Qld) s 296; *The Criminal Code* (WA) s 273; *Criminal Code* (Tas) s 154(d); *Crimes Act 1961* (NZ) s 164; *Criminal Code* (Can), RSC 1985, c C-46, s 226.

6 Hart and Honoré, *Causation in the Law* (2nd ed, 1985), p 240.

7 The scope of the provision is, however, narrowed by an additional clause: ' . . . and which is directly and immediately connected with his death'.

8 The other person could, however, be liable as an aider and abettor of the homicide.

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is that both actors can be held to have caused the death and can be convicted of a homicide offence.

Usually in such situations, the two actors will be working in concert as joint-principals. They could, however, be independent actors. A spectacular example is the American case of *People v Lewis*.<sup>9</sup> The appellant from a manslaughter conviction had shot the deceased in the abdomen. The deceased, knowing that the wound was fatal, had then self-inflicted another fatal wound by cutting his throat with a knife. The argument on the appeal was that this was a case of suicide not homicide. The court played with the idea that the relationship between the two wounds might sustain the causal chain, even if the knife wound could be isolated as the operative cause of death.<sup>10</sup> It concluded, however, that it was unnecessary to decide this, since the two wounds worked together in producing death. Hence, even if the second wound had been inflicted by a third party, the appellant would still have caused the death along with the third party.

In addition to these instances where the 'but for' test is by-passed, there are several instances where the test would be satisfied but the law nevertheless chooses to ignore the connection. An obvious example arises under the 'year-and-a-day' rule, which is recognised at common law and under most codes.<sup>11</sup> A death is not caused by conduct if it occurs more than a year and a day after the conduct. The origins of this rule are obscure and some recent reform proposals have recommended its abolition.<sup>12</sup> It would appear to be an anachronism if its rationale is lack of confidence in medical diagnosis after the passage of a year.

There are two other restrictive rules which have historical foundations but diminished support in modern times. One rule is that which excludes causing death by giving false evidence which procures an execution. Smith and Hogan have concluded that the balance of authority at common law is perhaps against the rule.<sup>13</sup> It is also absent from the criminal codes of Queensland and Western Australia. The rule has, however, been incorporated into the criminal codes of Tasmania, New Zealand and Canada.<sup>14</sup> The other rule is that which excludes causing death by influence upon the mind alone. This rule is incorporated in the criminal codes of New Zealand and Canada,<sup>15</sup> but not those of the Australian states. Its common law origins appear to be connected with fears about encouraging prosecutions for witchcraft. Its present relevance, however, lies mainly where victims of criminal offences have suffered emotional stress and fright which has induced heart attacks.<sup>16</sup> Support for the rule has now declined at common law,<sup>17</sup> perhaps due to increasing confidence in

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9 57 Pac 470 (1899) (Cal SC).

10 *Ibid* at 472.

11 See *The Criminal Code* (Qld) s 299; *The Criminal Code* (WA) s 276; *Criminal Code* (Tas) s 155; *Crimes Act 1961* (NZ) s 163; *Criminal Code* (Can) RSC 1985, c C-46, s 227.

12 See, for example, *Crimes Bill* (1989) No 152-1 (NZ), Explanatory Note p xv.

13 Smith and Hogan, *Criminal Law* (6th ed, 1988), p 327. *Sed contra*, Howard, *Criminal Law* (4th ed, 1982), pp 27-28.

14 *Criminal Code* (Tas) s 153(7) [but see also sub s (6)]; *Crimes Act 1961* (NZ) s 161; *Criminal Code* (Can) s 222(6).

15 *Crimes Act 1961* (NZ) s 163; *Criminal Code* (Can), RSC 1985, c C-46, s 228.

16 See, for example, *R v Popen* (1981) 29 CR (3d) 183 (Alta CA).

17 See Smith and Hogan, above n 13, pp 325-326.

medical diagnoses. Moreover, where it is recognised under codes, it is qualified by provisions respecting causing death by wilfully frightening children and sick persons.<sup>18</sup>

The doctrine of innocent agency can be viewed as a prescription for the exclusion of ‘but for’ connections which is still flourishing. An innocent agent is a person who is unwittingly used by someone else to achieve an unlawful end. An example would be the postman who delivers a bomb which has been sent through the mail. If the bomb explodes and kills the recipient, the death would not have occurred but for the delivery by the postman (and the actions of a string of other ‘innocent agents’). In ordinary language, however, an innocent agent is not said to cause a result. There are few judicial authorities on point, but it is generally supposed that the law of causation mirrors ordinary language in this respect. Criminal codes are silent on the matter, so that the recognition of the doctrine everywhere depends on common law.

The ‘coincidence’ or ‘ordinary hazard’ principle can be viewed as yet another mechanism by which certain conduct is held not to be causally connected with the result, even though the result would not have occurred without it. Again, the principle operates by virtue of common law, even in jurisdictions which possess criminal codes.

The function of the principle is to exclude connections which are mere coincidences. Suppose that A attacks and seriously injures V, and V is then killed instantaneously in a traffic accident as she is driven to hospital.<sup>19</sup> The generally accepted view is that A has not caused the death. The reason is that, although the death would not have occurred but for the attack, the attack would not have significantly increased the likelihood of the death occurring. Being killed in a traffic accident is an ordinary hazard of life. The connection with the attack would be no more than a coincidence. In contrast, if the attack takes place while V is crossing a road, and V is struck and killed by a car as she jumps backwards, the connection would escape the coincidence principle. Subjection to fears which lead to disregard of traffic conditions is not one of the ordinary hazards of life.

The coincidence principle can be viewed as an aspect of the more general principle that *de minimis non curat lex*. Although this wider principle is of severely limited application in criminal law, there is cursory dicta from the English Court of Appeal<sup>20</sup> and the Supreme Court of Canada<sup>21</sup> indicating that causal connections need to be above the ‘*de minimis*’ level to be recognised at law.

Another way of looking at the coincidence principle is to view it as an aspect of causal responsibility rather than causal connection. If the outcome was a coincidence, then the connection would not be sufficiently strong to justify the attribution of causal responsibility. This is the

18 *Crimes Act 1961* (NZ) s 160 (2)(e); *Criminal Code* (Can), RSC 1985, c C-46, s 222(5)(d).

19 See *Bush v Commonwealth* 78 Ky 268 (1880) (Ky CA). The deceased had been hospitalised as a result of a wound and had contracted scarlet fever from a surgeon who was operating on him. The death was held due to a ‘visitation of Providence’ and not the act of the assailant.

20 *R v Cato; R v Morris; R v Dudley* [1976] 1 All ER 260 at 265-266 (CA).

21 *Smithers v R* [1978] 1 SCR 506 at 519-520.

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approach taken by Smith and Hogan<sup>22</sup> and by Williams.<sup>23</sup> It is also reflected in the treatment of coincidences in the South Australia case of *R v Hallett*.<sup>24</sup> According to the version of the facts most favourable to the defendant, he had fought with the deceased, rendered him unconscious and left him lying at the water's edge of a tidal beach. The tide had risen and the death resulted from drowning. In holding that the defendant caused the death, the court ruled that the normal operation of the tide did not break the causal chain from the acts of the defendant. On the other hand, it was suggested that the chain would be broken if the victim had been left in a safe position but had been drowned by an extraordinary tidal wave resulting from an earthquake.<sup>25</sup> The court's observations assumed that, even in the latter case, there would be a causal contribution recognised by law on the part of the defendant, so that special rules respecting supervening causes would need to be invoked in order to hold that the original actor did not cause the death.

At one time, the choice to treat these cases of coincidence as instances where causal connection is negated or as instances where causal responsibility is negated could have been important. There was a common judicial practice of instructing juries that, if a particular causal connection was found, the causal responsibility of the accused would then be established as a matter of law. This practice was, however, repudiated by the English Court of Appeal in *R v Pagett*.<sup>26</sup> It was there insisted that, although the attribution of causal responsibility is governed by various legal rules and principles, their application to the facts of a particular case is properly a matter for the jury to decide.

On the approach taken in *Pagett* to the respective roles of judge and jury, nothing may now turn on the choice to handle the coincidence principle under the rubrics of connection or responsibility. Treating coincidences as negating responsibility but not connection aids conceptual simplicity. On the other hand, it seems odd to say in any sense that an assailant causes a death in a case where, for example, the death occurred coincidentally in a traffic accident. Treating coincidences as negating causal connection may sometimes have the virtue of mirroring ordinary language.

## THE THRESHOLD OF CAUSAL RESPONSIBILITY

A causal connection between conduct and a result is not by itself sufficient to make that conduct the legally recognised cause of the result. The conduct causes the result only where the connection is sufficiently strong to justify the attribution of causal responsibility. The assessment of the strength of a connection involves weighing it against any other factors which contributed to the result.

The conclusion that a particular connection is strong enough to establish causal responsibility does not necessarily resolve the question of legal causation. In assessing the strength of different causal contributions, it may emerge that more than one actor has passed the threshold for causal

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22 Above n 13 at 318.

23 Williams, *Textbook of Criminal Law* (2nd ed, 1983), p 387.

24 [1969] SASR 141 (Full Court).

25 *Ibid* at 150.

26 (1983) 76 Cr App R 279 at 290-291 (CA).



responsibility. In this kind of situation, either all actors passing the threshold can be held to have caused the result or the law can choose between them. The doctrine of *novus actus interveniens* is a mechanism for choosing between actors who could each be held causally responsible. The function of the doctrine is to eliminate certain persons from the causal picture because responsibility is to be attributed to someone else. The doctrine of *novus actus interveniens* is examined in a later section of this paper. The present section is concerned with the threshold of causal responsibility. It examines the tests for determining whether a causal connection is sufficiently strong to justify attributing causal responsibility in the absence of an attribution to someone else.

Two general tests have been used in handling questions of causal responsibility. They will here be called the 'substantial cause' test and the 'reasonable foreseeability' test. The 'substantial cause' test is a *retrospective* test. It involves looking backwards from a result in order to determine whether, in the light of all that happened, a particular causal factor has played a substantial role in bringing about that result. In contrast the 'reasonable foreseeability' test is a *prospective* test. It involves adopting the position of the person who was alleged to have caused the result and then looking forward from the conduct towards the result. The question is asked whether or not the conduct made the result a reasonably foreseeable consequence, in the sense that it was within the normal range of expected outcomes. The concern is with the foreseeability of the consequence which is an ingredient of the offence (eg a death) and not with the foreseeability of the manner of its occurrence. The intermediate steps which led to the consequence therefore need not have been foreseeable. As it was said in a recent case: 'If a person creates a situation intended to kill and it does kill it is no answer to a charge of murder that it caused death at a time or in a way that was to some extent unexpected'.<sup>27</sup>

In Australia as in most jurisdictions, these tests operate by virtue of the common law. Criminal codes have been silent on the question. Each test carries a good deal of judicial support. In most instances they yield the same outcomes but divergences are possible. Unfortunately the courts have avoided confronting the differences between the tests. Cases are handled by reference to one or the other, with the alternative usually being ignored. If the alternative is recognised at all, the choice which has been made is usually not defended.

The best-known example of the 'substantial cause' test is the English case of *R v Smith*.<sup>28</sup> A stabbing was there held to cause death, even though the victim had twice been dropped on the way to the hospital and the medical treatment which he eventually received for his wound was inappropriate and 'might well have affected his chances of recovery'.<sup>29</sup> The test applied by the court was whether the original wound was 'still an operating cause and a substantial cause'.<sup>30</sup> *Smith* was followed by the Victoria Full Court in *R v Evans and Gardiner (No 2)*,<sup>31</sup> where the death was more remote from the wound. A stab wound had there necessitated

27 *Demirian* (1988) 33 A Crim R 441 (VCCA).

28 [1959] 2 All ER 193 (Courts-Martial AC)

29 *Ibid* at 198.

30 *Ibid*.

31 [1976] VR 523.

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the removal of a portion of the bowel. The victim had apparently recovered. He collapsed and died, however, eleven months afterwards. A fibrous tissue-growth had led to a stricture of the bowel and poisoning had resulted. As in *Smith*, there was an issue of medical negligence, but again the original assailant was found to have caused the death. The trial judge directed the jury in accordance with the test of 'an operating cause and a substantial cause' from *Smith*. The Full Court held that this test was 'a satisfactory general guide'.<sup>32</sup>

*Smith* referred to an 'operating cause' as well as a 'substantial cause'. This does not mean that an initial injury must necessarily be the operative cause of death in the medical sense. For example, in *Hallett*<sup>33</sup> the man who was left unconscious at the edge of the beach died from drowning and not from the physical effects of his injuries. All that the reference to 'operating cause' appears to mean is that the strength of a causal connection must be sustained through to the time of the result. This would also follow from the essential nature of the 'substantial cause' test. Thus, the reference to an 'operating cause' merely serves a function of clarification.

The English case of *Jordan*<sup>34</sup> is sometime taken to illustrate how a causal factor which could once have been substantial diminished in significance over time. The victim of a stabbing was given an antibiotic to which he was intolerant. In addition, abnormal quantities of liquid were introduced intravenously. The medically operative cause of death was traceable to this treatment rather than the wound. Indeed, the wound had mainly healed by the time the mistakes in treatment were made. Various explanations have been offered for the decision that the wound did not cause the death.<sup>35</sup> The case is perhaps best rationalised, however, as one where the causal contribution of the wound had become insignificant. The treatment had become a precautionary measure. To adopt the language used in *Smith*, the wound had become merely 'the setting' for another cause (ie the treatment) to operate.<sup>36</sup>

Perhaps the fullest statement of the 'substantial cause' test is that found in *Hallett*. The Full Supreme Court of South Australia said:

The question to be asked is whether an act or a series of acts (in exceptional cases an omission or series of omissions) consciously performed by the accused is or are so connected with the event that it or they must be regarded as having a sufficiently substantial causal effect which subsisted up to the happening of the event, without being spent or without being in the eyes of the law sufficiently interrupted by some other act or event.<sup>37</sup>

*Hallett* is also noteworthy as one of the few cases in which reference has been made to both 'substantial cause' and 'reasonable foreseeability'. The court rejected arguments by counsel for the appellant that causation could only be found if the death was a reasonably foreseeable consequence of the appellant's actions.<sup>38</sup> The case is weakened as an authority because

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32 *Ibid* at 529.

33 Above n 24.

34 (1956) 40 Cr App R 152 (CA).

35 See notes 83-84 and accompanying text.

36 Above n 28 at 198.

37 Above n 24 at 149. The reference to interruption is presumably a reference to the doctrine of *novus actus interveniens*.

38 *Ibid* at 148-152.

the court apparently supposed that foreseeability could only be an issue relating to *mens rea*.<sup>39</sup> It did not appear to appreciate the support for foreseeability as a test of causation. Nevertheless, the case stands as perhaps the best authority for the proposition that causal responsibility is attributed where a causal connection contributes substantially to the result.

The most widely used authority for the competing test of reasonable foreseeability is the English case of *Roberts*.<sup>40</sup> A girl had been assaulted in a moving car and had injured herself when she jumped out. In upholding a conviction of assault occasioning actual bodily harm, the Court of Appeal laid down this test of causation:

Was it the natural result of what the alleged assailant said and did, in the sense that it was something that could reasonably have been foreseen as a consequence of what he was saying or doing? As it was put in the old cases, it has got to be shown to be his act, and if of course the victim does something so 'daft', in the words of the appellant in this case, or so unexpected, not that this particular assailant did not actually foresee it but that no reasonable man could be expected to foresee it, then it is only in a very remote and unreal sense a consequence of the assault, it is really occasioned by a voluntary act on the part of the victim which could not reasonably be foreseen and which breaks the chain of causation between the assault and the harm or injury.<sup>41</sup>

This statement captures the essence of the 'reasonable foreseeability' test as a device which can sometimes exclude the causation of surprising outcomes, no matter how substantial the contribution may appear to have been in retrospect. As so often happens in causation cases, however, the authority of *Roberts* is weakened by the failure to address alternative tests. There was no mention of the 'substantial cause' test in the judgment and no reference to the decision in *Smith*.

The strongest endorsements of the 'reasonable foreseeability' test are perhaps those coming from a line of cases under the Australian criminal codes. Issues of causation have tended to be addressed through the provisions in s 23 of the Queensland and Western Australia codes stating that a person is not criminally responsible 'for an event which occurs by accident' and the similar provision in s 13(1) of the Tasmania code referring to 'an event which occurs by chance'. Lack of causation is treated as one of the reasons why an event may be held to have occurred by accident or chance.<sup>42</sup>

The established test for determining whether an event occurred by accident or chance is that it should not have been foreseeable.<sup>43</sup> This

39 *Ibid* at 148-149.

40 (1971) 56 Cr App R 95 (CA).

41 *Ibid* per Stephenson L J at 102.

42 In *R v Martyr* [1962] Qd R 398 (CCA), Mansfield C J said that the words 'which occurs by' cover cases where the act of a person is the 'sine qua non' of a death or injury but not the 'proximate cause' or 'causa causans'. It has, however, been held that causation is not the exclusive concern of this part of s 23 and that special factors may establish an 'accident' even though causation is present: see *R v Tralka* [1965] Qd R 225 (CCA).

43 See *Vallance v The Queen* (1961) 108 CLR 56 (HC), per Dixon C J at 61 and Kitto J at 65; *Kapronovski v The Queen* (1975) 133 CLR 209 (HC), per Gibbs J at 231-232. The cases hold that the outcome must have been neither foreseen or foreseeable. It can be argued that anything actually foreseen must necessarily have been foreseeable. This is true, however, only if the objective standard of foreseeability incorporates any special knowledge which a particular actor may possess. Specifying actual foresight as an alternative secures this end.

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requirement is subject to an exception in cases where a death resulted in part from some constitutional defect which would not have been foreseeable to the ordinary person.<sup>44</sup> Otherwise, however, reasonable foreseeability has been the basic test which establishes causation and negatives the defence of accident or chance.

These developments have been based mainly on the historical construction of the words 'accident' and 'chance'. In the Queensland case of *R v Knutsen*,<sup>45</sup> however, a more direct link was made to general issues about causation. In that case a man had assaulted a woman and left her lying unconscious on a highway. She was then run over by a passing motorist. The original assailant was convicted of doing grievous bodily harm, not with reference to the injuries suffered in the assault but instead with reference to the injuries suffered from having been run over. All three judges of the Court of Criminal Appeal took the view that the assailant would have caused the victim's injuries if they were a reasonably foreseeable consequence of his actions. The court split, however, over the application of this test to the facts of the case. The majority held that the result was not reasonably foreseeable because of the visibility, the conditions of the road and the position of the woman. The third judge disagreed.

One reason why *Knutsen* is a significant endorsement of the 'reasonable foreseeability' test is that the choice of this test made a difference in the case. Although the alternative 'substantial cause' test was not mentioned in the judgments, that test would surely have been satisfied by the facts of the case. The result would not necessarily have changed, because the conduct of the motorist could perhaps have constituted a *novus actus interveniens*.<sup>46</sup> The analysis would, however, have been different.

Another reason why *Knutsen* is a significant case is that two judges gave explanations for their choice of test. Mack J gave reasons specific to the Queensland *Criminal Code*. He diagnosed a general principle in the code relating criminal liability to whether things are 'likely to happen'.<sup>47</sup> Stanley J, on the other hand, referred to developments in the law of torts, where causation problems are more frequent than in criminal law and where 'reasonable foreseeability' has become established as the main conceptual tool. He quoted a passage from the judgment of the Privy Council in *The Wagon Mound*, which expounds a general justification for the 'reasonable foreseeability' test:

If it is asked why a man should be responsible for the natural or necessary or probable consequences of his act (or any similar description of them) the answer is that it is not because they are natural or necessary or probable, but because, since they have this quality, it is judged by the standard of the reasonable man that he ought to have foreseen them.<sup>48</sup>

It can be argued conversely that causal responsibility ought not to be attributed where there was no reason why the person ought to have foreseen the consequence, however substantial the causal contribution might appear to have been in retrospect. A possible objection to this

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44 See notes 54-56 and accompanying text.

45 [1963] Qd R 157 (CCA).

46 See at text accompanying notes 64-65. See also n 74.

47 Above n 45 at 186.

48 *Overseas Tankship (UK) Ltd v Morts Dock and Engineering Co Ltd (The Wagon Mound)* [1961] AC 388 at 423. Quoted in *Knutsen*, above n 45 at 173.

line of argument is that it confuses the issue of causation with the issue of *mens rea*. It could be said that it is the function of the law of *mens rea* rather than the law of causation to address matters of culpability. A counter to this objection was outlined in the introduction to this paper. With respect to general principles of criminal liability, the distinction between the material and the mental elements of offences is more a distinction of analytical convenience than of function. Determinations of causal responsibility cannot sensibly be made without reference to the role of culpability in criminal law generally. The law of causation is similar in this respect to, for example, the law relating to liability for omissions. Both govern preliminary steps towards eventual determinations of criminal culpability. Both must be designed in light of the overall enterprise in which they play a part.

*Knutsen* has been curiously neglected, even in Queensland. For example, it was ignored in the later case of *R v Kinash*.<sup>49</sup> The Queensland Court of Criminal Appeal was there faced with a causation issue respecting the turning-off of a life-support machine. The court held that assaults committed by the appellant 'continued to be an operating and substantial cause' and referred to *Smith*.<sup>50</sup> *Knutsen* has also been ignored or misunderstood in other states. For example, in his book *Criminal Law*, Howard confidently asserts that '[t]he law attributes homicide to D if his act sufficiently contributed to the subsequent death of V'.<sup>51</sup> *Knutsen* is cited at various points in the text, but only once with respect to causation and only to illustrate how causation can be an issue in relation to assault as well as homicide.<sup>52</sup> His comment on the case ends with a brief suggestion that the case was wrongly decided because the appellant had 'substantially contributed' to the injuries the victim received from the car. The text gives no recognition to the view of causation which actually guided the judgments.

On balance, the 'substantial cause' test may carry a little more modern judicial support than the 'reasonable foreseeability' test. The latter test, however, can claim to fit better with the overall law of causation. In particular, it provides a rationale for the existence of the 'thin skull' principle as a special principle of causation which identifies an exception to general principles of causal responsibility. The 'thin skull' principle eliminates unusual antecedent conditions of victims from the assessment of causal responsibility. It is said that assailants must take their victims as they find them. It is immaterial that an antecedent condition was unforeseen and unforeseeable by the ordinary person. In most such instances, however, the action of the assailant was the only trigger alleged for the operation of the condition. Causal responsibility would therefore inevitably be attributed to the assailant if the 'substantial cause' test is used. Only if the 'reasonable foreseeability' test is used is there a distinct role for the 'thin skull' principle to play.

With respect to antecedent *physical* conditions, the 'thin skull' principle has constituted a long-established rule of law. A modern reaffirmation occurred in the decision of the Supreme Court of Canada in *Smithers v*

49 (1981) 5 A Crim R 240 (CCA).

50 *Ibid* at 242.

51 Howard, n 13, p 29.

52 *Ibid* p 124, n 21.

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R.<sup>53</sup> The youth had kicked the deceased in the stomach area. The kick induced vomiting, a malfunctioning epiglottis caused aspiration of the vomit and death resulted. In dismissing an appeal from a conviction of manslaughter, the Court ruled that the unforeseeability of the malfunction, and hence of the death, was immaterial. The principle has also underlain the recognition in the Australian code jurisdictions of an exception for constitutional defects to the general requirement that a death or injury have been foreseeable. Cases have concerned weak blood vessels,<sup>54</sup> enlarged spleens<sup>55</sup> and, indeed, thin skulls.<sup>56</sup>

With respect to antecedent *psychological* conditions, the application of the principle has been less certain. In *R v Blaue*,<sup>57</sup> however, the English Court of Appeal held that some psychological as well as physical conditions can be disregarded in assessing causal responsibility. A Jehovah's Witness had been stabbed. She was advised that she needed a blood transfusion to save her life, but she refused because of her religious beliefs. Although the medical evidence was that she would not have died if she had permitted the transfusion, her assailant was convicted of manslaughter. On an appeal, counsel for the appellant argued that the causal chain should be considered broken if the decision not to have the transfusion was unreasonable, in effect proposing that the causation issue be determined on the test of foreseeability. The court preferred to follow the 'thin skull' principle, which was taken to apply to 'the whole man, not just the physical man'.<sup>58</sup>

The Court in *Blaue* did not distinguish cases such as *Roberts*,<sup>59</sup> where the significance of choices made by victims has been assessed on the test of reasonable foreseeability. A distinction could be drawn between choices which are contingent responses to the presence of immediate circumstances and all choices which are governed by antecedent psychological conditions. The 'thin skull' principle might then apply where, for example, a person with suicidal tendencies responded to the trauma of an attack by actively killing herself. It may, however, be significant that the victim in *Blaue* contributed to her own death by way of an *omission* to accept treatment. A standard feature of criminal codes is a specific provision eliminating omissions respecting medical treatment as causal factors. The usual formulation is that a person who causes an injury resulting in death causes the death even though it might have been prevented by proper treatment.<sup>60</sup> Such provisions would cover the type of situation presented by *Blaue*. They may reflect the way in which criminal law generally attaches less significance to omissions than to actions. Just as omissions play a restricted role as sources of the *actus rei* of offences, so too may omissions play a restricted role as factors which can break a causal chain.<sup>61</sup>

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53 Above n 21.

54 *R v Martyr*, above n 41.

55 *Mamote-Kulang v The Queen* (1964) 111 CLR 62 (HC).

56 *Ward v R* [1972] WAR 36 (CCA).

57 [1975] 3 All ER 446 (CA).

58 *Ibid* at 450.

59 See notes 40-41 and accompanying text.

60 See *The Criminal Code* (Qld) s 297; *The Criminal Code* (WA), s 274; *Criminal Code* (Tas) s 154(b); *Crimes Act 1961* (NZ) s 165; *Criminal Code* (Can), RSC 1985, c C-46, s 224.

61 See *R v Evans and Gardiner* (No 2), above n 4 at 527-528.

*Blaue* may therefore not stand as an authority for the proposition that all antecedent psychological conditions are governed by the 'thin skull' principle. Nevertheless, that principle has a role in the law of causation which is difficult to reconcile with the 'substantial cause' test for the attribution of causal responsibility. It is submitted that the competing test of reasonable foreseeability fits better with the overall scheme of causation in criminal law as well as being supported by the better arguments in relation to the objectives of criminal law.

## NOVUS ACTUS INTERVENIENS

It is often said that for causation to be established 'an accused's act need not be the sole cause or even the main cause, of the victim's death'.<sup>62</sup> This aphorism can, however, be misleading. Where more than one person, each pursuing an independent course of action, passes the threshold of causal responsibility, a selection is usually made. Criminal law resists the idea of multiple independent causation.<sup>63</sup> In the law of torts, multiple independent causation is more readily accepted and easily handled through apportionment of damages. Criminal law has not developed an equivalent doctrine, perhaps for fear of diluting the dramatic effect of the process of trial and punishment. Where there are independent courses of action, the search is for one cause. The device which is used to eliminate additional causal actors is the doctrine of *novus actus interveniens*. Under this doctrine, the attribution of causal responsibility to a later actor is held to relieve the earlier actor of causal responsibility. The causal chain from the earlier actor is broken by the intervention of a new act. This does not mean that the earlier actor obtains complete immunity from criminal liability. There could be liability for an attempt, for a lesser harm or for dangerous conduct.

These comments are not intended to deny the essential truth of the aphorism that causal responsibility does not depend on an accused's act having been the sole cause. Several causal factors can operate together in making a result occur. Moreover, the causal matrix can include the actions of more than one person. For example, two or more actors may be connected together in a way which makes them joint-principals or accomplices. In addition, where one person performs positive acts causing death or injury and another person omits to interfere in breach of a duty to act, both can be held to have caused the result.<sup>64</sup> In such a case, there are not two independent courses of action. There is merely an omission on the part of one person to interfere in a course of action pursued by the other. In cases where there are two independent courses of action, however, it would be extraordinary for both actors to be held causally responsible for the purposes of criminal law.

<sup>62</sup> See *R v Pagett*, above n 26 at 288.

<sup>63</sup> *Contra, R v Russell*, [1933] VR 59 at 82 per McArthur J (Full Court); *R v Knutsen*, above n 45 at 174 per Stanley J. Nevertheless, acceptance of multiple independent causation is unusual. The cases cited provide the support only of dicta from single judges. Moreover, acceptance of multiple independent causation is clearly inconsistent with the special rules in criminal codes on when medical treatment can break a causal chain: see notes 84-86 and accompanying text.

<sup>64</sup> See, for example, *R v Russell*, above n 63; *R v Popen* (1981) 60 CCC (2d) 232 (Ont CA).

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The phrase *novus actus interveniens* is sometimes used loosely to describe any situation where the conduct of a later actor breaks a causal chain stemming from an earlier actor. Yet, quite apart from the doctrine of *novus actus interveniens*, one actor may relieve another of causal responsibility under the general principles which have already been outlined. Consider, for example, the hypothetical discussed earlier where A attacks and seriously injures V, and then V is killed instantaneously in a traffic accident as she is driven to hospital.<sup>65</sup> By virtue of the coincidence principle, the motorist and not the assailant causes the death. In contrast, the function of the special doctrine of *novus actus interveniens* is to handle situations where threshold tests for causal responsibility have been passed. Whereas threshold tests of causal responsibility function to *include* persons as causes of an outcome, the doctrine of *novus actus interveniens* functions to *exclude* persons. Only where threshold tests have been passed is the doctrine needed and its power displayed.

There is little established law on when later conduct constitutes a *novus actus interveniens*. At the level of general principle, the leading case is *R v Pagett*.<sup>66</sup> The English Court of Appeal there upheld a manslaughter conviction where the appellant had shot at armed police in a dark area, while using a girl as a shield and the girl had been killed by shots fired by the police in self-defence instinctively and without taking particular aim. The court ruled that neither a reasonable act performed for the purpose of self-preservation nor an act done in the performance of a legal duty can be viewed as a *novus actus* if it was caused by the accused's own act.<sup>67</sup> These propositions were viewed as derivations from a general requirement that a *novus actus interveniens* must be 'voluntary' in the sense of 'free, deliberate and informed'.<sup>68</sup> The terminology was here taken from Hart and Honoré, *Causation in the Law*.<sup>69</sup> The Court refrained from endorsing the definition completely but suggested that it was 'broadly correct and supported by authority'.<sup>70</sup>

The suggestion that a *novus actus* must be 'free' appears to signify only that it must not itself be caused by the earlier actor. Yet this seemingly simple requirement is subject to the uncertainties which surround the general issue of causal responsibility. The earlier actor could be held to have caused an intervention wherever there was a substantial contribution to its occurrence; alternatively, the original actor could be held to have caused an intervention only where its occurrence was reasonably foreseeable.<sup>71</sup>

The second part of the formula, 'deliberate and informed', appears to exclude altogether conduct which is inadvertently negligent even if it is grossly negligent. The indication is that the only conduct which can constitute a *novus actus interveniens* in relation to some death or injury is conduct which was intended to bring about that death or injury or which was at least accompanied by an awareness of the risk of what

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65 Above at text accompanying n 19.

66 Above n 26.

67 *Ibid* at 289-290.

68 *Ibid* at 289.

69 (1st ed, 1959), p 292 et seq; (2nd ed, 1985), p 292 et seq.

70 See note 26 at 289.

71 The latter alternative appears to be the position taken by Philp J in *R v Knutsen*, above n 45 at 168.



followed. This general formula could be more readily accepted as a statement of *sufficient* conditions for a *novus actus interveniens*. There is a substantial body of dicta to the effect that the intended infliction of harm by a third party breaks a causal chain. For example, it was said in *Lewis* that if the knife wound could have been isolated as the operative cause of death and the wound had been inflicted by a third party who was unconnected with Lewis, then the third party and not Lewis would have caused the death.<sup>72</sup> The general formula is, however, problematic as a statement of *necessary* conditions. It means that the negligent conduct of a third party can never break a causal chain, no matter how grossly negligent it may have been.<sup>73</sup> Thus, although the narrow ruling in *Pagett* pertained to *reasonable* acts of self-defence and law-enforcement, the outcome would have been the same if the police had been negligent in firing despite the presence of the girl or had shot wildly and killed a bystander or even each other.

The patterns of police gun-use in the United States have generated a substantial body of case-law on the causal significance of shots fired by opposing parties. Reference was made to this body of authority in *Pagett*, but the nature of the rulings was misunderstood.

Two extreme positions have emerged in the American cases, one of which is very favourable to the finding of a *novus actus interveniens* (except in 'shield' cases) and the other of which effectively rules out any scope for the causal chain to be held broken. One of the best-known cases on the former side is *Pennsylvania ex rel Smith v Myers*<sup>74</sup> Three robbers had initiated a gun-fight with police who attempted to prevent their escape. One of the policemen was killed as he struggled with a robber, but the fatal shot may have been fired by another policeman. The robbers were nevertheless convicted of murder. Twenty years afterwards, one of them successfully appealed his conviction. The court disposed of the case by ruling that causal responsibility is generally negated where the fatal shot was fired by someone acting in opposition to the accused.<sup>75</sup> The only exception it was prepared to admit was for the death of someone being used as a 'shield'. Otherwise an act in opposition is apparently always a *novus actus*. There are other authorities to the same effect.<sup>76</sup> They were dismissed in *Pagett* on the ground that they turned on the scope of the felony-murder rule.<sup>77</sup> The felony-murder rule was, however, discussed in these cases only because it had sometimes been taken to justify a form of constructive causation as well as constructive *mens rea*. In cases such as *Smith v Myers*, the idea that there was anything special about felony-murder situations was repudiated. The decision rested simply on a special rule of policy.

72 Above n 9 at 472-473.

73 See the comments in *R v Knutsen*, above n 45 at 167-168, on the hypothetical situation where the motorist deliberately inflicted injury. Philp J said, at 167, that any *negligence* on the part of the motorist was irrelevant.

74 261 A2d 550 (1970) (Penn SC). The report gives a sparse summary of the facts. A more detailed statement was given in an earlier appeal concerning one of the other robbers: *Pennsylvania v Almeida*, 68 A2d 595 (1949) (overruled in *Smith v Myers*).

75 *Smith v Myers*, above n 74 at 555.

76 See the discussion in *Pennsylvania v Redline* 137 A2d 472 (1958) (Penn SC). A similar rule has been recognised *obiter* in a Canadian case: *R v Dubois* (1959) 32 CR 187 at 191-192 (Que QB).

77 Above n 26 at 286-287.

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A radically different policy decision has underlain a contrasting line of cases in which robbers had been held to have caused death, despite the deaths resulting from shots fired in opposition. Robbers have sometimes even been held responsible for a third party killing an accomplice.<sup>78</sup> The reasoning appears to be based on a policy decision that a person who engages in a serious crime, such as robbery, should be held responsible for all the reasonably foreseeable consequences, regardless of any intervening acts.<sup>79</sup>

One of the most important features of *Pagett* was its rejection of the idea of dealing with difficult problems of causation through special rules of policy. The court insisted that the problems were to be 'determined on the ordinary principles of causation'.<sup>80</sup> The sentiment is laudible. Rational development in any area of law depends on adherence to a strong set of general principles. The obstacle in the law of causation, however, is that there is little agreement over what the principles are. The problem is perhaps worst in relation to the doctrine of *novus actus interveniens*.

The principle of 'free, deliberate and informed' action which the court asserted in *Pagett* has the virtue of subsuming a special common-law rule governing situations where an injury receives medical treatment and the treatment happens to kill. Where the injury was serious, the standard tests for attributing causal responsibility to the person who inflicted the injury will be satisfied. The question then becomes whether the treatment constitutes a *novus actus interveniens* which shifts causal responsibility from the assailant to the medical staff. At least since the decision in *Smith*,<sup>81</sup> the position at common law has usually been supposed to be that, as long as medical treatment is given in good faith, it does not break the causal chain even if it is negligent. It was held in *Smith* that, where the original injury was a substantial cause of the death, it is immaterial that bad mistakes had been made in treatment. A different view may have been taken in the case of *Jordan*.<sup>82</sup> *Jordan* was earlier cited as an example of how a causal factor can decline in strength over a period of time. This is the basis on which the decision is now often rationalised. There were, however, comments in the judgment to the effect that while normal treatment would not break a causal chain, the assailant escaped causal responsibility because the treatment was abnormal.<sup>83</sup> These suggestions were disclaimed in *Smith* and other subsequent cases, where *Jordan* was said to be a case which turned on its particular facts.<sup>84</sup>

The development of the common law on medical treatment may support the general principle advanced in *Pagett*. The picture under criminal codes, however, is much more confused. On the one hand, the codes of New Zealand and Canada express the same position as *Smith*.

78 See, for example, *Taylor v Superior Court of Alameda County* 477 P2d 131 (1970) (Cal SC).

79 *Ibid* at 133. See also *Smith v Myers*, above n 74 at 552-553.

80 Above n 26 at 287.

81 Above n 28.

82 Above n 34 and accompanying text.

83 *Ibid* at 157-158.

84 *Smith*, above n 28 at 198; *Blaue*, above n 57 at 446; *Malcherek* [1981] 2 All ER 422 at 428. See also *Evans and Gardiner* (No 2), above n 4 at 531.

The formulation used is that a person who causes an injury of a dangerous nature, from which death results, causes the death even though the immediate cause of death is proper or improper treatment that is applied in good faith.<sup>85</sup> *Prima facie*, only treatment which is not applied in good faith (such as 'treatment' which is in fact intended to kill or which is administered with reckless disregard of known risks) can constitute a *novus actus interveniens*. Very different language is, however, used in the codes of the Australian states. Under the Tasmania code, the injury still causes the death if the treatment is 'applied in good faith, and with reasonable knowledge and skill, but not otherwise'.<sup>86</sup> Under the codes of Queensland and Western Australia, the injury still causes the death 'provided that the treatment was reasonably proper under the circumstances, and was applied in good faith'.<sup>87</sup> Thus, in these jurisdictions, negligent treatment can sometimes constitute a *novus actus interveniens* and relieve the assailant of causal responsibility. Indeed, although the language is imprecise, it could be argued that any degree of negligence would constitute a *novus actus*.

General principles for the doctrine of *novus actus interveniens* cannot be derived easily from the sparse case-law and divergent statutory provisions. The source for such principles must be the role of the doctrine within the overall law of causation. The function of the doctrine is to determine causal responsibility as between two or more independent actors so that only one is ultimately guilty of an offence of causing the result. There is therefore no reason to relieve an earlier actor of responsibility unless the later actor can be found criminally liable. The causal contribution of the later actor must be sufficient to justify an attribution of causal responsibility. In addition, the culpability of the later actor must be sufficient to satisfy the mental requirements of an offence. For offences involving death or bodily injury, the threshold of criminal culpability in most jurisdictions is gross or 'criminal' negligence. Simple negligence, such as would ground liability in the law of torts, is not sufficient for criminal law. The negligence must be of 'a very high degree',<sup>88</sup> amounting to 'a marked and substantial' departure from the standard of the reasonable person.<sup>89</sup>

The formula advanced in *Pagett* calls for an even higher level of culpability, with a 'deliberate and informed' choice to commit or risk committing death or injury. There is no reason to insist always on this higher level of culpability. For example, if the earlier actor and the later actor were both criminally negligent, there is no reason why the earlier actor should be the one who is fixed with causal responsibility. The standard of 'deliberate and informed' choice is, however, attractive for cases where a similar choice has been made by the earlier actor. Where the earlier actor intended to kill, for example, it would be unjust to attribute causal responsibility for the death to a later actor who was merely negligent.

It is therefore suggested that the application of the doctrine of *novus actus interveniens* should turn on the relative criminal culpability of the

85 *Crimes Act 1961* (NZ) s 166; *Criminal Code* (Can) RSC 1985, c C-46, s 225.

86 *Criminal Code* (Tas) s 154 (b).

87 *The Criminal Code* (Qld) s 298; *The Criminal Code* (WA) s 275.

88 *Andrews v DPP*, [1937] AC 576 at 583 (HL).

89 *R v Sharp* (1984) 39 CR (3d) 367 at 379 (Ont CA).

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actors as well as their temporal proximity to the death or injury. The objective should be to relieve the first actor of causal responsibility only where a later actor has the same or a higher level of culpability. A general principle could be formulated along these rough lines: where two or more persons, not acting in concert, do things which would ordinarily be sufficient to make each of them causally responsible for a death or injury, the last actor alone causes the death or injury except that, where an earlier actor is more culpable, the earlier actor alone causes the death or injury. The proposed principle does not fit neatly with either of the divergent sets of code provisions respecting the significance of medical treatment. The degree of divergence between these sets of provisions suggests, however, that a middle-path would merit exploration.

The principle is no more than a rough one because it does not provide a formula for assessing relative criminal culpability. Criminal culpability is usually thought to depend on two variables: the type of harm (eg 'death', 'wounding') and the type of mental state (eg 'intention', 'recklessness', 'negligence'). Calculations of relative culpability are fairly straightforward when one of these variables is constant. For example, a person who intentionally kills is more culpable than a person who causes death negligently; a person who intends to wound is less culpable than a person who intends to kill. Calculations are more difficult where neither variable is constant: for example, where one actor intended to wound and a later actor negligently caused death. General principles of criminal law do not provide a clear answer for such cases. Answers for particular jurisdictions can, however, be found by comparing the measures of penal liability which are attached to each offence.

The approach which has been advocated here does not make reference to an idea which was stressed in *Pagett*: that later conduct can only constitute a *novus actus interveniens* if it was not itself caused by the earlier conduct.<sup>90</sup> An intervention which is caused by the earlier conduct will typically be a non-culpable intervention, as in the circumstances of *Pagett* itself, or at least will be merely negligent and therefore less culpable than the original conduct. In such cases, the absence or lower-level of culpability provides the simplest and best rationale for holding that the later act does not constitute a *novus actus interveniens*. If, however, the intervention was equally or more culpable, there is no reason why the earlier conduct should enable the later actor to escape criminal liability for causing the death or injury. Denying the later conduct the status of a *novus actus interveniens* should therefore lead to the conclusion that both actors caused the death or injury, even though they made independent contributions to it. For example, in a case with facts similar to *Knutsen*,<sup>91</sup> it could mean that the original assaulter and a motorist who was reckless or grossly negligent would both be held to have caused the injuries. Whether or not this is a desirable outcome, it is an outcome which criminal law has not hitherto contemplated.

<sup>90</sup> Above n 26 at 289-290. See also above text accompanying n 71.

<sup>91</sup> Above n 45.

## CONCLUSIONS

The principal aim of this paper has been to present a structure for understanding problems of causation in criminal law. It has been argued that causal analysis is clarified if it is divided into three steps:

- (i) the search for a causal connection between a person's conduct and a proscribed result;
- (ii) the assessment of the strength of the causal contribution in order to determine whether it is sufficient to justify attributing causal responsibility;
- (iii) the comparison with the contributions of other actors in order to determine whether there are stronger claims to causal responsibility.

It has not been an aim of this paper to propose new directions for the law. Nevertheless, the law of causation is clearly in need of greater rationalisation, particularly with respect to the threshold test for causal responsibility and the application of the doctrine of *novus actus interveniens*. It has been argued that 'reasonable foreseeability' provides a better principle than 'substantial cause' for threshold determinations of causal responsibility. It has also been contended that relative criminal culpability should be recognised as a key factor governing the impact of intervening acts upon a causal chain. These arguments have been framed in light of the role played by causal determinations in relation to determinations of criminal guilt. The objective has been to present principles of causation which are geared to the role played by attributions of causal responsibility in relation to eventual attributions of criminal culpability.