

**INTOXICATED VICTIMS AND THE  
ACCIDENT EXCUSE UNDER THE QUEENSLAND  
CRIMINAL CODE**

COLLEEN DAVIS<sup>1</sup>

---

**Abstract**

*Section 23(1A) of the Criminal Code of Queensland denies the excuse of accident to an offender where death or grievous bodily harm is caused by a 'defect, weakness or abnormality'. Alcohol-related vulnerability to subarachnoid haemorrhage would arguably meet the definitions provided by the three judges in Steindl, the only case to date to consider the meaning of 'defect, weakness or abnormality'. A high percentage of victims who die after being assaulted are intoxicated, and medical research has shown people under the influence of alcohol are more vulnerable to fatal conditions such as subarachnoid haemorrhages. Section 23(1A), therefore, has the potential to prevent defendants from relying on the excuse of accident where people they assault die from alcohol-caused weaknesses.*

I INTRODUCTION

There is growing public concern about the number of deaths as a result of impulsive, unpremeditated fights in which the victim is punched or kicked.<sup>2</sup>

---

<sup>1</sup> My thanks to Malcolm Barrett and Dr Heather Douglas for their comments and feedback. Thanks also to the two anonymous reviewers who provided helpful and useful remarks and suggestions.

<sup>2</sup> See, eg, 'Police Say One-Punch Assaults Too Prevalent', *ABC News* (Online), 21 October 2008, <<http://www.abc.net.au/news/stories/2008/10/21/2397073.htm>>; Peter Cameron, 'Keep the Fuel From the Fire', *Gold Coast Bulletin*, Gold Coast, 3 May 2007, 23; Mark Furler, 'When Will We Learn That One Punch Can Kill?', *Sunshine Coast Daily* (Online), 1 April 2008, <<http://www.thedaily.com.au/blogs/mark-my-words/2008/apr/01/punch-kill>>. Among the one-punch deaths in the

There is also concern that the perpetrators of such assaults can be acquitted if the prosecution fails to negate the accident excuse.

The recent acquittals of Ryan Moody and Jonathon Little prompted a public outcry.<sup>3</sup> Nigel Lee and David Stevens died after being punched in separate unrelated incidents in Brisbane in 2005. In separate trials,<sup>4</sup>

---

media spotlight recently are: Sese Tioa, who died in March 2007 after a single punch to the head. Brisbane bouncer, Tevita Fifita, was acquitted of manslaughter after arguing he acted in self-defence ('Bouncer Cleared Over Patron's Death', *ABC News* (Online), 12 December 2008, <<http://www.abc.net.au/news/stories/2008/12/12/2445267.htm>>); Sunshine Coast teenager Matthew Stanley, who died of massive head injuries after a single punch in September 2006. His juvenile attacker was sentenced to five years in jail (Christine Kellett, 'Bottle Shops "Like a Toy Store"' *Brisbane Times* (Online), 16 November 2007, <<http://www.brisbanetimes.com.au/news/queensland/teen-jailed-over-stanleys-death/2007/11/16/1194766930529.html>>); Neville Knight, who died in Adelaide in July 2007. His attacker was found guilty of manslaughter ('Man Found Guilty Over Single Punch Killing', *ABC News* (Online), 4 December 2008, <<http://www.abc.net.au/news/stories/2008/12/04/2438217.htm>>); Neil Collette, who died after being king hit at a West Australian hotel in 2006. His assailant was found guilty of causing grievous bodily harm and sentenced to four years in jail ('Man Gets 4 Years Jail for One Punch Death', *ABC News* (Online), 9 May, 2008, <<http://www.abc.net.au/news/stories/2008/05/09/2240425.htm>>); Dexter Williams, who died after being punched in the face in July 2007. The perpetrator was found not guilty of unlawful killing, but guilty of causing grievous bodily harm, and sentenced to three years (Todd Tardy, 'Sailor Jailed for Three Years for One Punch Death', *ABC News* (Online), 23 May 2008, <<http://www.abc.net.au/news/stories/2008/05/23/2253817.htm>>); Mark Fryer, who died in Western Australia in October 2008 after a single punch ('Police Say One-Punch Assaults Too Prevalent', *ABC News* (Online), 21 October 2008, <<http://www.abc.net.au/news/stories/2008/10/21/2397073.htm>>).

<sup>3</sup> See, eg, A. Watt, 'Man Admits Unprovoked Bashing Death, Walks Free', *The Courier-Mail* (Online), 2 April 2007, <<http://www.news.com.au/story/0,23599,21485699-2,00.html>>; Leanne Edmiston, 'Law Review Favours End to Provocation Defence in Murder', *The Courier-Mail* (Online), 2 October 2008, <<http://www.news.com.au/couriermail/story/0,,24431142-3102,00.html>>; Kay Dibben, 'Pain Behind Jonty Bush's Passion', *The Courier-Mail* (Online), 25 May 2008, <<http://www.news.com.au/couriermail/story/0,23750316-5007190,00.html>>.

<sup>4</sup> The cases of both Little and Moody are unreported trial cases.

Little and Moody both raised the accident excuse,<sup>5</sup> arguing the victims' deaths were neither intended nor foreseeable. The families of the victims were outraged, and issued a statement saying victims' voices seemed to be lost in a legal system where the notion of accountability for one's actions appeared to be fast disappearing and disavowing the law relating to accident that they claimed was unfairly weighted in favour of the accused.<sup>6</sup>

However, another subsection of s 23 could have been raised to try and prevent these defendants from being able to rely on the accident excuse. Section 23(1A) renders the excuse unavailable where a defect, weakness or abnormality causes the victim's death, even if this was an unforeseen and unforeseeable outcome. There is evidence that the victims in the cases of both Moody and Little were intoxicated.<sup>7</sup> Medical research shows that death and serious injuries are more likely to occur when the victim is in a state of intoxication so that even a relatively moderate amount of force applied to an intoxicated individual may have unforeseen consequences. It could be argued therefore that intoxicated victims may be suffering from a defect, weakness or abnormality. However, s 23(1A) does not appear to have been raised at either trial,

---

<sup>5</sup> Section 23(1)(b) of the Code provides that a person is not criminally responsible for an event that occurs by accident.

<sup>6</sup> Leanne Edmiston and Jodie Munro O'Brien, 'Families Robbed', *The Courier-Mail* (Brisbane), 2 May 2007, 16.

<sup>7</sup> Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (2008) 96, indicates the victim, Stevens, was hit and kicked and later died from a subarachnoid haemorrhage that occurred as a consequence of a traumatic rupture of the left vertebral artery. The post-mortem examination revealed that the deceased had had a blood alcohol concentration of 0.277 per cent. The pathologist called by the prosecution at trial gave evidence that this level of intoxication contributed to death: the rupture injury is associated with heavy intoxication. The artery tore because it was overstretched. Overstretching occurs only in an intoxicated victim. A summary of *Moody's Case*, at 97, indicates Moody punched his victim, Lee, in the face, breaking Lee's nasal bridge and causing unconsciousness. Lee aspirated blood from the nasal injury and died. Post-mortem examination showed Lee had had a high blood alcohol level. His intoxication may have contributed to his death by impairing or hindering the reflexes that would have protected him from aspiration.

even though it has been suggested intoxication may have contributed to both deaths.<sup>8</sup>

According to the Queensland Law Reform Commission's review of the accident excuse, these two cases are obvious examples where a moderate blow has caused death in a deceased without defect, weakness or abnormality.<sup>9</sup> However, this paper will argue that s 23(1A) (inserted into the *Criminal Code* of Queensland in 1997) is worded so broadly that the excuse of accident may be unavailable to an accused whose victim dies from alcohol-caused weaknesses, such as a predisposition to subarachnoid haemorrhage,<sup>10</sup> as in *Little's Case*, or depression of reflexes, as in *Moody's Case*.

In light of the recent 'One Punch Can Kill'<sup>11</sup> campaign, it may be more difficult for an accused to rely on the excuse in the future because juries may be more inclined to find that death or injury from a single punch is foreseeable. If a prosecutor can prove that it was objectively foreseeable that death could result from a punch, there would be no need to rely on s 23(1A). However, the campaign does not draw attention to the potential

---

<sup>8</sup> Ibid 96–7.

<sup>9</sup> Ibid 87.

<sup>10</sup> Julia Barrett, in an online *Encyclopaedia of Medicine* article 'Subarachnoid Hemorrhage' defines a subarachnoid haemorrhage as an abnormal and very dangerous condition in which blood collects beneath the arachnoid mater, a membrane that covers the brain. This area, called the subarachnoid space, normally contains cerebrospinal fluid. The accumulation of blood in the subarachnoid space can lead to stroke, seizures, and other complications. Additionally, subarachnoid haemorrhages may cause permanent brain damage and a number of harmful biochemical events in the brain. A subarachnoid haemorrhage and the related problems are frequently fatal. Subarachnoid haemorrhages are classified into two general categories: traumatic and spontaneous. Traumatic refers to brain injury that might be sustained in an accident or a fall. Spontaneous subarachnoid haemorrhages occur with little or no warning and are frequently caused by ruptured aneurysms or blood vessel abnormalities in the brain: Julia Barrett, *Subarachnoid Hemorrhage* (2001) *Encyclopaedia of Medicine* <[http://findarticles.com/p/articles/mi\\_g2601/is\\_0013/ai\\_2601001311/print?tag=artBody;col](http://findarticles.com/p/articles/mi_g2601/is_0013/ai_2601001311/print?tag=artBody;col)> at 4 November 2008.

<sup>11</sup> The 'One Punch Can Kill' campaign was started in 2007 by families of victims of fatal assaults. In late 2007, the Queensland Government created a range of advertisements targeting young men and women who may find themselves in potentially violent situations.

vulnerability of intoxicated people. Its focus instead is to inform the public about the general danger associated with violence in public places.<sup>12</sup> Therefore, despite the campaign, the general public may not link alcohol consumption with an increased vulnerability to violence.

This paper will begin by outlining research that shows that punching or kicking assaults, which are the types of assaults in which the accident excuse is likely to be raised, are relatively common and that a high percentage of victims of assaults are intoxicated. It will go on to look at medical research that suggests there is a link between intoxication and increased vulnerability to potentially fatal conditions, particularly brain haemorrhage, after head trauma, and some cases in which courts have accepted this link.

The paper will then outline the excuse of accident in s 23 of the *Criminal Code* of Queensland (the Code) and the exception in s 23(1A), including the meaning of ‘defect, weakness or abnormality’ in s 23(1A). It will argue that this phrase could be interpreted to include alcohol-related weaknesses and that in cases where the victim is intoxicated, the excuse of accident may therefore not be available to defendants.

The paper will then consider the implications of including alcohol-related vulnerability within the ambit of s 23(1A) for defendants’ and victims’ families. It will argue that alcohol-related weakness is a good example of the potential for inconsistent and unjust application

---

<sup>12</sup> This is the text on the home page of the One Punch Can Kill website:

You know, every year far too many young Queenslanders are assaulted at parties, in bars and out on the streets. We exist for one purpose: to reverse this. All too often young people are getting hurt or even killed when they are out just trying to have a good time. You can help. We need mass support from the teens and young adults of Queensland to shift attitudes and change ways amongst young people regarding senseless violence at social events. Our message is clear — one punch can kill.

Browse around the site and check out some of the stuff we are up to — similarly, jump on board and show your support by registering your details by clicking the button below. Together we can stop this unnecessary violence and improve yours and our safety when we are just wanting to have some fun.

Available from <<http://www.onepunchcankill.com.au/home.html>> at 14 June 2009.

of s 23(1A), and that the application of the section can result in an inappropriate balance between moral culpability of an accused on the one hand, and community expectations on the other.

## II FISTS AND FEET AS WEAPONS

The rate of recorded assaults in Australia rose 47 per cent between 1995 and 2006.<sup>13</sup> Where assaults have fatal consequences, hands and/or feet are the second most common type of weapon, after knives and sharp instruments. In 2006–07 in Queensland, hands and/or feet were the weapons used in 35 per cent of male homicides and 31 per cent of female homicides. The figures for previous years were similar.<sup>14</sup>

The incidence of such types of assaults is important for two reasons. The first is that many assaults involving people who are drunk happen on the spur of the moment, and fists are weapons readily at hand. The second is that homicides in which fists or feet are the weapons used are more likely to raise accident as an excuse — and therefore also possibly the operation of s 23(1A) — than cases where guns and knives are involved.<sup>15</sup>

---

<sup>13</sup> Samantha Bricknell, *Trends in Violent Crime*, Trends and Issues in Crime and Criminal Justice, No 359, (2008) 3.

<sup>14</sup> Megan Davies and Jenny Mouzos, *Homicide in Australia: 2005–06 National Homicide Monitoring Program Annual Report*, Australian Institute of Criminology Research and Public Policy Series, No 77 (2007), 52, report that, of the 60 Queensland deaths in 2005–06, 16 were caused by hands/feet. Jenny Mouzos and Tina Houliaras, *Homicide in Australia: 2004–05 National Homicide Monitoring Program Annual Report*, Australian Institute of Criminology Research and Public Policy Series, No 72, (2006) 46, report that during the previous financial year 23 of the 55 Queensland deaths attributed to hands or feet. In 2003–2004, 22 of the 63 deaths were caused by blows from hands or feet.

<sup>15</sup> Where perpetrators are armed with guns and knives, it may not be difficult for the prosecution to prove intention to cause death or grievous bodily harm. Further, if there is no evidence of intention, s 289 of the Code could be relevant. This section is one of the criminal negligence provisions and requires people in charge of dangerous things to take reasonable care and precautions to avoid danger to others. If criminal negligence is proved, accident is not open as an excuse.

### III THE INCIDENCE OF INTOXICATED VICTIMS

Research shows that a larger proportion of victims of violence are intoxicated at the time of injury compared to victims of other types of trauma.<sup>16</sup> Several overseas studies have shown that high percentages of assault and fight victims who present to hospital emergency departments are under the influence of alcohol.<sup>17</sup>

Australian research also shows that a high percentage of people who die after being assaulted, particularly males, are affected by alcohol at the time of the killing. Of the 1565 solved homicides in Australia between July 2000 and June 2006, almost 50 per cent were alcohol related. The victims in 579 of 729 alcohol-related deaths (79 per cent) had alcohol in their bloodstreams at post-mortem examination.<sup>18</sup> The percentages are similar for Queensland. Between 1980 and 2007, 68 per cent of male homicide victims in Queensland, and 40 per cent of female victims, were under the influence of alcohol, with a further 8 per cent

<sup>16</sup> I. Rossow, K. Pernanen, and J. Rehm, 'Accidents, Suicide and Violence', in Harald Klingemann and Gerhard Gmel (eds), *Mapping the Social Consequences of Alcohol Consumption* (2001) 101.

<sup>17</sup> R. T. Lange et al, 'Effects of Day-of-Injury Alcohol Intoxication on Neuropsychological Outcome In the Acute Recovery Period Following Traumatic Brain Injury' (2008) 23 (7) *Arch Clin Neuropsychol*, 809, refers to a Canadian study that reported that between 33 and 72 per cent of patients who presented to several emergency departments had positive blood alcohol levels, and that 37 to 53 per cent of these patients had excessive blood alcohol concentrations. Harald Klingemann and Gerhard Gmel (eds), *Mapping the Social Consequences of Alcohol Consumption* (2001) 101, discuss two 1997 Norwegian studies that showed 64 to 69 per cent of emergency department patients with injuries from violence were under the influence of alcohol. In a similar 1983 study of hospital emergency cases in Scotland, 70 per cent of the victims of violence had a positive blood alcohol reading. This research is referred to in M.E. Walsh. and D.A.D. Macleod, 'Breath Alcohol Analysis in the Accident and Emergency Department' (1983) 15(1) *Injury*, discussed in Harald Klingemann, and Gerhard Gmel, 94. A 1969 study found that 56.4 per cent of the assault and fight victims had blood alcohol concentrations of at least 0.05g/100ml. See Henry Wechsler et al, *Alcohol Level and Home Accidents*, (1996) 84(12) *Public Health Reports*, 1043, 1050.

<sup>18</sup> Jack Dearden and Jason Payne, 'Alcohol and Homicide in Australia', *Trends & Issues in Crime and Criminal Justice*, No 372 (2009), 2–3.

of males affected by both alcohol and drugs.<sup>19</sup> The figure below shows a steady increase in the percentage of Queensland victims who were intoxicated at the time of their deaths, with a corresponding decline in the percentage of victims who were under the influence of neither alcohol nor drugs.

Victims by Alcohol and/or Illicit Prescription-drug Use (per cent)

Year	Number of homicides in Queensland	Percentage of Queensland victims under the influence of alcohol only		Percentage of Queensland victims under the influence of alcohol and drugs		Percentage of Queensland victims under the influence of neither alcohol nor drugs	
		Male	Female	Male	Female	Male	Female
2005-06 <sup>20</sup>	60	48	15	3	4	39	62
2004-05 <sup>21</sup>	51	44	20	0	7	51	73
2003-04 <sup>22</sup>	63	26	26	14	0	52	74

The effect of alcohol in increasing assault victims' susceptibility to fatal consequences has become an important issue. According to the Queensland Director of Public Prosecutions, death by subarachnoid haemorrhage, caused by a blow to the head of an intoxicated person, occurs a dozen times a year in Queensland.<sup>23</sup>

#### IV ALCOHOL-RELATED VULNERABILITY TO POTENTIALLY FATAL CONDITIONS

Alcohol affects the physiological functioning of the body in several ways. It can raise blood pressure,<sup>24</sup> cause blood vessels to dilate, delay

<sup>19</sup> Jack Dearden and Warwick Jones, *Homicide in Australia: 2006-07, National Homicide Monitoring Program Annual Report*, AIC Reports Monitoring Reports No 01, (2008), 51.

<sup>20</sup> Davies and Mouzos, above n 14, 45 and 51.

<sup>21</sup> Jenny Mouzos and Tina Houliaras, *Homicide in Australia: 2004-05 National Homicide Monitoring Program (NHMP) Annual Report*, Research and Public Policy Series, No 72 (2006), 33 and 45.

<sup>22</sup> Jenny Mouzos, *Homicide in Australia, 2003-2004 National Homicide Monitoring Program (NHMP) Annual Report*, Research and Public Policy Series, No. 66 (2005), 34 and 38.

<sup>23</sup> Queensland Director of Public Prosecutions' submission to the Queensland Law Reform Commission, above n 7, 167.

<sup>24</sup> Seppo Juvola et al, 'Cigarette Smoking and Alcohol Consumption as Risk



reaction of voluntary muscles, and affect co-ordination and control of actions.<sup>25</sup> Alcohol may also affect the brain's reaction to injury.<sup>26</sup> Heavy drinkers are at an increased risk for more severe brain injury following trauma<sup>27</sup> and the outcome for intoxicated victims of traumatic brain injury is worse than for people who are sober at the time of injury.<sup>28</sup>

Because alcohol causes blood vessels to dilate and reduces muscle tone, a blow to the head of an intoxicated person can cause hyperextension of the head or neck, or a twisting of the head or neck, and this in turn generates greater stretching forces on the vertebral arteries,<sup>29</sup> which can rupture and cause death. The stretching of the vertebrobasilar system during hyperextension of the neck due to head trauma is a well-recognised mechanism of rupture of the arteries at the base of the brain. Other researchers have also reported that stretching of the vertebral artery can result in tears.<sup>30</sup>

Traumatic subarachnoid haemorrhage has been described as occurring typically in a 'young, healthy, but intoxicated man who received a minor blow, immediately collapses, and dies within minutes'.<sup>31</sup> Studies have found that regular heavy alcohol consumption is a significant risk factor for subarachnoid haemorrhage<sup>32</sup> and that the amount of alcohol

Factors for Aneurysmal Subarachnoid Hemorrhage' (1993) 24 *Stroke* 639, 645; H. Ronty et al, 'Cerebral Trauma and Alcohol Abuse', (1993) 23 *European Journal of Clinical Investigation*, 182, 186.

<sup>25</sup> J.T. Gray et al, 'Traumatic Subarachnoid Haemorrhage: a 10-year Case Study and Review' (1999) 105 *Forensic Science International* 13, 19.

<sup>26</sup> H. Ronty et al, 'Cerebral Trauma and Alcohol Abuse', (1993) 23 *European Journal of Clinical Investigation*, 182, 182.

<sup>27</sup> *Ibid.*

<sup>28</sup> R.T. Lange et al, above n 17, 2.

<sup>29</sup> Kazuhiko Kibayashi et al, 'Traumatic Basal Subarachnoid Hemorrhage Due to Rupture of the Posterior Inferior Cerebellar Artery — Case Report' (2000) 40 (3) *Neurologica medico-chirurgica* 156, 158.

<sup>30</sup> See footnotes 17 to 19 in J.T. Gray et al, above n 25, 19.

<sup>31</sup> J.H.N. Deck and V. Jaghada, 'Fatal Subarachnoid Haemorrhage Due to Upper Cervical Trauma' (1983) 36 *J Clin Pathol* 1335, cited in J.T. Gray et al, above n 25, 16.

<sup>32</sup> M. Kubota, A Yamaura and J Ono, 'Prevalence of Risk Factors for Aneurysmal Subarachnoid Haemorrhage: Results of a Japanese Multicentre Case Control Study for Stroke', (2001) 15(6) *British Journal of Neurosurgery* 474; J. Simonsen, 'Traumatic Subarachnoid Hemorrhage

consumed within 24 hours beforehand is a significant risk factor for both men and women.<sup>33</sup>

## V RECOGNITION OF ALCOHOL-RELATED VULNERABILITY IN THE COURTS

There have been several recent Queensland cases in which intoxicated victims died from brain haemorrhages. Some of the cases are discussed below. Evidence about the predisposition of an intoxicated victim to brain bleeding has also been heard by courts in other jurisdictions.<sup>34</sup>

In *R v Graham*,<sup>35</sup> one ground of appeal was that the victim's death was an event that was caused by an accident within the meaning of

---

in Alcohol Intoxication', (1963) 8 *Journal of Forensic Science*, 97, discussed in J. T. Gray et al, above n, 25. Simonsen compared traumatic and spontaneous subarachnoid haemorrhage for alcohol involvement and found a significantly higher proportion of traumatic subarachnoid haemorrhage cases involved alcohol.

<sup>33</sup> Seppo Juvela et al, above n 24, 643.

<sup>34</sup> For example, in *R v Makike* [2003] VSC 340, in which a father struck his drunk son in the head, resulting in a fatal subarachnoid haemorrhage, Harper J said people with elevated blood alcohol levels were especially vulnerable to this type of injury. The victim's blood alcohol concentration was 0.16. In *England v Queen* [2001] FCA 1722, the Federal Court heard an appeal against a manslaughter conviction handed down by the Australian Capital Territory Supreme Court. The victim died from a subarachnoid haemorrhage after a cerebellar artery ruptured. The Court, at [55], pointed out that this type of injury is caused by a blow to the side or back of the head, causing the head or neck to hyperextend or rotate, and that a person who has consumed alcohol may be more exposed to injury in this way because of dilation of blood vessels and reduced muscle tone. In sentencing Warren Tighe for the manslaughter of his de facto wife, killed by a subarachnoid haemorrhage after a single blow to the head, Hunt CJ in the New South Wales Supreme Court considered similar medical evidence. Doctors had testified that, where a victim is affected by alcohol, less force than otherwise is needed to cause the sudden rotation of the head which in turn results in the haemorrhage (*R v Tighe* [1999] NSWSC 1354). In *R v Cornelissen* [2004] NSWCCA 449, another case in which a punch to an intoxicated victim was followed by subarachnoid haemorrhage and death, the neuropathologist called by the Crown testified that this type of injury may be more common in victims whose reflexes are impaired by alcohol (at [134]).

<sup>35</sup> [1995] QCA 190.

s 23. It was submitted that an ordinary person would not be expected to foresee that the victim was in a condition in which she may have been more vulnerable than others to the effects of a blow. The victim was an alcoholic whose drinking habits predisposed her to dysfunctional blood clotting mechanisms in the brain. Death was caused by cardiac arrest induced by brain damage resulting from a single punch. A doctor testified at trial that the subdural bleeding was caused by the rupture of blood vessels connecting the brain and the dura mater; that this was caused by the twisting of the dura mater as a result of the trauma of the blow; and that the danger of such twisting is greater if the brain is diminished in size, which is a condition that may be caused or accelerated by alcoholism.<sup>36</sup> The Queensland Court of Appeal refused the appeal on the basis that the jury's verdict was not unsafe or unsatisfactory.<sup>37</sup> As this case preceded the 1997 amendment which introduced the notion of defect, weakness or abnormality,<sup>38</sup> the question whether the vulnerability of the victim amounted to a defect, weakness or abnormality did not fall for consideration.

In *R v Katia; ex parte Attorney-General (Qld)*<sup>39</sup> the victim died from a subarachnoid haemorrhage after a punch behind an ear. McMurdo P, with whom Holmes JA and Mullins J agreed, pointed out that ruptures of a vertebral artery, with resultant basal subarachnoid haemorrhage, are commonly caused by a blow resulting in rotation of the head and stretching of the artery. Her Honour said consumption of alcohol by the victim is a factor in about 80 per cent of such injuries because an intoxicated victim has less muscular control than normal so that when force is applied there is excessive head rotation and the vertebral artery is ruptured. At the time of the assault, the victim's blood alcohol concentration was 0.203.<sup>40</sup> McMurdo P mentioned that the sentencing judge, before passing sentence, had noted that the victim had consumed

---

<sup>36</sup> *R v Graham* [1995] QCA 190 at [3].

<sup>37</sup> The Court held, at [4], that it was for the jury to determine whether an ordinary person would have foreseen death as a result of a blow delivered with the degree of force described in the evidence at the trial. It was not possible to say that on that issue their verdict of guilty was not sustainable, or that it was unsafe or unsatisfactory.

<sup>38</sup> *Criminal Code 1899 (Qld)* s 23(1A).

<sup>39</sup> [2006] QCA 300.

<sup>40</sup> *R v Katia; ex parte Attorney-General (Qld)* [2006] QCA 300 per McMurdo P at [8].

a large amount of alcohol and this seemed to be a contributing factor to his fatal injuries.<sup>41</sup> As Katia pleaded guilty to unlawful killing, the accident excuse was not considered.

*R v Simeon*<sup>42</sup> was also an appeal against sentence for killing a drunken victim. The defendant had pleaded guilty to manslaughter. The cause of death was probably also a blow behind an ear, which caused subarachnoid bleeding. Medical opinion was that the force applied had been only moderate, but that no great force was necessary in the case of a heavily intoxicated victim to cause such a haemorrhage.<sup>43</sup>

In *R v Hutchings*<sup>44</sup> one ground for an appeal against a manslaughter conviction by a hotel security officer who delivered a single kick to the victim's head related to the cause of death.<sup>45</sup> The pathologist who did the post mortem testified that death was caused by subarachnoid haemorrhage after a brain artery ruptured. Trauma to the head had caused the head to swing excessively, and this was helped by the presence of high levels of alcohol. The excessive movement stretched the arteries, causing them to rupture.<sup>46</sup>

A subarachnoid haemorrhage was also the cause of death of the victim in *Little's* case.<sup>47</sup> The victim's left vertebral artery ruptured after he was

---

<sup>41</sup> Ibid [16].

<sup>42</sup> [2000] QCA 470.

<sup>43</sup> *R v Simeon* [2000] QCA 470 at [4].

<sup>44</sup> [2006] QCA 219.

<sup>45</sup> The intoxicated victim had fallen off a chair about 15 minutes before he was kicked in the head by the defendant and the defence argued it was this fall that caused the rupture of an artery resulting in death. De Jersey CJ, with whom Helman J and Williams JA agreed, held on appeal that a jury was entitled to conclude beyond reasonable doubt that a forceful kick by the appellant to the head of the deceased just prior to his collapse caused the death of the deceased, and in so doing, to exclude any reasonable doubt whether the cause was injury sustained through the deceased's fall from the chair 15 minutes earlier. However, the appeal was upheld on other grounds.

<sup>46</sup> *R v Hutchings* [2006] QCA 219 per de Jersey CJ at [40].

<sup>47</sup> *R v Little*, discussed in Queensland Law Reform Commission, above n 7, 96. As this was an unreported trial case, the facts are drawn from the Department of Justice and Attorney-General's October 2007 Discussion Paper (DJAG Discussion Paper) and the August 2008 Queensland Law

punched in the head. The post-mortem examination showed the victim had a very high blood alcohol concentration of 0.277 per cent.<sup>48</sup> The artery tore because it was overstretched, and, according to the report, overstretching occurs only in an intoxicated victim.<sup>49</sup>

Intoxication is also thought to have contributed to the death of the victim in *Moody's case*.<sup>50</sup> A punch broke the victim's nose and he died after aspirating blood from this injury. At post-mortem, the victim's high blood alcohol level was 0.196 per cent. This level of intoxication may have impaired or hindered the reflexes that would normally have protected him from aspiration.<sup>51</sup>

Although courts have accepted that intoxicated people are more vulnerable to death from subarachnoid haemorrhage and other potentially fatal conditions after being assaulted, such vulnerability does not appear to have been raised in any Queensland case in the context of s 23(1A) to deny an excuse of accident where an intoxicated victim has died or suffered grievous bodily harm. The cases discussed above suggest there are two types of intoxicated victims: those who have developed vulnerabilities due to long-term alcohol use, and those who have been drinking on social occasions and who are vulnerable while they are intoxicated. Both conditions could be regarded as defects, weaknesses or abnormalities in s 23(1A).

## VI THE ACCIDENT EXCUSE

Section 23(1)(b) of the Queensland *Code* and s 23B(2) of the West Australian *Code* provide that a person is not criminally responsible for an event that occurs by accident. The 'event' refers to the consequences of an accused's act.<sup>52</sup> The event is the result of the accused's conduct that gives rise to potential criminal liability; for example the death of

---

Reform Commission's report.

<sup>48</sup> Queensland Law Reform Commission, above n 7, 96.

<sup>49</sup> *Ibid.*

<sup>50</sup> *R v Moody*, discussed in Queensland Law Reform Commission, above n 7, 97.

<sup>51</sup> *Ibid.*

<sup>52</sup> *Kaporonowski v The Queen* (1973) 133 CLR 209, 231 (Gibbs J).

the victim<sup>53</sup> or grievous bodily harm<sup>54</sup> or, as described by Thomas JA in *R v Steindl*,<sup>55</sup> ‘the consequence to the victim’.<sup>56</sup>

An ‘accident’ is an outcome that is neither intended nor foreseen as a possible outcome by an accused, and not objectively foreseeable as possible by an ordinary person.<sup>57</sup> A successful plea of accident will result in a complete acquittal, regardless of the charge/s.

An accused will not be able to rely on accident in two situations: where the act that causes the event involves criminal negligence,<sup>58</sup> and where the event is the result of a defect, weakness or abnormality in the victim. In the latter case, s 23(1A) operates as a rider or exception to s 23(1)(b), providing that an accused will be criminally responsible for unintended or unforeseeable death or grievous bodily harm where the victim has a defect, weakness or abnormality.

Between 1962 and 1995, offenders could not succeed with a plea of accident where their victims suffered from unknown weaknesses or susceptibilities such as an eggshell skull. Although the existence of a hidden weakness added weight to an argument that the death or grievous bodily harm was both subjectively and objectively unforeseeable and therefore an accident, the courts held repeatedly that accident was open only if something intervened between the blow and the harm caused.<sup>59</sup> However, in the 1995 case of *Van Den Bemd*,<sup>60</sup> the Queensland Court of Appeal overruled earlier authorities and formulated the following test for criminal responsibility under s 23(1)(b): ‘whether death was

<sup>53</sup> *Stevens v The Queen* (2005) 227 CLR 319, 325 (Gleeson CJ and Heydon J).

<sup>54</sup> *Kapronowski v The Queen* (1973) 133 CLR 209, 215 (McTiernan ACJ and Menzies J).

<sup>55</sup> [2001] 2 Qd R 542.

<sup>56</sup> *R v Steindl* [2002] 2 Qd R 542, 553 (Thomas JA).

<sup>57</sup> *R v Taiters* [1997] 1 Qd R 333, 335.

<sup>58</sup> The introductory words to s 23(1) indicate the two excuses that are subject to the express provisions of the Code relating to negligent acts and omissions. In *R v Hodgetts and Jackson* [1990] 1 Qd R 456, it was held that neither of these excuses are available where the offence charged involves criminal negligence.

<sup>59</sup> Eg, *R v Martyr* [1962] Qd R 398, *Mamote-Kulang v R* (1964) 111 CLR, *Timbu Kolian v R* (1968) 119 CLR 47.

<sup>60</sup> [1995] 1 Qd R 401.

such an unlikely consequence ... that it could not have been foreseen by an ordinary person in the position of the accused'.<sup>61</sup> In *Van Den Bemd*, the appellant punched the victim, who later died from a subarachnoid haemorrhage. The trial judge directed the jury that it was not a defence that a person may have been more susceptible to a subarachnoid haemorrhage because he was intoxicated and that offenders had to take their victims as they find them.<sup>62</sup> This was in accordance with the test laid down in *Martyr*.<sup>63</sup> This test was that an accused could not rely on accident where death or injury to the victim was caused by an immediate and direct blow, even if the outcome was subjectively and objectively unforeseeable because of a hidden weakness in the victim.<sup>64</sup> The facts in both cases were very similar. In *Martyr*, a man died after being punched in the face. Medical evidence at trial was that death resulted from a brain haemorrhage and that the blow would have been 'extremely unlikely' to cause such a haemorrhage, except in a person having the victim's 'peculiar weakness'. However, the accused could not argue that the death was not foreseeable because of this weakness unless there was some intervening act, such as the victim's head hitting the floor. The Court of Appeal in *Van Den Bemd* overruled *Martyr* by removing the requirement for an intervening act in cases involving direct physical violence and focusing instead on the foreseeability of the outcome. The test for criminal responsibility under s23(1)(b) is 'whether death was such an unlikely consequence ... that it could not have been foreseen by an ordinary person in the position of the accused'.<sup>65</sup> The Court said *Martyr* was no longer good authority.<sup>66</sup> An appeal to the High Court was refused.<sup>67</sup>

## VII SECTION 23(1A)

For a brief interlude after *Van Den Bemd*, defendants whose victims had

<sup>61</sup> *R v Van Den Bemd* [1995] 1 Qd R 401, 405.

<sup>62</sup> *R v Van Den Bemd* (1994) 179 CLR 137, 140 (Brennan J).

<sup>63</sup> *R v Martyr* [1962] Qd R 398.

<sup>64</sup> *Ibid* 414–415 (Philp J), 416–417 (Townley J).

<sup>65</sup> *R v Van Den Bemd* [1995] 1 Qd R 401, at 405.

<sup>66</sup> *Ibid* 403.

<sup>67</sup> *R v Van Den Bemd* (1994) 179 CLR 137. 139. Mason CJ, Deane, Dawson, Toohey and Gaudron JJ, Brennan and McHugh JJ dissenting, held that the words of s 23 were 'inherently susceptible of bearing the meaning' placed upon them by the Court of Appeal.

an inherent weakness were able to raise accident as a possible excuse. If a victim was punched, for example, and died because of an inherent weakness (where someone without this weakness may not have suffered any adverse effect from the punch) the prosecution would have to prove that the death was neither subjectively nor objectively foreseeable. The fact that there was a weakness not known or visible would assist the accused's argument that the death was not foreseeable.

However, the Queensland Parliament was quick to legislate to overcome the decision in *Van Den Bemd*. The amendment introducing s 23(1A) into the *Criminal Code* came into effect on 1 July 1997. In his Second Reading Speech, Attorney-General Denver Beanland said that where a person causes death or grievous bodily harm to another, the offender must 'take the victim as he or she finds him or her' if it is later shown the victim had some defect, weakness or abnormality such as an eggshell skull.<sup>68</sup>

Section 23(1A) qualifies s 23(1)(b). It provides:

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

Section 23(1A) is relevant only if the excuse of accident is at issue.<sup>69</sup> It is not a stand-alone provision.

The West Australian equivalent to s 23(1A) is s 23B(3). The Criminal Code Amendment (Homicide) Bill 2008 introduced this section into the West Australian *Criminal Code* in August 2008. This followed a recommendation in the Law Reform Commission of Western Australia's review of the homicide.<sup>70</sup> The section encapsulates the excuse of

<sup>68</sup> Queensland, *Parliamentary Debates*, Legislative Assembly, 4 December 1996, Second Reading, Criminal Law Amendment Bill, 4870, <<http://parlinfo.parliament.qld.gov.au/isysquery/76eed6e-63e8-4d52-a200-3612d6038ac0/9/doc/961204ha.pdf#xml=http://parlinfo.parliament.qld.gov.au/isysquery/76eed6e-63e8-4d52-a200-3612d6038ac0/9/hilite/>> at 9 January 2009.

<sup>69</sup> *R v Charles* [2001] QCA 320 at [11].

<sup>70</sup> Law Reform Commission of Western Australia, *Review of the Law of Homicide Final Report, Project 97* (2007), <<http://www.lrc.justice.wa.gov>.



accident and the eggshell skull exception but is worded differently to s 23(1A). Section 23B(3) provides that if death or grievous bodily harm is directly caused to a victim by another person's act that involves a deliberate use of force, but would not have occurred but for an abnormality, defect or weakness in the victim, the other person is not, for that reason alone, excused from criminal responsibility for the death or grievous bodily harm. The West Australian section is, in effect, a legislative encapsulation of the Queensland position prior to the case of *Van Den Bemd*.<sup>71</sup> Therefore, if a person in Western Australia punches an intoxicated victim, who dies because of an alcohol-related vulnerability, the accident excuse is precluded because direct violence is involved. This achieves the same result as s 23(1A) in Queensland (provided alcohol-related weaknesses fall within the ambit of this section) but by a different route. If, however, an intoxicated victim dies after falling over and hitting his head hard, the excuse of accident is available in Western Australia. The question then is simply whether the death was foreseeable, from the perspective of the accused as well as an ordinary person.

The meaning of 'defect, weakness or abnormality' in the context of s 23(1A) has been considered by the Queensland Court of Appeal in only one case — *R v Steindl*.<sup>72</sup> The accepted approach to interpreting a criminal code is that the words should be given their natural and ordinary meaning.<sup>73</sup> There was no similar statutory provision elsewhere in Australia in 2001, and the appellate judges could not draw on decisions from other jurisdictions.<sup>74</sup>

Steindl was charged with doing grievous bodily harm after he punched his neighbour in the face. An ophthalmologist who later examined the neighbour found that a lens inserted in an eye to repair a cataract had moved. Instead of sitting behind the pupil and iris, the lens protruded

---

au/2publications/reports/homicide/P97-Forepages.pdf> at 10 January 2009.

<sup>71</sup> *R v Van Den Bemd* [1995] 1 Qd R 401.

<sup>72</sup> (2001) 124 A Crim R 520.

<sup>73</sup> *Kaporonowski v The Queen* (1973) 133 CLR 209, 236 (Gibbs J): 'The proper course in the first instance is to turn to the language of the Code itself and to construe it according to its natural meaning.'

<sup>74</sup> *R v Steindl* [2002] 2 Qd R 542, 546 (McMurdo P).

through the pupil. If left untreated, this could lead to bleeding, increased pressure in the eye and blindness.<sup>75</sup>

Steindl's counsel argued that 'defect, weakness or abnormality' referred only to constitutional or natural defects and should not be extended to cover artificial or foreign objects. All three appellate judges — McMurdo P, and Thomas and Davies JA — held that artificial objects inserted into a body would fall within the term 'defect, weakness or abnormality'. However, they differed slightly in their views of what the weakness was in the case at hand. McMurdo P and Thomas JA thought the lens on its own was the defect, weakness or abnormality while Davies JA held it was the eye with an artificial lens.<sup>76</sup>

McMurdo P said it seemed unlikely that the legislature would wish to limit the words in s 23(1A) to constitutional defects and the words should be given their current meaning consistent with changing technology. Her Honour referred to Macquarie Dictionary definitions of 'defect' as 'a falling short; a fault or imperfection; a want or lack, especially of something essential to perfection or completeness; or a deficiency'. The definition of 'weakness' is 'a state or quality of being weak; feebleness; a weak point, as in a person's character; a slight fault or defect'. 'Abnormality' is defined as 'an abnormal thing, happening or feature; a deviation from the standard, rule or type; irregularity'.<sup>77</sup> For Davies JA, the phrase 'defect, weakness or abnormality' in s 23(1A) is intended to include bodily abnormalities however caused.<sup>78</sup> Thomas JA found the term 'defect, weakness or abnormality' would include the consequences of trauma and disease.<sup>79</sup>

The interpretation given to 'defect, weakness or abnormality' by all three Court of Appeal judges in *Steindl* could extend arguably to temporary alcohol-caused vulnerability to conditions such as subarachnoid haemorrhage. It could also cover weaknesses associated with chronic alcohol abuse. However, although courts have recognised the link between alcohol and these conditions, an argument that alcohol-caused weaknesses falls within the ambit of s 23(1A) remains untested in the

---

<sup>75</sup> Ibid 545.

<sup>76</sup> Ibid 549 (McMurdo P), 552 (Davies JA), 554 (Thomas JA).

<sup>77</sup> Ibid 549 (McMurdo P).

<sup>78</sup> Ibid 551 (McMurdo P).

<sup>79</sup> Ibid 541 (Thomas JA).

courts.<sup>80</sup> It therefore seems unusual that the prosecution failed to raise s 23(1A) in *Moody* and *Little*.

### VIII THE IMPLICATIONS OF INCLUDING ALCOHOL-RELATED WEAKNESSES WITHIN THE AMBIT OF SECTION 23(1A)

A determination whether alcohol-related vulnerabilities are included within the term ‘defect, weakness or abnormality’ and, if they are, what types of vulnerabilities fall within the ambit of the section, is an important issue. If alcohol-related weaknesses are included, defendants who punch or kick their victims but claim the resulting injury or death was neither intended nor foreseeable, may not be able to rely successfully on the excuse of accident.<sup>81</sup> This might meet with approval from people, such as victims’ families, who argue that ‘the law should not protect violent assailants on the basis they didn’t foresee all possible consequences’, or that ‘deliberate violence should never be viewed as an accident’.<sup>82</sup> Family members might be angered at the suggestion their loved ones were partly to blame for their demise because they had been drinking and were therefore more vulnerable to potential fatal consequences of a single punch. However, s 23(1A) may operate to secure the outcome the families seek — a conviction and punishment instead of a complete acquittal.

There is also the potential for an even wider interpretation of the section to include other alcohol-related vulnerabilities, such as slower reflexes, poor coordination and unsteadiness. The broader the meaning of ‘defect, weakness or abnormality’, the less scope there is for an accused to rely on accident as an excuse.

The Queensland Director of Public Prosecutions has argued for the retention of s 23(1A) because it reflects the principle that one should take one’s victim as one finds him or her.<sup>83</sup> A recent Home Office

<sup>80</sup> There was, however, a suggestion in the trial judge’s direction to the jury in *Van Den Bemd* that intoxication-related susceptibility to subarachnoid haemorrhage may be tantamount to a constitutional defect. See *R v Van Den Bemd* (1994) 179 CLR 137, 140 (Brennan J).

<sup>81</sup> The prosecution has the onus of disproving foreseeability of the outcome — the injury or death as the case may be.

<sup>82</sup> Three of the responses from the public to the Queensland Law Reform Commission, above n 7, 144–145.

<sup>83</sup> Queensland Law Reform Commission, above n 7, 166.

(United Kingdom) report also took the view that anyone who embarks on a course of illegal violence has to accept the consequences of his act, even if the final consequences are unforeseeable.<sup>84</sup> However, as the Law Reform Commission of Ireland report pointed out in its 2008 review of murder and involuntary manslaughter, perpetrators of minor assaults can be punished harshly if their victims die from unexpected physical weaknesses. In many ‘single-punch’ type cases there would be no prosecution for assault had a fatality not occurred.<sup>85</sup> A light blow can lead to death if the victim is intoxicated, but a much heavier blow may not have adverse consequences if the recipient is sober.

In a 1996 review of homicide, the Law Commission of England and Wales said the criminal law ‘should properly be concerned with questions of moral culpability’ and that an accused who is culpable for causing some harm is not sufficiently blameworthy if an unforeseen death results.<sup>86</sup> However, criminal liability in Queensland where the victim has an alcohol-caused weakness may come down to bad luck rather than reflect the level of moral wrongdoing on the part of an accused. For example, if a person punches two people and both die, but one is intoxicated and suffers a subarachnoid haemorrhage and the other is sober and has no such weakness, the accused would be able to raise accident in the second case, but not the first. If the accused is successful, an acquittal follows. However, moral wrongdoing i.e. his intention and foresight of harm was identical in both cases.

Although the inclusion of alcohol-related weakness to subarachnoid haemorrhage and other conditions may result in outcomes that are welcomed by victims’ families, such outcomes may be unduly harsh and unjust from the perspective of defendants.

---

<sup>84</sup> Home Office (United Kingdom), *Reforming the Law of Involuntary Manslaughter: The Government’s Proposals* (2000) 10 <<http://www.homeoffice.gov.uk/documents/conse-2005-corporate-manslaughter/2000-cons-corporate-manslaughter.pdf?view=Binary?>> at 24 January 2009.

<sup>85</sup> Queensland Law Reform Commission, above n 7, 108. The comments were made in the context of an offence of unlawful and dangerous act manslaughter.

<sup>86</sup> The Law Commission (England and Wales), *Legislating the Criminal Code: Involuntary Manslaughter*, Report No 237 (1996), [4.39] <<http://www.lawcom.gov.uk/docs/c238.pdf>> at 26 January 2009.

## IX CONCLUSION

Prosecutors in Queensland have yet to explore the possibility that alcohol-related predisposition to subarachnoid haemorrhage may fall within the definition of ‘defect, weakness or abnormality’ in s 23(1A). However, there is clearly the potential for these terms to be interpreted very broadly, with a resultant narrowing of the scope of the accident excuse.

Alcohol-related vulnerability to subarachnoid haemorrhage would arguably meet the definitions provided by the three judges in *Steindl*, the only case to date to consider the meaning of these terms. However, judicial or legislative clarification of the scope of ‘defect, weakness or abnormality’ is needed. Does the phrase encompass alcohol-related conditions and, if so, which ones? Does it extend to both short-term temporary vulnerabilities related to alcohol consumption as well as long-term permanent effects of chronic alcohol abuse?

Given that many offences of personal violence involve punches and kicks, and that a high percentage of victims are intoxicated at the time of the offence, there is the potential for s 23(1A) to become an important provision. However, its application may not always produce an outcome that achieves an appropriate balance between the moral culpability of an accused on the one hand and community expectations and requirement for retribution on the other.