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Keywords

Criminal Code, common law, cause, test

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JENNIFER PORTER*

Abstract

This article considers s 281 of the Criminal Code (WA), which was introduced in 2008 to create an offence of unlawful assault causing death and to exclude the defence of accident (and the test of reasonable foreseeability) in those cases. The author argues that, given the 'unfixed' state of the common law of criminal causation in Australia, triers of fact may still consider the reasonable foreseeability of consequences in deciding the primary question of causation. If triers of fact may still have regard to the reasonable foreseeability of consequences in deciding causation as a separate issue, then s 281 might not achieve what it is intended to achieve. An accused might be acquitted of a charge of unlawful assault causing death on the basis that the death was not reasonably foreseeable even before the defence of accident arises. While this argument remains open, s 281 may be a vehicle for further appellate consideration of the law of criminal causation and the relationship of (legal) causation with accident in code jurisdictions.

I Introduction

In 2008, the Parliament of Western Australia enacted s 281 within Schedule 1 of the *Criminal Code Act Compilation Act 1913* (WA) (the '*Criminal Code*'), which created the offence of unlawful assault causing death while expressly excluding the defence of accident. This attributes individual criminal responsibility for death arising even where death was not reasonably foreseeable.¹ The offence was a response to the perceived increase in 'one-punch' homicide cases in Western Australia at that time. Specifically, it was a response to public concern about the way the defence of accident operated, which often meant that perpetrators of violent assaults were found not criminally responsible for the death they caused.

This article begins with a brief examination of the current law of criminal causation. Part II outlines the uncertainty that exists in the

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¹ *Criminal Law Amendment (Homicide) Act 2008* (WA) s 12 created the new offence under s 281 of the *Criminal Code Act Compilation Act 1913* (WA) sch 1 ('*Criminal Code*') and came into operation on 1 August 2008.

relevant doctrines and their application. Analysis on this issue is founded on the premise that the ‘substantial cause’ test and ‘common sense approach’ conflate questions of causation-in-fact with the question of the scope of liability for consequences. Recent cases on criminal causation have not produced doctrinal certainty, and it is in this respect that this area of the law is described here as ‘unfixed’.² Part III outlines the legal conditions and outcomes in one-punch homicide cases in Western Australia that prompted the enactment of s 281 to deal with the defence of accident in such cases. Part IV examines the scope of s 281 as a means of determining whether the exclusion of the test of reasonable foreseeability in that provision might inadvertently give rise to further consideration of the law of criminal causation at the appellate level. The article concludes that there is sufficient ambiguity in s 281 to justify the operation of the principle of legality so as to allow the test of ‘reasonable foreseeability’ to be applied to the question of causation, even when it is excluded with respect to the defence of accident. This means that an accused may be acquitted of unlawful assault causing death on the basis of the test of reasonable foreseeability applied to the question of *causation*, before the question of the defence of accident even arises.³

II The ‘Unfixed’ State of the Law of Criminal Causation

Shortly after the civil decision in *March v E & MH Stramere Pty Ltd*,⁴ the case of *Royall v R* (‘*Royall*’) considered the current law of criminal causation in Australia.⁵ This case is generally accepted as authority for the ‘substantial cause’ test and the ‘common sense approach’ in criminal causation. Adopting the approach of Burt CJ in *Campbell v The Queen*,⁶ a majority of the High Court in *Royall* agreed that the question of causation is not a philosophical or a scientific question, but a question to be determined by the jury applying their common sense to the facts as they find them.⁷ A majority of the judges also accepted that an accused person will not be held criminally responsible unless his or her act is a ‘substantial’ cause of the death.⁸ In this context, ‘substantial cause’ means a cause that is ‘something more than *de minimis*’.⁹ Thus, on the basis of the authority in *Royall*, it is generally accepted that an accused person is criminally responsible for the consequences of his or her act if the act is a

² Kenneth J Arenson, ‘Causation in the Criminal Law: A Search for Doctrinal Consistency’ (1996) 20 *Criminal Law Journal* 189, 211.

³ As discussed in greater detail in Part III, Section B below, the statutory provisions relating to criminal responsibility in ch V of the *Criminal Code* arise for consideration only after the essential conduct elements including causation (and the relevant mental elements) of a given offence have first been established.

⁴ (1991) 171 CLR 506.

⁵ (1991) 172 CLR 378.

⁶ (1981) WAR 286.

⁷ *Royall* (1991) 172 CLR 378, 387 (Mason CJ). This was the formulation that was approved in the context of the civil case of *March v E & MH Stramere Pty Ltd* (1991) 171 CLR 506.

⁸ *Ibid* 398 (Brennan J), 411 (Deane and Dawson JJ), 441 (Toohey and Gaudron JJ).

⁹ *R v Hennigan* (1971) 3 All ER 133, 135 (Lord Parker CJ).

substantial (not *de minimis*) cause of the death. In determining whether or not the accused's act was a substantial or significant cause of the death, the jury must apply their common sense to the facts as they find them. This formulation has been repeatedly affirmed by the High Court and is adopted in Western Australia (the relevant jurisdiction in this paper) by the Western Australian Court of Appeal in the leading case of *Krakouer v Western Australia* ('*Krakouer*').¹⁰

The 'substantial cause' test and 'common sense approach' have been the subject of criticism, not only in the dissenting judgement of McHugh J in *Royall*, but also in other more recent judgments. It has been suggested that the more recent criticisms amount to a sign that the 'common sense approach' is in decline in Australia.¹¹ In his dissenting judgment in *Royall*, McHugh J said that the substantial cause test was an unsatisfactory formula which, in application, is actually the 'but for' test applied under another label.¹² More recently, in the case of *Arulthilakan v The Queen* ('*Arulthilakan*'),¹³ the High Court appears to have confirmed that the 'substantial cause' test is slightly more onerous than the 'but for' test, in that it requires something more than a negligible causal relationship, or in other words, something more than *de minimis*. Despite this, the Court held that the direction by the trial judge in that case (which it was argued placed more emphasis on the words 'but for' than the words 'substantial cause') did not amount to a misdirection on the issue of causation.¹⁴ It has been suggested that the decision in *Arulthilakan* therefore stands for the proposition that in Australia 'substantial cause' can mean 'but for' cause.¹⁵ In the current author's view, this suggestion impermissibly extends the rationale expressed by the Court in *Arulthilakan*. However, the decision does place a 'substantial cause' very proximate to a 'but for' cause on the continuum of threshold causal responsibility. Indeed, the reason why the 'substantial cause' test has found legitimacy in recent cases is probably because of its relative proximity to the 'but for' test on this continuum. The 'but for' test of causation is clean of any cues to policy and continues to endure the development of the law in this area.¹⁶

The 'substantial cause' test takes account of the possibility of multiple sufficient causes, which the 'but for' test does not.¹⁷ The application of

¹⁰ (2006) 161 A Crim R 347. See also *Gunnensen v Henwood* [2011] VSC 440 [378] (Dixon J); *Osland v R* (1998) 197 CLR 316; *Arulthilakan v R* (2003) 203 ALR 259.

¹¹ Justice James Edelman, 'Unnecessary Causation' (Paper presented at the Association of Anglo-Australian Lawyers, Australian National University, Canberra, 25 June 2014) 15–17.

¹² *Royall* (1991) 172 CLR 378, 449.

¹³ *Arulthilakan* (2003) 203 ALR 259, 269 [35] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

¹⁴ See Michael Plaxton, 'Case and Comment: *Arulthilakan v The Queen*' (2004) 28 *Criminal Law Journal* 381.

¹⁵ *Ibid.*

¹⁶ Edelman, above n 11, 13.

¹⁷ Mason CJ observed (in a civil context) in *March v E & MH Stramere Pty Ltd* (1991) 171 CLR 506, 516, citing W V H Rogers, *Winfield and Jolowicz on Tort* (Sweet & Maxwell, 13th ed, 1989) 134, that 'the "but for" test gives rise to a well known difficulty in cases

the ‘common sense approach’ safeguards against an approach that fails to accord with common sense. For all of its simplicity and doctrinal consistency, however, the ‘substantial cause test/common sense approach’ perpetuates the problem. The problem of conflating questions of factual and legal causation existed in the case law before *Royall*, and has continued after it as well.¹⁸

The ‘common sense approach’ has been the subject of criticism more recently. In the civil context, the majority in *Amaca Pty Ltd v Booth* criticised the common sense approach, which directed a jury to apply its common sense to the facts of a particular case to determine cause and consequence, stating that ‘the invocation of the “common sense” of the jury discredited judicial directions containing theoretical analysis and exposition’.¹⁹ In the case of *Gunnensen v Henwood*, Dixon J said that ‘the common law approach to causation is oversimplified by describing it as a matter of common sense’.²⁰ As Edelman has recently observed, in difficult cases the ‘sense’ of an answer is rarely common amongst judges.²¹ Whether or not these recent pronouncements show that judicial opinion is shifting, there is sufficient ambiguity to say that the current state of the common law of criminal causation in Australia is ‘unfixed’.

Perhaps the most important point to make here is that, in the criminal context, which has a particular focus on moral culpability, causation cases will often involve the application of broad formulations of principle on the question of causation in subtly different ways, depending on the facts of the case at hand. It may be in this sense that triers of fact are required to apply their common sense to the facts as they find them. That is, triers of fact must first choose the most appropriate principle to be applied to any given set of facts, and then apply that principle in slightly different ways to slightly different factual scenarios. For example, and as considered in greater detail below, there are four broad principles or tests for causation, the first of these being the substantial and operating cause test. But even inside the notion of a substantial and operating cause, different cases produce slightly different linguistic formulations of this test. For example, *Royall* was a self-preservation case,²² whereas *Krakouer* was a case involving multiple lethal blows inflicted by more than one assailant. The linguistic composition of legal principle appears to vary slightly between these cases, as different factual scenarios bring emphasis to different aspects of the same principle. In *Krakouer*, the

where there are two or more acts or events which would each be sufficient to bring about the plaintiff’s injury. The application of the test “gives the result, contrary to common sense, that neither is a cause.”” The ‘but for’ test does, however, usefully apply to an analysis of multiple *necessary* causes (as per the facts of *March* itself).

¹⁸ See Eric Colvin, ‘Causation in Criminal Law’ (1989) 1 *Bond Law Review* 253; Jane Stapleton ‘Cause in Fact and the Scope of Liability for Consequences’ (2003) 119 *Law Quarterly Review* 388, 411.

¹⁹ *Amaca Pty Ltd v Booth* (2011) 246 CLR 36, 60 [65] (Gummow, Hayne and Crennan JJ).

²⁰ *Gunnensen v Henwood* [2011] VSC 440, [379] (Dixon J).

²¹ Edelman, above n 11, 15.

²² In *Royall*, the deceased had jumped (or was pushed) from a bathroom window in her sixth floor apartment following a violent attack by the appellant.

applicant and the deceased had got into a fight. A third party intervened and hit the deceased on the chin with a mallet, inflicting a mortal wound. The applicant then obtained a marker post from nearby scrub and hit the deceased over the back of the head with it. Both injuries were, in isolation, sufficiently serious to cause death, and in concert they certainly were. This may explain, for example, why the phrase ‘substantial cause’ featured in the judgement in *Royall*, whereas ‘substantial contribution’ featured in *Krakouer*.

The obvious need for different principles to be applied in slightly different ways across a variety of factual scenarios has seen the emergence over time of four general tests of criminal causation: the substantial and operating cause test;²³ the natural consequence test;²⁴ the reasonable foresight of consequences or reasonable foreseeability test;²⁵ and, the test of *novus actus interveniens*, which may arise independently of or in conjunction with any of the preceding tests.²⁶ These tests have received varying degrees of judicial support, depending on the type of factual scenario under consideration. The uncertainty in this area of the law is due to the tendency of the courts to handle the issue of causation ‘by reference to one or the other [of the tests], with the alternative usually being ignored’ and that ‘if the alternative is recognised at all, the choice which has been made is usually not defended’.²⁷ In *Royall*, McHugh J expressed this point by saying that while judges have tended to make use of one or more of the above tests, ‘unfortunately, the cases show no consistent pattern in applying these tests’ and that ‘frequently, one test has been used to the exclusion of the others without any express recognition of the existence of the other tests’.²⁸ Indeed, McHugh J has also observed that:

Judicial and academic efforts to achieve a coherent theory of common law causation have not met with significant success. Perhaps the nature of the subject matter when combined with a lawyer’s need to couple issues of factual causation with culpability make achievement of a coherent theory virtually impossible.²⁹

Each of the judgments in *Royall* considered, in varying degrees, all of the four tests described above; however, exactly how these tests should be regarded in relation to self-preservation cases, such as *Royall*, or other categories of causation case is less straight forward. This is because all of

²³ See *R v Smith* [1959] 1 All ER 193 (‘*Smith*’); *R v Evans and Gardiner* (No 2) [1976] VR 523.

²⁴ See *R v Beech* (1912) 7 Cr App R 197 (‘*Beech*’); *Royall* (1991) 172 CLR 378, 447 (McHugh J).

²⁵ See *R v Taiters* [1997] 1 Qd R 333, 334 (MacRossan CJ, Pincus JA and Lee J) (‘*Taiters*’).

²⁶ See *R v Russell* [1933] VR 59; *R v Jordan* (1956) 40 Cr App R 152; *Smith* [1959] 1 All ER 193; *R v Knutsen* [1963] Qd R 157; *R v Blaue* [1975] 1 WLR 1411; *Royall* (1991) 172 CLR 378, 447.

²⁷ Colvin, above n 18, 259.

²⁸ *Royall* (1991) 172 CLR 378, 442 (McHugh J), citing Colvin, above n 18, 259.

²⁹ *Ibid* 448.

these tests to some extent overlap with one another, depending upon the particular facts of the case under consideration.

In *Royall*, although McHugh J agreed with the majority that the appeal should be dismissed, his Honour disagreed on the appropriate test for determining causation. McHugh J was of the view that in self-preservation cases the body of case law favoured questioning whether or not the act by the victim was a reasonably foreseeable consequence of the accused's act.³⁰ His Honour observed that the body of common law on self-preservation cases showed an evolution in rationale from a bare 'natural consequences' test, as applied in *Beech*,³¹ to a test of natural consequences, which defined a 'natural' consequence as one which was 'reasonably foreseeable', as applied in *R v Roberts* ('*Roberts*'),³² *R v Mackie* ('*Mackie*'),³³ and *Director of Public Prosecutions v Daley* ('*Daley*').³⁴ His Honour held that in self-preservation cases

an accused should not be held to be guilty unless his or her conduct induced the victim to take action which resulted in harm to him or her and that harm was either intended by the accused or *was of a type which a reasonable person could have foreseen as a consequence of the accused's conduct*.³⁵

McHugh J's dissenting judgment in *Royall* references the views put forward by Colvin in his 1989 work on causation in criminal law, which favoured a test of reasonable foreseeability for cases where there are multiple contributing causes. Colvin argued that "reasonable foreseeability" provides a better principle than "substantial cause" for threshold determinations of causal responsibility.³⁶ While acknowledging that the substantial cause test probably carries 'a little more modern judicial support' than the reasonable foreseeability test, Colvin was of the view that the test of reasonable foreseeability was more consistent with the overall law of causation.³⁷ He argued that the test of reasonable foreseeability is to be preferred to 'substantial cause' for threshold determinations of causal responsibility because the substantial cause test is 'difficult to reconcile with the eggshell skull principle', whereas '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'.³⁸ McHugh J's exposition of the principles of criminal causation, including the references to Colvin's work, was included at length in Steytler P's judgment in *Krakouer*.³⁹

³⁰ Ibid 450–1.

³¹ (1912) 7 Cr App R 197, 200.

³² (1971) 56 Cr App R 95, 102.

³³ (1973) 57 Cr App R 453, 459–60.

³⁴ [1980] AC 237, 245–6.

³⁵ Ibid 451 (emphasis added).

³⁶ Colvin, above n 18, 271.

³⁷ Ibid.

³⁸ Ibid 265.

³⁹ *Krakouer* (2006) 161 A Crim R 347, 356–7 [28]–[29].

A majority of the High Court in *Royall* favoured a substantial cause test and a common sense approach. However, there is sufficient reason to conclude that an inquiry as to the reasonable foreseeability of consequences might still be appropriate in certain cases.

While Mason CJ, Toohey and Gaudron JJ considered that the issue of reasonable foreseeability was likely, in the majority of cases, to confuse rather than clarify the issue of causation, it was nevertheless observed by Mason CJ that in some respects the natural consequence test has been linked conceptually to the concept of foreseeability and that ‘because the natural consequence test inevitably invites conjecture about the likelihood of an occurrence, *it is impossible to divorce completely the application of the test from the concept of foreseeability*’.⁴⁰ Deane and Dawson JJ supported a natural consequence direction but did not go as far as to consider the likelihood of an occurrence or the concept of foreseeability as a measure of what sort of consequence might be deemed to be a natural one.⁴¹ This leaves open the question of whether there is a place for the test of reasonable foreseeability of the consequences.⁴²

Brennan J was more explicit in his approval of a test of reasonable foreseeability of consequences, stating that ‘an accused cannot be held criminally responsible for a death that has been caused in fact by his conduct if the final fatal step taken by the victim was neither foreseen nor reasonably foreseeable’.⁴³ His Honour further noted that ‘reasonable foreseeability marks the limit of the consequences of conduct for which an accused may be held criminally responsible’.⁴⁴

Royall should not be considered as authority for the proposition that the test of reasonable foreseeability has no application in deciding criminal causation. In the light of the inherent breadth of notions such as ‘common sense’ and ‘substantial and significant operating cause’; the somewhat equivocal views expressed regarding reasonable foreseeability by Mason CJ and to some extent also by Deane, Dawson, Toohey and Gaudron JJ; and the references to reasonable foreseeability in the judgments of Brennan J (of the majority) and McHugh J (in dissent), there is no reason to believe that in certain circumstances an accused cannot argue that a direction on causation in terms of reasonable foreseeability is appropriate. These are arguments that have been made in detail by Arenson in his earlier work on this topic following the decision in *Royall*.⁴⁵

The purpose of this paper is not to advocate that the test of reasonable foreseeability should be preferred as a test of criminal causation, but simply to point to the arguments that support the notion that in particular types of factual scenarios the test could have valid theoretical and

⁴⁰ *Royall* (1991) 172 CLR 378, 390 (emphasis added).

⁴¹ *Royall* (1991) 172 CLR 378, 410, 412–3.

⁴² Arenson, above n 2.

⁴³ *Royall* (1991) 172 CLR 378, 398–9.

⁴⁴ *Royall* (1991) 172 CLR 378, 399.

⁴⁵ Arenson, above n 2, 211.

practical application. Certainly, the Western Australian experience shows that the question of reasonable foreseeability of consequences, albeit under the banner of accident rather than causation, is particularly well suited to the analysis of culpability that is involved in one-punch homicide factual scenarios. If it were not, then there would have been no need to legislate against it.

The preceding analysis of the current state of the law of criminal causation in Australia demonstrates that the state of the law in this area is ‘unfixed’, and that in certain types of cases the test of ‘reasonable foreseeability’ could still be useful as a test of causation. Part III examines the legal conditions and outcomes in Western Australia that prompted the Western Australian Parliament to legislate to exclude the defence of accident in one-punch homicide cases.

III One-Punch Homicides in Western Australia

A *General Principles*

The law of causation that applies to a one-punch homicide case in Western Australia is understood, first and foremost, by reference to general provisions in the *Criminal Code* (under s 270 to ‘kill’ means to cause the death of another, ‘directly or indirectly, by any means whatever’) and then by reference to the relevant case law identified above. While ss 272–5 of the *Criminal Code* provide the law of causation that applies to specific factual scenarios (causing death by threats, acceleration of death, medical intervention etc.), those provisions do not limit the general requirement under s 270, which is to be read with the guidance of principles set down in case law.⁴⁶ To understand the law of criminal causation that applies in Western Australia beyond the general statement provided in s 270, it is necessary to refer to the relevant case law.

What is obvious is that the issue of causation is always fact-dependent. With this in mind it is important to preface any conclusions drawn in this paper with a general discussion about the factual parameters of a typical one-punch homicide case.

‘One-punch homicide’ is an expression that emerged colloquially to describe a category of offences that shared a similar set of factual circumstances falling generally within the category of manslaughter by deliberate violence. The characteristic facts common to one-punch homicide cases are a deliberate application of force in the manner of a single punch or blow (with or without a weapon or instrument) that results, directly or indirectly, in the death of a victim. The single punch or blow could also be part of a longer transaction involving multiple blows

⁴⁶ *Krakouer* (2006) 161 A Crim R 347, 366 [74] (McLure JA). See also Arenson, above n 2, 211; P St J Langan, *Maxwell on the Interpretation of Statutes* (Sweet & Maxwell, 12th ed, 1969) 116; Matthew Goode, ‘Codification in the Criminal Law’ (2004) 28 *Criminal Law Journal* 226.

if the death was the result of a critical blow forming part of that longer transaction. These are the types of scenarios s 281 is intended to capture.

Quilter's recent article dealing with the relevant New South Wales one-punch homicide reforms suggests a number of reasons why a specific one-punch homicide offence should not be enacted by state parliaments.⁴⁷ The primary argument given is that deaths occurring in the context of a history of domestic violence should not be prosecuted under a one-punch homicide provision. While it is not the specific focus of this article to determine the merits of the policy approach of creating a specific offence of the type embodied by s 281, Quilter's article does not appear to appreciate the nature of the gap that existed in Western Australia prior to the introduction of s 281. Therefore, some brief comment here is warranted to clarify exactly what the gap was and why s 281 was enacted as a remedy.

Deaths occurring as a result of a one-punch scenario might be preceded by a variety of circumstances, including a history of domestic violence. Thus, whereas the physical aspects of one-punch homicide offences have some relatively clear dimensions, the context of those offences may be quite varied. Quilter appears to suggest that it is undesirable that perpetrators of domestic violence who kill their spouse should be prosecuted under s 281 and liable to the lesser statutory maximum penalty. However, this suggestion presumes that there is some other homicide offence with a higher statutory penalty under which the suspect could have been successfully prosecuted. Where an assault causing death has been preceded by a history of domestic violence and the fact scenario gives rise to a reasonable prospect of conviction for murder or manslaughter, the proper exercise of prosecutorial discretion should result in the prosecution of the accused on indictment for those more serious homicide offences. The whole point of the s 281 offence in Western Australia was to fill the gap that existed in the suite of homicide offences, which enabled perpetrators of violent attacks causing death to altogether avoid criminal responsibility for the death. Section 281 of the *Criminal Code* enables those perpetrators to be found criminally responsible for the death when previously they would not have been because of the operation of the defence of accident.

With respect, the suggestion that it is somehow undesirable for s 281 offences to be charged in cases involving domestic violence because there is a lower statutory maximum penalty misses the point. Before the introduction of s 281, perpetrators of those offences were not even being convicted, let alone sentenced. As will be explained in more detail below, there was a legislative gap that enabled perpetrators of violence to successfully argue the defence of accident where a death was not seen to be a reasonably foreseeable consequence of the punch to avoid responsibility for causing death altogether.

⁴⁷ Julia Quilter, 'The Thomas Kelly Case: Why a "One-Punch" Law is Not the Answer' (2014) 38 *Criminal Law Journal* 16, 24–5.

B Legal Conditions and Outcomes in Western Australia pre-s 281

As mentioned earlier, s 270 of the *Criminal Code* provides the starting point for the consideration of causation issues in *Criminal Code* offences. Section 270 provides that to 'kill' means to have caused the death of another 'directly or indirectly by any means whatever'. This provision allows for criminal liability despite a degree of remoteness between act and outcome, by providing that an accused's assault might be either a 'direct' or 'indirect' cause of a victim's death. The part contemplates that other relevant events may have occurred subsequent to (or in the case of the eggshell skull cases, contemporaneously with) the initial assault upon the victim, but that criminal responsibility may nevertheless be found. The existence of other relevant events, their nature and the relative contribution of those events to the resulting death then become relevant to the question of causation and criminal responsibility more generally. Fundamentally, however, s 270 provides that a causal connection between the accused's act and the victim's death may well exist, notwithstanding that there may have been other events contributing to the victim's death.⁴⁸

Beyond these guiding principles of remoteness, the principles of criminal causation set down in common law are to be applied. The common law 'but for' test is generally accepted as a useful tool for determining whether there is a prima facie causal link between the actions of the accused and the resulting event. The 'but for' test is, however, inadequate to deal with a case where certain other phenomena, such as an intervening or supervening event, exist and bear upon a factual scenario. In some cases, for instance, an intervening event may be so significant that it comes to displace the original 'but for' cause and substitute it with a new significant, substantial and operating cause of the event, which potentially relieves the accused of criminal responsibility. In this respect, the 'but for' test, while a useful starting point, is not in and of itself sufficient to justify criminal responsibility and, irrespective of any finding of prima facie causation-in-fact, the causal connection must also be sufficiently strong before the attribution of causal responsibility is justified.⁴⁹

Further, where a victim would not have died but for the accused's act, it may be necessary to consider the relevant act (or acts) of the accused in the context of other potentially contributory factors. There may be, for instance, multiple independent contributing causes, which are relevant to the chain of causation and which require analysis. The causation inquiry may therefore be characterised as both qualitative and quantitative.

Using the terminology of s 270, a *direct* one-punch homicide occurs when the victim's death results from the application of force by the accused upon the victim and there is no other relevant event contributing

⁴⁸ *R v Pagett* (1983) 76 Cr App R 279.

⁴⁹ Colvin, above n 18, 258.

to the death.⁵⁰ In these types of circumstances (where the victim died as a *direct* result of deliberate violence) a factual complication may arise because the victim suffered from some underlying physical infirmity that contributed to their death. Aside from the potential difficulties that arose from the High Court's decision in *R v Van den Bemd* ('*Van den Bemd*'),⁵¹ the eggshell skull rule has generally precluded the defence of accident being utilised in cases of this type because, at common law, it is reasonably foreseeable that a victim might have a pre-existing weakness, which hastens death, or that death would not have been caused but for the weakness. This principle is also clearly enshrined in the *Criminal Code*, which provides that an accused does not evade criminal liability merely because the victim would not have suffered death or grievous bodily harm but for an 'abnormality, defect or weakness'.⁵²

An *indirect* one-punch homicide case generally involves an initial application of force by the accused upon the victim as well as some other event or events, either on the part of the victim or a third party, which can be seen to contribute to the resulting death. In Western Australia, such events have included circumstances where the victim was rendered unconscious by the accused's initial blow, which then caused the victim to fall to the ground, hitting his or her head on some hard surface such as a kerb or pavement. In such cases the secondary impact constitutes an event subsequent to the initial blow that contributes to the death. Another example of an *indirect* one-punch homicide scenario is where the original injury is aggravated by disadvantageous first aid administered by bystanders.⁵³

The question of whether or not an accused is criminally responsible for the victim's death in an indirect one-punch homicide case will be considered at two stages in the process of determination of a criminal

⁵⁰ See, eg, *Western Australia v Barrett* (Unreported, District Court of Western Australia, McCann J, 7 May 2009): The offender was convicted of assault occasioning bodily harm (Count 3) on the indictment which also contained charges of manslaughter (Count 1) and grievous bodily harm (Count 2)) (the offence having occurred on 7 April 2008). In that case the offender and the victim were neighbours and became involved in an argument which escalated to a physical fight during which the offender delivered a heavy blow with a fist to the victim's head, causing him to fall backwards into the garden. The victim staggered to his feet and called for help before collapsing again in the garden. He never recovered and medical evidence showed the punch had caused irreversible brain injury causing death. At trial, the jury found that the life threatening injury was caused by accident and so the offender was convicted of assault occasioning bodily harm.

⁵¹ *R v Van den Bemd* (1994) 179 CLR 137.

⁵² *Criminal Code* (WA) s 23B(3); See also *Criminal Code Act 1899* (QLD) sch 1 s 23(1A).

⁵³ See, eg, *Western Australia v Perrella* (Unreported, District Court of Western Australia, Martino J, 9 May 2008): The offender was convicted of Grievous Bodily Harm (Count 2)) on the indictment which also contained a charge of manslaughter (Count 1)) in relation to facts which involved the offender punching the victim out the front of a night club, causing the victim to fly backwards, clearing three steps and hitting the concrete footpath below. At trial, the jury found that the death was caused by accident either by the offender's punch or by the subsequent hitting of the head on the path, and the offender was not responsible for that injury because it was not intended, foreseen, or reasonably foreseeable and so the offender was convicted of grievous bodily harm in relation to the injury to the right vertebral artery, which was found to be a reasonably foreseeable consequence of the punch.

charge: once in the context of causation; and, again, independently, in the consideration of the available defences contained in ch V of the *Criminal Code*, which relate to criminal responsibility.⁵⁴

Historically, some confusion has arisen because of the conceptual overlap between the issues of causation and accident. Both issues fundamentally inquire as to the question of criminal responsibility, or culpability, to be attributed to the accused. However, the issue of causation, which is a fundamental conduct element, should be viewed as the primary inquiry in both a procedural and qualitative sense.⁵⁵ It has been said that the ‘attribution of causal responsibility is a preliminary step towards the eventual attribution of criminal culpability to the accused’,⁵⁶ and that ‘in all cases the *first* question under the Code is that of causation’.⁵⁷ Given the particular issues considered in this paper, it is important to note that in Western Australia the statutory provisions relating to criminal responsibility in ch V should be properly understood as arising for consideration only after the essential conduct elements including causation (and the relevant mental elements) of a given offence have first been established.⁵⁸

In one-punch homicide cases in Western Australia the issue of criminal responsibility has almost invariably been raised in the context of the defence of accident contained in ch V under s 23B of the *Criminal Code*.⁵⁹ Section 23B provides that a person is not criminally responsible for an event or result which occurs by accident. At common law, an event (such as a death) is said to occur by accident when a voluntary, willed or intended act (in other words a deliberate act) has consequences that were: (1) unintended; (2) unforeseen by the accused; and (3) not reasonably foreseeable by any ordinary person in the position of the accused.⁶⁰ The three limbs of accident are conjunctive in the sense that the prosecution is required to disprove only one limb beyond reasonable doubt in order to negate the defence. However, in practice, because the first two limbs are subjective and easily proved, trials in which accident is raised as a defence have generally turned upon the third limb.⁶¹ Therefore in Western Australia one-punch homicide cases have invariably centred upon the

⁵⁴ See also *R v Hallett* [1969] SASR 141, 149.

⁵⁵ Colvin, above n 18, 253.

⁵⁶ *Ibid.*

⁵⁷ *Ward v R* [1972] WAR 36, 43 (‘*Ward*’) (emphasis added).

⁵⁸ Colvin, above n 18, 253.

⁵⁹ *R v Martyr* [1962] Qd R 398; *Mamote-Kulang v R* (1964) 111 CLR 62; *R v Kaporonovski* (1973) 133 CLR 209; *Ward* [1972] WAR 36 (subsequently followed in *Hooper v R* (2000) 116 A Crim R 510 (‘*Hooper*’) and *Chew v R* (1991) WAR 21).

⁶⁰ The ‘event’ or ‘result’ under consideration is the death rather than the accused’s act: See *Taiters* (1996) 87 A Crim R 507, 509; *R v Falconer* (1990) 171 CLR 30, 38; *Hooper* (2000) 116 A Crim R 510, 511–12 [8].

⁶¹ While a submission by an accused based on accident under s 23B must sensibly have some evidential basis, that does not mean that the burden of proof is on the accused to establish the defence: *Mittheo v Jones* [2008] WASC 41; *Woolmington v DPP* [1935] AC 462; *R v Mullen* (1938) 59 CLR 124.

objective question of whether or not the death was a reasonably foreseeable consequence of the accused's act in all the circumstances.

The principle of reasonable foreseeability was formulated in *Roberts*,⁶² and then approved in *Mackie*.⁶³ In *Taiters*,⁶⁴ the Queensland Court of Appeal held that the modern formulation was that an accused is not criminally responsible if death was such an unlikely consequence of his or her actions that an ordinary person could not reasonably have foreseen it, and that 'the jury should exclude possibilities that are no more than remote or speculative'.⁶⁵

As noted above, accident has not generally been relevant to *direct* one-punch homicide cases. This is because, where a victim dies as a *direct* result of an accused's assault, even where it may also be the case that the victim might not have died but for a pre-existing weakness, both the common law and s 273 provide, in effect, that the relevant weakness is always reasonably foreseeable. Notwithstanding the difficulties created by the decision of the High Court in *Van den Bemd*,⁶⁶ the position in Western Australia, based on the authority of *Ward*,⁶⁷ is that where a victim is injured or killed as a *direct* result of a deliberate act, the eggshell skull principle will effectively prevent the accused from relying upon the defence of accident. If, however, the death was an *indirect* result of the accused's act, then it is likely that the key factual issue is not one of some underlying physical infirmity unknown to the accused. Consequently, in an *indirect* one-punch homicide case, the question of the foreseeability of the result will take into contemplation events externally contributing to the result.

To overcome the uncertainty that emerged through the common law, s 23B of the *Criminal Code* was amended to effectively codify the eggshell skull principle in Western Australia in sub-ss 23B(3)–(4).⁶⁸ While these amendments were not introduced in response to the situation that had emerged in one-punch homicide cases, ss 23B(3)–(4) do offer some clarification as to how the eggshell skull principle might arise for consideration in one-punch homicide cases under s 281, and help to conceptually separate the principle from the wider concept of causation.

⁶² (1971) 56 Cr App R 95: a self-preservation case where a woman had jumped out of the appellant's car while it was moving in order to escape the harm the appellant had threatened against her. In that case the Court of Appeal stated that 'the test is: was it a natural result of what the alleged assailant said and did, in the sense that it was something that could reasonably have been foreseen as the consequence of he was saying or doing?'

⁶³ (1973) 57 Cr App R 453: another self-preservation case where the appellant was convicted of the manslaughter of a boy who fell down stairs when running away in fear of being bullied by the appellant.

⁶⁴ [1997] 1 Qd R 333, 334 (MacRossan CJ, Pincus JA and Lee J): In *Taiters*, the accused struck the victim, causing him to fall to the ground and hit his head on the footpath, which resulted in his death.

⁶⁵ *Ibid* 338.

⁶⁶ *Van den Bemd* (1994) 179 CLR 137.

⁶⁷ *Ward v R* [1972] WAR 36.

⁶⁸ The eggshell skull principle was codified for the first time in Australia when it was inserted into the new s 23B(3) of the *Criminal Code* (WA) as part of the broader amendment to the defence of accident in the *Criminal Law Amendment (Homicide) Act 2008* (WA).

These provisions operate in addition to s 273 of the *Criminal Code*. In the result, the eggshell skull principle now explicitly applies in Western Australia to one-punch homicide scenarios and thus operates as its own limitation on the defence of accident. However, the one-punch homicide cases in Western Australia that demonstrated the issues discussed in this paper were *indirect* one-punch homicide cases and the eggshell skull principle was not usually the point on which these cases turned.

Prior to the introduction of the specific offence of unlawful assault causing death under s 281 of the *Criminal Code*, charges were preferred based upon a consideration of two initial enquiries: first, the level of intent on the part of the accused; and, second, the nature of the result or consequence that could be argued was causally attributable to the accused's act (factual and legal causation).⁶⁹ In most cases involving a death from a single application of force in the manner of a punch or blow (leaving aside cases involving the use of a weapon or instrument) it was generally the case that there was no intention to kill or do grievous bodily harm. This meant that wilful murder and murder were rarely prosecuted.⁷⁰ For this reason, it was generally the case that, prior to the enactment of s 281, a charge of manslaughter, which involves an unlawful killing caused by the accused, was preferred. A charge of grievous bodily harm was generally preferred in the alternative so that, in the event that the accused was found to be not criminally responsible for the death, he or she might still be held criminally responsible for the injuries inflicted up to the point of death.⁷¹ The offence of assault occasioning bodily harm is a statutory alternative to grievous bodily harm, which means that if the accused was found not criminally responsible for grievous bodily harm, he or she might nevertheless be found criminally responsible for assault occasioning bodily harm.

For example, in *Hooper v R* ('*Hooper*'),⁷² the victim received a punch to the head by the accused. The punch fractured the victim's skull, causing him to lose consciousness and fall to the ground, where he sustained a further impact by hitting his head on the pavement. In this case, the subsequent impact with the pavement was shown to have been the cause of the victim's death. The accused was charged with manslaughter in respect of the death and, in the alternative, grievous bodily harm in respect of the fractured skull. The accused raised the defence of accident. In order to negate the defence in respect of each

⁶⁹ The prosecution bears the onus of negating the application of excuse provisions: *Griffiths v The Queen* (1994) 76 A Crim R 164, 166; *R v Mullen* (1938) 59 CLR 124.

⁷⁰ *Criminal Code* (WA) s 277. See also James J Edelman, 'Preventing Intentional "Accidents": Manslaughter, Criminal Negligence and Section 23 of the Criminal Codes' (1998) 22 *Criminal Law Journal* 71.

⁷¹ The offence of grievous bodily harm under s 294 of the *Criminal Code* (WA) is an express statutory alternative to manslaughter under s 280. The offence of assault occasioning bodily harm is an express statutory alternative to grievous bodily harm (*Criminal Code* (WA) ss 294, 297) and so assault occasioning bodily harm would be available as an alternative even without being included on the indictment: *Criminal Code* (WA) s 10B(2).

⁷² *Hooper* (2000) 116 A Crim R 510.

charge, the prosecution was required to prove beyond reasonable doubt that the death was a reasonably foreseeable consequence of the accused's act. Alternatively, or if unsuccessful in this regard, the prosecution was required to prove that the fractured skull (constituting grievous bodily harm) was a reasonably foreseeable consequence of the accused's act.⁷³

In *Hooper*, the existence of the fractured skull meant that the alternative charge of grievous bodily harm was relatively simple to prove. However, this was not always the case in one-punch homicide cases, as the *Criminal Code* defines 'grievous bodily harm' as any bodily injury of such a nature as to either 'endanger, or be likely to endanger life' or 'to cause, or be likely to cause, permanent injury to health'.⁷⁴ If the defence of accident was made out with respect to the charge of manslaughter (in other words, if death was not a reasonably foreseeable consequence), it necessarily cancelled out the first category of grievous bodily harm. This is because,

where the accused raises the defence of accident in a case in which the allegation by the prosecution is that the accused inflicted bodily injury of such a nature as to fall within (a), as being of such a nature to endanger or be likely to endanger life, a verdict of guilty of the offence of doing grievous bodily harm would be inconsistent with a verdict of not guilty of manslaughter based on the same evidence.⁷⁵

Therefore, in practical terms, while a fractured skull constitutes a bodily injury likely to cause permanent injury (satisfying the second limb of grievous bodily harm), even where the victim subsequently died from the fall, an initial blow that merely caused unconsciousness would not have been sufficient to satisfy either the first or the second limb of the definition of grievous bodily harm. Thus, in circumstances where both death and grievous bodily harm were found to be accidental, such as where the initial blow only caused a loss of consciousness, the only charge that could be proved was the offence of assault occasioning bodily harm under s 317 of the *Criminal Code*, even though death resulted from the initial assault, which attracts a maximum statutory penalty of 5 years imprisonment.

Following a number of cases in which a trial on a charge of manslaughter ended with only a conviction for an offence of assault occasioning bodily harm, there was an increasing concern that perpetrators of assaults causing death were found to be not criminally responsible for the death (or life threatening injury) because the death was deemed to have been an accident. The outcomes in these trials were controversial because, even though it was not in dispute that the victim died and that the accused had *caused* the victim's death by way of a deliberate application of force upon the victim (causation usually having been technically conceded), the successful application of the defence of

⁷³ See also *Seminara v R* (2002) 128 A Crim R 567.

⁷⁴ *Criminal Code* (WA) s 1 (emphasis added).

⁷⁵ *Hooper* (2000) 116 A Crim R 510, 512 [11] (Malcolm CJ).

accident meant that the accused was not found to be criminally responsible for the death. The issue was exacerbated by the fact that the law often operated so as to preclude convictions for the lesser but still serious charge of grievous bodily harm, thus the outcome was a conviction for the offence of assault occasioning bodily harm. This offence carries significantly weaker statutory penalties and was viewed as entirely incommensurate with the harm that was ultimately caused as a result of the violent offending behaviour.

The increasing prevalence of such cases and the repetition of outcomes at trial raised the policy question: how many times must a person be killed by a single punch causing the victim to hit his or head on the pavement before it could be said that death was a reasonably foreseeable consequence of such an act? The specific offence of unlawful assault causing death under s 281 of the *Criminal Code* was devised to address this issue.⁷⁶ Part IV examines s 281 to see if it has been successful in this regard, or if ambiguity in the part may produce unintended outcomes.

IV The Potential Ambiguity in s 281

A *The Terms of the Provision*

Essentially, s 281(1) creates a new offence that is intended to apply specifically to one-punch homicide factual scenarios. Section 281 provides as follows:

Unlawful assault causing death

- (1) If a person *unlawfully* assaults another *who dies as a direct or indirect result of the assault*, the person is guilty of a crime and is liable to imprisonment for 10 years.
- (2) A person is criminally responsible under subsection (1) even if the person does not intend or foresee the death of the other person and *even if the death was not reasonably foreseeable* (emphasis added).

Subsection (1) creates the offence of unlawful assault causing death, providing that a person will be guilty of a homicide offence if he or she unlawfully assaults another who dies as a direct or indirect result of the assault. Subsection (2) then excludes the defence of accident (or the constituent limbs of the defence of accident including the test of reasonable foreseeability) in such cases.

⁷⁶ While the *Criminal Law Amendment (Homicide) Act 2008* (WA) was the vehicle for legislative reform recommended by the Law Reform Commission of Western Australia, *Review of the Law of Homicide*, Report no 97 (2007) and contained several amendments to the law of homicide and the relevant defences, interestingly, the Commission had not considered the issue that had arisen in one-punch homicide cases.

B *The Ambiguity*

The ambiguity in s 281 arises because sub-s (2), instead of referring specifically to the defence of accident with words such as ‘even if s 23B would otherwise apply’ or ‘even if the death was an accident’, sets out the three constituent limbs of the defence of accident at common law. In circumstances where the third limb (the test of ‘reasonable foreseeability’) might also arise as a test of causation, it is unclear whether or not sub-s (2) is meant to exclude the test of ‘reasonable foreseeability’ entirely, or only as it arises in the context of the defence of accident.

C *Legislative Intent*

The Second Reading speech does not clarify the intended scope of s 281. Upon introducing s 281 to Parliament, the Attorney-General said that:

This new offence is to address the so-called one-punch homicide cases. An example of these types of cases is when a person who is punched falls to the ground and suffers a blow to the head from hitting the ground and dies. Western Australia will be the first state in Australia to introduce legislation that creates an offence to deal specifically with this issue. *As the law currently applies, offenders who are charged with manslaughter in such cases are often acquitted on the basis that the death was an accident. A death will be an accident when it was not reasonably foreseeable that death would result as a consequence of the punch. Under the new provision, it will be irrelevant whether the death was foreseen, or foreseeable, and it will also be irrelevant that the death was unintended.* The offence will be committed when a person unlawfully assaults another person who dies as a direct result of the assault. This new offence reinforces community expectations that violent attacks, such as a blow to the head, are not acceptable behaviour and will ensure that people are held accountable for the full consequences of their violent behaviour. A person convicted of this offence will be liable to a penalty of 10 years’ imprisonment.⁷⁷

The overall tenor of the statement appears to identify the defence of accident as the mischief that s 281 is intended to remedy. The test of reasonable foreseeability is referred to, but only as a constituent limb of the common law test of accident. There does not appear to be any contemplation of the possibility that, by excluding the test of reasonable foreseeability, s 281 could bear *separately* upon the issue of causation. It may be that this was not contemplated because the test of reasonable foreseeability could not arise separately as a test of causation and then accident.

⁷⁷ Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 March 2008, 1210 (Jim McGinty) (emphasis added). See also *Interpretation Act 1984* (WA) s 19(2)(f).

D Is Causation an Issue to be Considered Separately From Accident?

In code jurisdictions, such as Western Australia, the question of an accused's guilt is determined first by asking whether or not the accused committed the act or caused the result (in common law terms, the *actus reus*) and, second, by asking whether or not the act was done unlawfully. If the act was not unlawful, then the accused is not criminally responsible for it. Whether or not the act was unlawful depends upon whether or not there was any authorisation, justification or excuse for the act by reference to the exculpatory provisions contained in ch V of the *Criminal Code*, of which the defence of accident under s 23B of the *Criminal Code* is one pertinent example. Under s 23B, a person is 'not criminally responsible for an event which occurs by accident'.

The issue of causation addresses the question of whether or not the accused did the act (in other words caused the death). The issue of causation is generally understood to include two aspects—factual causation and legal causation. The latter aspect is said to incorporate policy questions about the scope of the attribution of criminal responsibility and this overlaps, to some extent, with the territory covered by question of unlawfulness that follows. In *R v Martyr*, Mansfield CJ opined that the key to understanding the overlap between causation and accident is to be found in the words 'which occurs by' in s 23B Code.⁷⁸ His Honour said that these words cover cases where a death or injury would not have occurred 'but for' the act of a person, but the act is not the 'legal' or 'proximate' cause of the death or injury. In effect, the inquiry about legal causation is the same as the inquiry about accident. In *R v Tralka*,⁷⁹ it was held that causation is not the exclusive concern of this part of s 23 of the *Criminal Code* and that special factors may establish an accident even though causation is present.⁸⁰ In other words, causation can be a separate issue to be decided separately from accident, but only in certain circumstances.

In *Jemielita v R*, Murray J implicitly acknowledged the existence of this overlap when he said that:

The emergence of the 'substantial contribution' test has led to a clear distinction between a denial of causation and a defence of accident under the Code s 23. A death can be 'caused' and yet also be an 'accident'. An accident must not have been foreseeable ... If a test such as 'substantial contribution' is used for causal responsibility, then the question of whether a defence of accident is available is a separate question from that of causation.⁸¹

Based on his Honour's comments, if the test for reasonable foreseeability is used to determine causal responsibility, then the question of whether a defence of accident is available is not a separate question

⁷⁸ *R v Martyr* [1962] Qd R 398.

⁷⁹ *R v Tralka* [1965] Qd R 225.

⁸⁰ *Ibid.*

⁸¹ *Jemielita v R* (1995) 81 A Crim R 409, 432–3 (Murray J) (emphasis added).

from that of legal causation. If the overlap of legal causation and accident occurs when the circumstances of the case require the same test to be applied in deciding those two issues, then the ambiguity in s 281 is resolved by regarding the words ‘criminally responsible’ in sub-s (2) as a reference to criminal responsibility in both the ‘causal’ and ‘accidental’ context.

Before the enactment of s 281, the experience in Western Australia showed that the question of guilt was invariably decided on the question of accident rather than causation. This may be because of the inherent complexity and uncertainty that exists in the area of criminal causation. Alternatively, it may be because there was no doubt that the test of reasonable foreseeability was in play under consideration of ‘accident’. Even if the use of the test of reasonable foreseeability in the defence of accident has *nearly* collapsed the concepts of accident and causation in these trials, the primacy of causation in both a procedural and substantive sense in the practical conduct of a trial for a criminal offence under the *Criminal Code* should prevent the total collapse of the two inquiries.⁸²

As noted in Part III, causation is fundamental in that it is the starting point for any inquiry into criminal responsibility in both a procedural and substantive sense. Some confusion has arisen because of the conceptual overlap between the issues of legal causation and accident. Both issues fundamentally inquire as to the question of criminal responsibility, or culpability, to be attributed to the accused. However, an inquiry into the existence of a defence to criminal conduct is secondary in the sense that it does not arise until after a trier of fact is satisfied that the offence itself has occurred. The issue of causation in this sense is the primary inquiry in both a procedural and substantive sense because it is a fundamental conduct element.⁸³ It has been said that the ‘attribution of causal responsibility is a preliminary step towards the eventual attribution of criminal culpability to the accused,’⁸⁴ and ‘in all cases the *first* question under the Code is that of causation’.⁸⁵ If, in Western Australia, the statutory provisions relating to criminal responsibility in ch V are properly understood so as to arise for consideration only after the essential conduct elements of a given offence, including causation, have first been established, then it may be possible to argue in favour of an approach that conflates these two issues.⁸⁶

If it is accepted that there is potential ambiguity arising from both a ‘literal’ and ‘purposive’ reading of s 281, then the court may determine the matter by recourse to the so-called ‘principle of legality’, which gives effect to a presumption against the abrogation of common law rights and doctrines.

⁸² Colvin, above n 18.

⁸³ *Ibid* 253.

⁸⁴ *Ibid*.

⁸⁵ *Ward*[1972] WAR 36, 43 (Virtue SPJ) (emphasis added).

⁸⁶ Colvin, above n 18, 253.

E *Principle of Legality*

It is generally accepted that Parliament may alter, limit or exclude principles or doctrines of the common law, even those capable of being described as rights or freedoms, through codifying enactments or other statutes, provided that what it proposes to legislate for is *intra vires*, constitutional and done clearly by express statutory provisions.⁸⁷ The rationale for this is that Parliament would not interfere with such rights and freedoms ‘except by clear and unequivocal language for which the Parliament may be accountable to the electorate’.⁸⁸ Therefore, the rule is that unless there is an express intention to do so, the court will presume the legislature did not intend to abrogate existing common law rights or doctrines.⁸⁹

One frequently cited authority for the principle of legality is the statement of O’Connor J in *Potter v Minahan*. His Honour observed that:

It is in the last degree improbable that the legislature would *overthrow fundamental principles, infringe rights, or depart from the general system of law*, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them a meaning in which they were not really used.⁹⁰

If s 281 potentially limited the arguments that an accused person could present in seeking to negate causation when answering a criminal charge, this could amount to an abrogation of the right to a fair trial. If an accused person on trial for a charge of unlawful assault causing death under s 281 was statutorily prohibited from arguing that he or she did not *cause* the death on the basis that it was not reasonably foreseeable (the test having not been authoritatively rejected at common law), then it may be that s 281, if construed in that way, would give effect to the abrogation of one of the fundamental procedural rules sometimes described collectively as ‘the right to a fair trial’. In such circumstances, all the prosecution might be required to do is to demonstrate causation to a ‘but for’ standard, potentially escalating s 281 to something resembling an absolute liability offence.⁹¹ In this scenario, the accused would be prevented from rebutting the prosecutor’s assertions regarding the question of causation by reference to the foreseeability of the result — a fundamental question that the High Court has recognised as being, very

⁸⁷ *Brennan v R* (1936) 55 CLR 253, 263 (Dixon and Evatt JJ), citing *Bank of England v Vagliano Bros* [1891] AC 107, 144–5 (Lord Herschell).

⁸⁸ *South Australia v Totani* (2010) 210 CLR 1, 29 (French CJ).

⁸⁹ *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252; *Al-Kateb v Godwin* (2004) 219 CLR 562, 577 [19]–[20] (Gleeson CJ); *Coco v The Queen* (1994) 179 CLR 427, 436–7 (Mason CJ, Brennan, Gaudron and McHugh JJ), citing *Bropho v Western Australia* (1990) 171 CLR 1, 17–18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

⁹⁰ *Potter v Minahan* (1908) 7 CLR 277, 304 (O’Connor J) (emphasis added), cited in *Bropho v Western Australia* (1990) 171 CLR 1, 17–18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Coco v The Queen* (1994) 179 CLR 427, 436–437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

⁹¹ *Western Australia v JWRL* (2009) 213 A Crim R 50, 54 [12] (Heenan J).

often, highly relevant to determining the existence or otherwise of causation in every criminal case but, in particular, those cases involving harm to the victim as a result of subsequent acts or omissions of the victim or a third party. In this sense, the ‘right’ to a fair trial may be argued to include the right to defend a charge by contending that the elements of the offence have not been proved.

It has been stated at common law that the right to a fair trial is a ‘negative’ right, in the sense that that it concerns a failure to afford opportunities rather than the fulfillment of positively identified requirements.⁹² Having regard to the potential implications of s 281, a broad construction of this provision may well limit the opportunity for a defendant to argue that he or she is not guilty.

Where a broad interpretation of s 281 would have the effect of taking away from the defendant an advantage otherwise available to him or her by virtue of a common law rule or principle, this construction would be unlikely to be sustained without a clearly expressed intent on the part of the legislature.⁹³ This is so whether the relevant advantage is characterised as a procedural advantage, a rule of evidence or some form of common law ‘right’. If this is correct, then it follows that the likely interpretation of s 281 would be that it excludes the test of reasonable foreseeability only as it may be seen to arise in the context of the defence of accident.⁹⁴

V Conclusion

The question of whether or not s 281 excludes the test of ‘reasonable foreseeability’ as it relates to accident *and* causation has yet to arise for judicial consideration at appellate level. However, all that it would take for this to occur would be the presentation of an argument by an accused that subsection (2), while excluding a direction about the reasonable foreseeability of the death on the issue of accident, does *not* preclude the trial judge from giving a direction about the reasonable foreseeability of the death on the issue of *causation*. If a trial judge chose to direct in those terms, given that the test of ‘reasonable foreseeability’ is one of several available tests of criminal causation, then that direction would be justiciable.⁹⁵ Equally a decision not to direct in those terms would also be

⁹² See, eg, *Jago v District Court of New South Wales* (1989) 168 CLR 23, 29 (Mason CJ).

⁹³ *Sweet v Parsley* [1970] AC 132.

⁹⁴ *Geraldton Fisherman’s Cooperative Ltd v Munroe* [1963] WAR 129 is an example of a case where even though an offence was formulated in absolute terms, it did not mean all avenues for an exculpatory argument are excluded by implication. But see *McKenzie v GJ Coles* [1986] WAR 224.

⁹⁵ There are three circumstances where causation could arise for judicial consideration at appellate level: (1) An appeal against conviction on Indictment on the basis of an error of law by the Judge in the course of his or her charge to the jury (*Criminal Appeals Act 2004* (WA) s 23(1)(a)); (2) A prosecution appeal against a judgment of acquittal entered after a jury’s verdict of not guilty of a charge the statutory penalty for which is or includes imprisonment for 14 years or more or life, on the ground that before or during the trial the judge made an error of fact or law in relation to the charge (*Criminal Appeals Act 2004*

justiciable. In this way, s 281 may be a vehicle through which the relationship between (legal) causation and accident in code jurisdictions is further explored, or more broadly, the vehicle through which the common law of criminal causation and, in particular, the applicability of the test of reasonable foreseeability is again ventilated.⁹⁶

(WA) s 24(da)) (there would in this case need to have been a more serious charge to which Unlawful Assault Causing Death was an alternative); or (3) A referral of a question of law to the Court of Appeal by a superior court or by the Attorney General (*Criminal Appeals Act 2004* (WA) ss 46, 47). It is notable that the avenue of prosecution appeal against a jury verdict of acquittal is unique to Western Australia following an amendment to the *Criminal Appeals Act 2004* (WA) by the *Criminal Law and Evidence Amendment Act 2008* (WA) s 32 which came into operation on 27 April 2008. As a result, the avenues by which the issue could be ventilated under appeal are significantly broader in Western Australia than in any other Australian jurisdiction, and this further increases the likelihood that the causation issue will arise for High Court consideration on appeal from Western Australia.

⁹⁶ The High Court has demonstrated an interest in the issues that may remain to be resolved in relation to the law of accident and causation, which is played out most usefully in one-punch homicide cases: See, eg, the transcript of the Director of Public Prosecution for Western Australia's application to the High Court for special leave to appeal against the decision of the WA Court of Appeal in *Hooper* (2000) 116 A Crim R 510; See also Transcript of Proceedings, *The Queen v Hooper* [2001] HCATrans 561 (25 October 2001).