
The Patel trials: Further evidence of the need to reform the Griffith Codes

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This article argues that the two trials of Dr Jayant Patel for criminal medical negligence under s 288 of the Criminal Code 1899 Act (Qld) highlight the inadequacies of the duty provisions in the Griffith Codes of Queensland and Western Australia. The difficulties with these duty provisions extend beyond causation and go to the heart of the construction of the Griffith Codes. The fundamental problem lies in the wording of s 23 of both the Queensland and the Western Australia Codes, the principal section dealing with criminal responsibility, which allows a prosecution for criminal negligence under two alternative routes with different standards of proof, and the importation of common law criminal negligence into the duty provisions in the absence of a specified fault element in the relevant Code sections. It is further contended that other criminal law jurisdictions in Australia, such as the Criminal Code 1995 (Cth), offer a better model for the prosecution of criminal negligence cases that flow from breach of a specified duty. The article has greatly benefitted from comments provided to the author by Justice HG Fryberg, who conducted the second Patel trial.

INTRODUCTION

The starting point of the analysis of the operation of s 288 of the *Criminal Code Act 1899* (Qld) (Queensland Code)¹ does not lie with the section itself, but instead is to be found in s 23(1) which deals with voluntariness and accident, and which commences with the words: “Subject to the express provisions of this Code relating to negligent acts and omissions ...”.² Thus, from the outset, it needs to be understood that s 23 does not apply to the negligence provisions in the duty provisions.³ Furthermore, as will be discussed, the architecture of the Griffith Codes permits the prosecution of criminal negligence under two alternative routes: one route outside s 23 and one route where s 23 is applicable.⁴ The wording and centrality of s 23, which has been amended numerous times in both Codes over the years, impacts on offences in the Griffith Codes like the hub of spokes of a wheel, albeit a hub expressed in general, but negative, terms.

* Lecturer in Law, University of Southern Queensland. The author would like to acknowledge the assistance of Justice HG Fryberg, who kindly allowed access both to the PowerPoint presentations his Honour used to instruct the jury in the second Patel trial, as well as his Honour’s redirection to the jury on gross criminal negligence. In addition, his Honour provided valuable comments on the first draft of this article. Because Justice Fryberg expressed a contrary view to the main thrust of this article, many of his Honour’s comments have been included, both as a counterweight and to reflect the views of a very experienced trial judge. Justice Fryberg retired from the Supreme Court of Queensland on 28 November 2013. The author would also like to acknowledge helpful observations from Dr Jeremy Patrick, Professor Anthony Gray, and Professor Simon Young.

¹ Section 288 of the Queensland Code is entitled “Duty of persons doing dangerous acts”. Section 265 is the equivalent section in the *Criminal Code 1913* (WA) (WA Code).

² Section 23(1) of the Queensland Code (Intention – motive) states: “Subject to the express provisions of the Code relating to negligent acts and omissions, a person is not criminally responsible for (a) an act or omission that occurs independently of the exercise of the person’s will; or (b) an event that (i) the person does not intend or foresee as a possible consequence; and (b) an ordinary person would not reasonably foresee as a possible consequence.” Section 23A(1) of the WA Code (Unwilled acts and omissions) states: “This section is subject to the provisions in Chapter XXVII and section 444A relating to negligent acts and omissions.”

³ For Queensland, the duty provisions are: s 285 (Duty to provide necessities); s 286 (Duty of person who has care of a child); s 288 (Duty of persons doing dangerous acts); s 289 (Duty of persons in charge of dangerous things); and s 290 (Duty to do certain acts). The equivalent Western Australian provisions are ss 262-267. There is authority that s 23 does not apply to ss 286, 288-289 of the Queensland Code and to ss 263, 265-266 of the Western Australia Code, but whether the exclusion of s 23 applies to all the duty provisions is untested.

⁴ *Patel v The Queen* (2012) 247 CLR 531 at [19] (French CJ, Hayne, Kiefel and Bell JJ).

In *Callaghan v The Queen*,⁵ the High Court of Australia was considering a similar duty provision in s 266 of the WA Code.⁶ After pointing out that s 266 contains no reference to negligence and that guilt of the offence of manslaughter depends on the killing being unlawful under s 268,⁷ the High Court continued as follows:

It will be noticed that s 266 is expressed in terms of duty, so to speak, in gross. It is not connected with criminal liability in itself. But, because s 23 is qualified by being made subject to the provisions relating to negligent acts and omissions and s 266 is such a provision, it must be taken that the fact that an event causing death occurs independently of the accused's will or by accident can afford no excuse within s 268 if it falls within s 266. For that reason, and because of the final part of s 266 by which the person omitting to perform the duty is held to have caused any consequences which result to the life or health of another, breach of the duty of care imposed by the section becomes one of the constituents of the crime of manslaughter. The duty is "to use reasonable care and take reasonable precautions to avoid such danger".

What degree of negligence this contemplates is question that must be considered.⁸

The above passage is indicative of the convoluted manner in which s 266 of the WA Code and s 289 of the Queensland Code are expressed. The fault element is not to be found in either section. The High Court imputed negligence by virtue of the opening words of s 23.⁹

The lack of a fault element¹⁰ is amplified by the negative manner in which s 23 is written. In *Mamote-Kulang v The Queen*,¹¹ Windeyer J discussed s 23 of the Queensland Code. His Honour, having noted that the general provisions of Ch V of the Queensland Code concern criminal responsibility and are couched in an exculpatory form, went on to observe: "Instead of stating, *as in a more modern approach might perhaps be expected*, the elements of will, intent or knowledge which the doer of an act must have for him to be held guilty of a crime, their absence is stated as a matter of defence or excuse."¹²

⁵ *Callaghan v The Queen* (1952) 87 CLR 115.

⁶ Section 266 of the WA Code deals with the duty of a person in charge of a dangerous thing. The equivalent provision of the Queensland Code is s 289.

⁷ Section 268 of the WA Code states: "It is unlawful to kill any person unless such killing is authorised or justified or excused by law."

⁸ *Callaghan v The Queen* (1952) 87 CLR 115 at 119 (Dixon CJ, Webb, Fullagar and Kitto JJ).

⁹ Justice Fryberg has a contrary view. "I disagree with the proposition that the words relating to reasonableness in ss 288 and 289 have been used by the courts for the purpose of determining the appropriate fault element. In my view that is not how the courts have approached those sections. In broad terms the sections require proof of facts giving rise to a duty, proof of breach of that duty and proof of the consequence that results from that breach. The judges have not embarked on a search for a fault element. It was unnecessary to do so. They have applied the words of the sections to proof of those three matters. A fault element can be discerned only by applying *ex post facto* reasoning": Email from Justice Fryberg to Andrew Hemming (28 March 2014) containing a six-page attachment of comments: p 4 at [19].

¹⁰ Justice Fryberg disagrees, suggesting that the "biggest defect in the Commonwealth criminal code is the incorporation of the mental state required for proof of an offence as an *element* of the offence": Email from Justice Fryberg to Andrew Hemming, n 9, p 4 at [18] (original emphasis). His Honour goes on to argue: "The great virtue of the Griffith codes is that unless there is some evidence raising a ground of justification or excuse (particularly those in Chapter 5 [ss 22-36] of the Queensland Code) it is unnecessary to direct the jury upon that ground. In many cases it is unnecessary to say anything in the charge regarding the mental state required for the offence. It is otherwise when the mental state is an element of the offence itself. Some reference to it becomes inevitable."

¹¹ *Mamote-Kulang v The Queen* (1964) 111 CLR 62.

¹² *Mamote-Kulang v The Queen* (1964) 111 CLR 62 at 76 (emphasis added). The "more modern approach" is adopted in Ch 2 of the *Criminal Code 1995* (Cth) (Commonwealth Code). Justice Fryberg has suggested that modern practice is inconsistent with Windeyer J's observations: "What was seen as modern drafting practice by Sir Victor Windeyer in 1964, and what was adopted in the drafting of the Commonwealth criminal code, flies in the face of the modern trend toward identification of the real issues in a criminal trial and the submission to the jury only of those issues. To some extent there is a movement of convergence between the common law and the civil (European) law. More and more statutory and practice provisions require the defence to disclose its case and that trend will continue. Parliaments and courts are endeavouring to do away with the old defence practice of pleading the general issue, saying nothing and hoping that something will turn up. The policy reasons behind this movement are obvious": Email from Justice Fryberg to Andrew Hemming, n 9, p 3 at [17].

Windeyer J's observation should be understood in conjunction with Dixon CJ's well-known criticism in *Vallance v The Queen*¹³ of s 13(1) of the *Criminal Code Act 1924* (Tas) (Tasmanian Code), which was derived from s 23 of the Queensland Code. Dixon CJ focused on the failure to specifically link s 23 to the elements of offences: "[I]t is only by specific solutions of particular difficulties raised by the precise facts of given cases that the operation of such provisions as s 13 can be worked out judicially".¹⁴ The Griffith Codes suffer the fatal flaw, recognised by Dixon CJ in *Vallance v The Queen*,¹⁵ that the central criminal responsibility section is expressed in general but negative terms and often has little or nothing to say as to the elements of offences.¹⁶ This was problematic because the central provision of the Tasmanian Code (s 13) came "ab extra", restraining the operation of what followed even though common sense dictated resolution outside of s 13 itself.

The absence of a specific fault element in the duty-imposing provisions of the Griffith Codes has required the courts to interpret the words "to use reasonable care and take reasonable precautions" (in s 289) or "to have reasonable skill and to use reasonable care" (in s 288) for the purpose of determining the appropriate fault element. Colvin and McKechnie argued that "[i]t is difficult to see any textual basis for implying the common law standard of criminal negligence into the duty-imposing provisions of the [Queensland and Western Australia] Codes".¹⁷ However, the learned authors noted that the High Court in *Callaghan v The Queen* justified such importation as being appropriate for criminal liability, whilst critically observing that "[s]uch a liberal use of common law doctrine does not sit easily with orthodox views regarding the proper approach to interpreting the Codes".¹⁸

In addition, it is unclear whether the defence of mistake of fact under s 24 applies to the duty-imposing provisions of the Codes. *Pacino v The Queen*¹⁹ concerned an appeal against a conviction for manslaughter for a breach of s 266 following an attack by four dogs belonging to the applicant. The Western Australia Court of Criminal Appeal held that the trial judge had erred in holding that a defence under s 24 was not available to the applicant, on the grounds that there was no evidence that the applicant's dogs had ever actually attacked a human and therefore it remained possible that a reasonable person might honestly have believed that they did not present a risk to humans. However, as Colvin and McKechnie correctly pointed out, such a belief would negate criminal negligence: "The reference to s 24 was not only unnecessary but also potentially confusing because s 24 does not incorporate the distinctive standard of criminal negligence."²⁰ This follows because the test for negligence is objective and not subjective.

In summary, (a) the duty-imposing provisions of the Griffith Codes are expressed in convoluted terms and are unconnected with criminal liability in themselves; (b) while excluded from s 23 these

¹³ *Vallance v The Queen* (1961) 108 CLR 56.

¹⁴ *Vallance v The Queen* (1961) 108 CLR 56 at 61. Justice Fryberg has a different perspective. "Appellate decisions in the period of more than 50 years since *Vallance* and the development of judicial bench books have alleviated the difficulty to which Sir Owen Dixon referred: many 'specific solutions of particular difficulties' have been formulated": Email from Justice Fryberg to Andrew Hemming, n 9, p 3 at [16].

¹⁵ *Vallance v The Queen* (1961) 108 CLR 56 at 60. Leader-Elliott has argued that Dixon CJ's attack on s 13(1) of the Tasmanian Code in *Vallance v The Queen* "was to have a devastating effect on attempts to articulate a coherent theory of criminal liability in jurisdictions which adopted the Griffith Code": Leader-Elliott I, "Elements of Liability in the Commonwealth Criminal Code" (2002) 26 Crim LJ 28 at 29.

¹⁶ Justice Fryberg considers such an analysis to have fallen into error. "In my view it is a mistake to try to force the Griffith codes into a straitjacket containing a fault element when their architecture was specifically designed to avoid such an element. It is simply not helpful to reimagine the code cases in this way. In the code states offences are defined by reference to conduct and circumstances, which may sometimes include the existence of a specific state of mind. If the elements of an offence are proved, the offence has been committed unless the accused is relieved of criminal responsibility": Email from Justice Fryberg to Andrew Hemming, n 9, p 4 at [20].

¹⁷ Colvin E and McKechnie J, *Criminal Law in Queensland and Western Australia* (6th ed, LexisNexis Butterworths, 2012) p 76 at [4.36].

¹⁸ Colvin and McKechnie, n 17, citing inter alia *Brennan v The King* (1936) 55 CLR 253 at 263 (Dixon and Evatt JJ).

¹⁹ *Pacino v The Queen* (1998) 105 A Crim R 309.

²⁰ Colvin and McKechnie, n 17, p 76 at [4.37].

provisions remain trapped by both the negative manner in which s 23 is constructed and that section's silence as to the elements of offences; (c) the architecture of the Griffith Codes permits two different routes to prosecute criminal negligence manslaughter with differing standards of proof; and (d) it is doubtful if s 24 (mistake of fact) applies to these provisions. These significant limitations, which have been embedded in the Griffith Codes since their inception and have been brought to the fore in the Patel trials, raise the question as to the need for fundamental reform of the duty-imposing provisions of the Griffith Codes.

THE OPERATION OF SECTION 288 OF THE QUEENSLAND CRIMINAL CODE

Elements of medical criminal negligence under section 288

288 Duty of persons doing dangerous acts

It is the duty of every person who, except in a case of necessity, undertakes to administer surgical or medical treatment to any other person, or to do any other lawful act which is or may be dangerous to human life or health, to have reasonable skill and to use reasonable care in doing such act, and the person is held to have caused any consequences which result to the life or health of any person by reason of any omission to observe or perform that duty.

As was explained in the passage from *Callaghan v The Queen* cited above, s 288 is expressed in terms of gross breach of duty unconnected to criminal liability per se. In order for the trier of fact to arrive at a manslaughter conviction under s 303 of the Queensland Code,²¹ in conjunction with s 300,²² following the s 288 route, a four-step process has to occur. First, the defendant has to have caused the death of the victim under s 293. The deeming provision in s 288 satisfies s 293 where the relevant question is whether the death is a consequence resulting from the breach of duty. Secondly, the defendant must have had a duty to the victim, which in Dr Patel's case was to have reasonable skill and to use reasonable care under s 288. Thirdly, the defendant must have breached that duty. Fourthly, the defendant must have been grossly negligent to the criminal standard in performing that duty.

The first Patel trial

On 29 June 2010,²³ Dr Patel was convicted by a jury of three counts of manslaughter based on his gross criminal negligence having caused the deaths of three of his patients.²⁴ At the relevant time, Dr Patel was employed as a surgeon at the Bundaberg Base Hospital, and subsequently his competence as a surgeon had been the subject of considerable media attention: "The general tenor of the [Crown] case was that the appellant [Dr Patel] was generally incompetent and grossly negligent in: recommending the surgical procedures; the manner in which he carried out each of them; and the post-operative treatment which he supervised."²⁵ However, particulars of the prosecution case were only provided on the sixth day of the trial and only for one of the patients. On this basis, the defence applied on the 10th day to have the jury discharged without giving a verdict under s 60 of the *Jury Act 1995* (Qld). The trial judge, Byrne SJA, refused the application.

²¹ The definition of manslaughter states: "A person who unlawfully [without authorisation, justification or excuse] kills another under such circumstances as not to constitute murder is guilty of manslaughter." The equivalent section in the WA Code is s 280. Note the negative manner in which manslaughter is expressed as a residual, and with no explicit fault element. Contrast s 303 with s 160 of the *Criminal Code 1983* (NT) (NT Code): "A person is guilty of the crime of manslaughter if: (a) the person engages in conduct; and (b) that conduct causes the death of another person; and (c) the person is reckless or negligent as to causing the death of that or any other person by the conduct."

²² Section 300 (Unlawful homicide) states: "Any person who unlawfully kills another is guilty of a crime, which is called murder or manslaughter, according to the circumstances of the case." The reference to the word "kills" in s 300 leads to the definition of "killing" in s 293: "Except as hereinafter set forth, any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person."

²³ On 1 July 2010, the Australian Health Practitioner Regulation Agency commenced operation representing a new national approach to health workforce governance.

²⁴ Dr Patel became the first doctor in Australia to be convicted of manslaughter since Dr William Valentine in 1843. See Dobinson I, "Medical Manslaughter" (2009) 28(1) *University of Queensland Law Journal* 101 at 101.

²⁵ *Patel v The Queen* (2012) 247 CLR 531 at [2] (French CJ, Hayne, Kiefel and Bell JJ). The High Court's decision was unanimous. French CJ, Hayne, Kiefel and Bell JJ gave a joint judgment, while Heydon J gave a separate judgment.

On the 43rd day of the trial, the prosecution provided revised particulars which narrowed the case against Dr Patel because the focus was now on whether the surgical procedure in each of the three cases should have been undertaken, as opposed to Dr Patel's surgical competence in undertaking the three operations. The following day, the defence failed in a second attempt to have the jury discharged on the grounds that a considerable body of prejudicial and now irrelevant (as against the revised particulars) evidence had previously been admitted over the preceding six weeks of what ended up as a 58-day trial. The Queensland Court of Appeal dismissed Dr Patel's appeal, holding that with one exception all the previous evidence admitted before day 43 remained relevant.²⁶

The grounds of appeal to the High Court were twofold. The first ground, that s 288 of the Queensland Code did not encompass the decision to operate, was dismissed. The main reason for the dismissal of this appeal ground was founded on the historical origins of s 288, and in particular the writings of Sir James Fitzjames Stephen.²⁷

The authorities to which Stephen referred support the view that at common law an accused could be guilty of manslaughter for rashly advising or carrying out the administration of substances and the use of procedures ... The question is what the common law then viewed as "treatment" ... The widest versions of the case alleged against the present appellant ... all fall within the conception of "treatment" revealed in the common law authorities.²⁸

The ramifications of this decision are widespread for the medical profession and will impact on all Australian jurisdictions.²⁹

The second ground of appeal, that there was a miscarriage of justice in the conduct of the trial due to the trial judge's refusal to discharge the jury on day 44 because evidence "that was highly prejudicial and now largely irrelevant had been admitted and it was not possible to ameliorate its effects on the jury by directions",³⁰ was upheld and a new trial ordered.

The second Patel trial

The second trial of Dr Patel was presided over by Fryberg J, who took great pains to ensure that the Crown detail the particulars against Dr Patel before the trial commenced. The second trial focused on one death (Mr Morris) and s 288 of the Queensland Code "which had not been invoked before to convict a medical practitioner for his decision to operate".³¹ Here, it should be noted that the Crown could have proceeded under s 293 and s 303 of the Code without recourse to s 288, but such an approach would have meant that s 23 would apply, as well as s 282 (surgical operations and medical treatment) where the test is whether "performing the operation or providing the medical treatment is reasonable, having regard to the patient's state at the time and to all the circumstances of the case". Presumably, the Crown wished to avoid the reasonably foreseeable consequences test in s 23(1)(b),³² and believed its best chance of conviction lay with s 288. The issue of the two alternative routes for manslaughter under the Code will be further considered below.

Given the strength of the High Court's criticism of the manner in which the first Patel trial was conducted, particularly the judgment of Heydon J, and the extent of the publicity accorded by the media to that trial, it was unsurprising that initially Douglas J, and subsequently Fryberg J, were

²⁶ *R v Patel; Ex parte A-G (Qld)* [2011] QCA 81 (McMurdo P, Muir and Fraser JJA).

²⁷ See Heydon J in *Patel v The Queen* (2012) 247 CLR 531 at [138]-[151] where his Honour pointed out that s 288 of the Queensland Code was modelled on cl 158 of Stephen's *Criminal Code Bill 1880* which in turn was derived from Art 217 of Stephen's *A Digest of the Criminal Law (Crimes and Punishments)* first published in 1877 in which Stephen stated his understanding of the common law.

²⁸ *Patel v The Queen* (2012) 247 CLR 531 at [148]-[149] (Heydon J).

²⁹ See Dobinson, n 24 at 112.

³⁰ *Patel v The Queen* (2012) 247 CLR 531 at [6].

³¹ *R v Patel* [2012] QSC 419 at [29] (Douglas J).

³² When the Queensland legislature finally amended s 23(1)(b), with the passage of the *Criminal Code and Other Legislation Amendment Act 2011* (Qld), to remove the misnamed word "accident", the amendment merely substituted the judicial test already in use. See *R v Taiters* (1996) 87 A Crim R 507.

required to give a series of judgments prior to and during the second trial. At the outset, the defence applied for a no jury order under ss 614-615 of the Queensland Code. Douglas J exercised his discretion to refuse the application.

The risk of prejudice that may exist from the publicity is likely to be able to be contained and is offset to a significant extent by the interest in deciding the criminal negligence issue by reference to objective community standards considered by a jury.³³

The defence's next step was to seek on order for the particulars of count 9 to be struck out. Count 9 read "that between the first day of April 2003 and the 15th day of June, 2003 at Bundaberg in the State of Queensland, [the accused] unlawfully killed Mervyn John Morris".³⁴ Fryberg J held that the particulars in their present form were "incomplete and embarrassing"³⁵ in ordering the Crown to file and serve proper particulars of the charge. His Honour highlighted the need for the immediate causes of death (cardio respiratory failure, hypoalbuminaemia and fluid overload, malnutrition and septicaemia) "to be related by some logical path to specific breaches of duty, via the performance of the operation if that is what is alleged".³⁶

The Crown duly filed and served a fresh set of particulars which were substantially amended in *R v Patel (No 3)*. Fryberg J was less than impressed with the Crown's performance thus far.

In my judgment so much of the particulars as I have found to be deficient should be struck out. At this late stage the Crown should not have leave to amend them without first formulating the amendments. Having regard to the history of the matter (this is the fourth set of particulars admitted or found to be defective since the case was remitted to this court for retrial) I have no confidence that the Crown is in a position to reformulate them acceptably. If there are to be any further amendments, they must be formulated and made the subject of an application for leave.³⁷

The revised particulars formed the basis of the 25 steps in the flowchart Fryberg J provided as part of his instructions to the jury (discussed in more detail below). The difficulties the Crown experienced in formulating the particulars of the charge against Dr Patel are reflected in the four-step process necessary to secure a conviction for manslaughter using the duty provisions of s 288.³⁸

There was further legal skirmishing between the Crown and the defence on matters not presently relevant,³⁹ save for the final judgment in *R v Patel (No 7)*⁴⁰ which related to the meaning of "except in a case of necessity" in s 288. The defence was seeking to import the common law defence of necessity into the language of s 288. Fryberg J declined to give the jury any directions in relation to the defence of necessity:

The fact that there may be a defence of necessity at common law does not mean that that is what was intended by the word in s 288 of the Code.

Indeed, it is worth noting that neither in Chapter 5 of the Code [which deals with criminal responsibility] nor in any of the other exculpatory areas is there a section granting a defence or, more accurately, a removal of criminal responsibility, in cases equivalent to common law necessity. The fact that no such defence is generally imported into the Code would make it surprising if it should be included in the present context by way of exception to a duty.⁴¹

³³ *R v Patel* [2012] QSC 419 at [47] (Douglas J).

³⁴ *R v Patel (No 2)* [2012] QSC 420 at [1] (Fryberg J).

³⁵ *R v Patel (No 2)* [2012] QSC 420 at [46].

³⁶ *R v Patel (No 2)* [2012] QSC 420 at [46].

³⁷ *R v Patel (No 3)* [2013] QSC 1 at [39]. The full particulars are set out in Annexure A of the case.

³⁸ Justice Fryberg disagrees with this proposition, arguing that the main problem lay with "the Crown's failure to analyse the words 'consequences which result' in the section", which "required a coherent chain of causation to be identified": Email from Justice Fryberg to Andrew Hemming, n 9, p 1 at [6].

³⁹ See *R v Patel (No 4)* (2013) 228 A Crim R 422; *R v Patel (No 5)* [2013] QSC 63; *R v Patel (No 6)* QSC 64. Judgments 5 and 6 were given after the trial commenced.

⁴⁰ *R v Patel (No 7)* [2013] QSC 65.

⁴¹ *R v Patel (No 7)* [2013] QSC 65 at [12]-[13]. Judgment 7 was given after the evidence concluded.

Fryberg J's refusal to "import" the common law defence of necessity into the Queensland *Criminal Code* can be contrasted with the High Court's decision to "import" common law criminal negligence into the duty-imposing provisions of the Griffith Codes.⁴² Given that Griffith essentially reproduced the common law,⁴³ it is little wonder that the common law leaks through the Griffith Codes like a colander.⁴⁴

In any event, the stage was finally set for the second trial of Dr Patel for criminal medical negligence. The Crown had elected to follow the s 288 route, but had been required after four attempts to furnish full particulars of the charge of criminal negligence manslaughter. As it was common ground that the operation itself "was carried out properly and the subsequent death was not the result of anything done during the operation",⁴⁵ the Crown case reduced to whether it was criminally negligent for Dr Patel to have recommended the operation on a 75-year-old man in poor health, and whether he was criminally negligent in his post-operative management and care of Mr Morris.

Directions and flowcharts given to the jury in the second Patel trial

At the outset, it should be acknowledged that the questions in the flowchart⁴⁶ are particular to the Patel case. Fryberg J drew attention to this point in an email to the author:

It is important to remember that the questions were not designed to cover every element of the charge as particularised. They make sense only in the context of the case. Matters which were not in issue were not addressed, so the chart cannot be used for another case.⁴⁷

Nevertheless, the flowchart is instructive as to the broad steps necessary to secure a conviction for medical criminal negligence where the Crown chooses the s 288 route. Such a choice was likely influenced by a desire to avoid s 23(1)(b) and the reasonably foreseeable consequences test.

The flowchart, which was provided only as a suggestion and jury members were advised they did not have to follow it, contained a series of 25 steps in the form of questions, where the juror was told to select "yes" only if satisfied of that answer beyond reasonable doubt. Otherwise the juror was told to select "no". Thus, for example, the first question asked: "Was any one or more of the following a substantial cause of Mr Morris's death: (a) cardio respiratory failure? (b) hypoalbuminaemia? (c) fluid overload? (d) malnutrition? (e) septicaemia?" A "no" answer to question one led to a "not guilty" verdict. If the answer was yes to any part of question one, the second question asked: "Was the operation a substantial cause of at least one of the immediate causes of Mr Morris's death?" A "no" answer took the juror to question 17, a "yes" answer to question three.

For ease of analysis, the questions constituting the "yes" path are listed below.

Q3 On 23 May 2003 was Mr Morris's condition such that the operation was unnecessary at that time?

Q4 Was the accused's belief that the operation was then necessary unreasonable?

Q5 Between 20 and 23 May 2003 did Mr Morris have liver disease?

Q6 Was the accused's belief that any liver condition had resolved by 20 May 2003 unreasonable?

Q7 Taking into account the nature of the operation, Mr Morris's heart condition, his level of malnourishment and (if you answered Yes to Q6) his liver disease, was there between 20 and 23 May 2003 a substantial chance that Mr Morris would die from the operation if he were to have it?

Q8 Ought the accused to have known this?

⁴² *Callaghan v The Queen* (1952) 87 CLR 115 at 119.

⁴³ Schloenhardt A, *Queensland Criminal Law* (3rd ed, Oxford, 2013) pp iv, 28 at [2.2.1.1].

⁴⁴ See, for example, Dixon J's comment in *Thomas v The King* (1937) 59 CLR 279 at 305-306 that s 24 of the Queensland Code (Mistake of fact) reflected the common law with complete accuracy. See also s 8 of the Tasmanian Code which provides that the common law relating to defences remains in force unless specifically altered by the Code.

⁴⁵ *R v Patel (No 7)* [2013] QSC 65 at [7] (Fryberg J).

⁴⁶ Email from Kay Naudzius, Executive Secretary at the Supreme Court of Queensland to Andrew Hemming (28 January 2014) containing the flowchart as an eight-page attachment.

⁴⁷ Email from Justice Fryberg to Andrew Hemming (13 January 2014) p 1.

Q9 Between 20 and 23 May 2003, was it unreasonable, having regard to all the circumstances of which the accused knew or ought to have known, including Mr Morris's heart condition, his level of malnourishment and (if you answered Yes to Q6) his liver disease, for the accused to recommend and perform an operation with the chance of death referred to in Q7?

Q10 Between 23 May and 14 June 2003, did Mr Morris's bowel become and remain partially obstructed?

Q11 Ought the accused to have known this?

Q12 Did the accused fail to take reasonable steps to remedy the situation?

Q13 Did the obstruction cause the stoma to work inadequately?

Q14 Was the accused's belief that the stoma was working adequately unreasonable?

Q15 Was the inadequately working stoma a substantial cause of any of the immediate causes of death?

Q16 Between 23 and 30 May 2003, was the accused's belief that Mr Morris was receiving adequate nutrition unreasonable?

Q17 Between 23 and 30 May 2003, was there a substantial risk that Mr Morris would later develop cardio respiratory failure and malnutrition if not given parenteral feeding?

Q18 Ought the accused to have known this?

Q19 Between 23 and 14 June 2003, did Mr Morris suffer cardio respiratory failure and malnutrition?

Q20 Would ordering parenteral feeding between 23 and 30 May 2003 have ensured Mr Morris's nutrition was sufficient for him to recover from the operation?

Q21 Ought the accused to have known this?

Q22 Were cardio respiratory failure and malnutrition a substantial cause of Mr Morris's death?

Q23 Did you answer Yes to any one or more of questions 9, 15 and 22?

Q24 Read the information below and then go to question 25.

If you answered Yes to question 9, the accused's actions in recommending and performing the operation form part of "the challenged conduct" in question 25.

If you answered Yes to question 15, the accused's failure to keep the stoma working adequately forms part of "the challenged conduct" in question 25.

If you answered Yes to question 22, the accused's failure to order parenteral feeding for Mr Morris forms part of "the challenged conduct" in question 25.

Q25 In doing the acts or making the omissions constituting the challenged conduct, was the accused criminally negligent?

The above series of questions reveal three alternative paths by which the Crown could have required the jury to consider question 25 above: namely, by way of positive answers to questions 2, 15 or 22. These three questions all went to causation and were framed in accordance with the substantial cause test in *Royall v The Queen*,⁴⁸ as applied to the words "consequences which result" in s 288. The final question (Q 25) assesses the accused's acts or omissions against the objective standard of criminal negligence.

Fryberg J redirected the jury on the test for criminal negligence in the following terms:

- (1) The law punishes grossly or criminally negligent conduct which causes death because of the value which it places upon human life.
- (2) The test applied to conduct which is alleged to amount to gross or criminal negligence in the context of manslaughter is an objective one.
- (3) The standard against which the accused's conduct is to be judged is that of a reasonably competent surgeon working in the situation of the accused. The standard is not world's best practice or even Australian best practice. You should assess what a reasonably competent surgeon would have done.
- (4) There may be cases where two different surgeons, both reasonably competent, would do different things or adopt different views, and those things and views may be inconsistent. That is because in this field it is possible for reasonable minds to differ.

⁴⁸ *Royall v The Queen* (1991) 172 CLR 378; 54 A Crim R 53.



- (5) In such a case, neither course of action or opinion would be even civilly negligent, let alone criminally negligent if harm to a patient resulted from the action or opinion.
- (6) Civil negligence in a context like the present occurs where, viewed objectively, the conduct of the accused falls short of that of a reasonably competent surgeon. In such a case the defendant is liable to compensate anyone injured by his negligence
- (7) In assessing whether the conduct of the accused in recommending and performing the operation fell short of that of a reasonably competent surgeon, it is relevant to take into account the facts or matters which would affect the formation of the decision to operate, such as what was known about Mr Morris's condition, whether a diagnosis was possible without further investigation, what the correct diagnosis was, whether there was a need for surgery, whether less risky alternative procedures were available, and the ability of the patient to withstand the surgery.
- (8) Criminal negligence requires more. It requires that judged objectively, the standard of conduct of the accused was so unskilled and careless as to be grossly negligent. It is a question of degree.
- (9) The terms culpable, wicked and grave moral guilt explain the rationale for the degree of negligence required to amount to criminal negligence, but they are not the test. Gross negligence alone is the test. Those terms, which relate to a subjective state of mind, could not by themselves provide an objective test. They are the rationale for the gross negligence test. When you assess the grossness of any negligence, you may bear this in mind.⁴⁹

With respect, the above redirection is consistent with common law gross criminal negligence, as explained by Lord Hewitt CJ in a well-known passage from *R v Bateman*:

In order to establish criminal liability the facts must be such that in the opinion of the jury the negligence of the accused went beyond a mere matter of compensation between subjects and showed such disregard for the life and safety of others as to amount to a crime against the State and conduct deserving punishment.⁵⁰

Lord Hewitt CJ distinguished between civil liability for negligence, which depends on the amount of damage done, with criminal negligence where the amount and degree of negligence are the determining factors: "There must be *mens rea*."⁵¹ *Mens rea* applies to offences where the fault element is negligence because liability is imposed for the intentional doing of the act given the risk involved.

In *Widgee Shire Council v Bonney*,⁵² Griffith CJ famously observed that "under the criminal law of Queensland, as defined in the *Criminal Code*, it is never necessary to have recourse to the old doctrine of *mens rea*, the exact meaning of which was the subject of much discussion". However, the replacement test in s 23 of whether the act or omission occurred independently of the person's will or is an event that occurs by accident, has been aptly described by Goode such that "the floating jurisprudence on the scope and meaning of s 23, can hardly be called well settled or well understood".⁵³ Furthermore, as Goode has noted "whether or not the terms 'actus reus' and *mens rea*' have been used in the Griffith Code, equivalent concepts have been widely employed in a variety of guises".⁵⁴

Unsurprisingly, under s 302(1)(a) of the Queensland Code, a person is liable for murder where he or she unlawfully kills another with intent to kill or with intent to cause grievous bodily harm. Yet, while intention is the fault element for a limited range of offences,⁵⁵ the sub silentio underlying fault element in the Griffith Codes is negligence⁵⁶ because the Codes do not recognise recklessness or knowledge as a fault element.

⁴⁹ Email from Kay Naudzius, Executive Secretary at the Supreme Court of Queensland to Andrew Hemming (28 January 2014) containing Fryberg J's redirection on gross negligence as a single page attachment.

⁵⁰ *R v Bateman* (1925) 19 Cr App R 8 at 11.

⁵¹ *R v Bateman* (1925) 19 Cr App R 8 at 11.

⁵² *Widgee Shire Council v Bonney* (1907) 4 CLR 977 at 981.

⁵³ Goode MR, "Constructing Criminal Law Reform and the Model Criminal Code" (2002) 26 Crim LJ 152 at 160.

⁵⁴ Goode, n 53 at 159.

⁵⁵ As well as murder in s 302(1)(a), intention is the fault element in s 317 (Acts intended to cause grievous bodily harm and other malicious acts), s 340(1)(a) (Serious assaults), and s 4(1) (Attempts to commit offences).

⁵⁶ As Professor Fairall has pointed out: "In Queensland and Western Australia, Courts have interpreted the Griffith Codes in such a way that negligence is the underlying fault standard", citing as authority *R v Taiters* (1996) 87 A Crim R 507 at 512: "The

Lord Hewitt CJ's formulation was approved by the House of Lords in *R v Adomako*,⁵⁷ where the test was whether, given the risk of death involved, the conduct of the accused was so heinous as to warrant criminal liability. Australia has followed *R v Bateman* in the Victorian case of *Nydam v The Queen*, in the New South Wales case of *R v Lavender*,⁵⁸ and in s 5.5 of the Commonwealth Code.

5.5 Negligence

A person is negligent with respect to a physical element of an offence if his or her conduct involves: (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and (b) such a high risk that the physical element exists or will exist; that the conduct merits criminal punishment for the offence.

Thus, it can be fairly said that the jury in the second Patel trial was instructed on criminal negligence manslaughter in a manner consistent with common law principles. The difficulty, from a Criminal Code perspective, is that in the Griffith Codes the judiciary has been required to fill in all the blank spaces.⁵⁹ It is no accident that the latest edition of *Carter's Criminal Law of Queensland* runs to 2,934 pages.⁶⁰

The question that now arises is how best to proceed to modernise the 19th century Griffith Codes as regards the duty-imposing provisions. At a minimum, it will be necessary to state explicitly the fault element of negligence in each provision, with a definition of negligence to be contained in s 1 of Ch 1 (Interpretation). Furthermore, the convoluted four-step process to arrive at a conviction for manslaughter under the s 288 route will need to be simplified and clarified. In so doing, other sections such as ss 23 and 303 will need to be examined and referred to where necessary.

ALTERNATIVES TO THE DUTY PROVISIONS IN THE QUEENSLAND AND WESTERN AUSTRALIA CRIMINAL CODES

Two alternative routes for manslaughter

The authority for the two alternative routes for manslaughter under the Queensland Code is *Griffiths v The Queen*⁶¹ where Brennan, Dawson and Gaudron JJ stated "the crime of manslaughter can be committed either by a voluntary act which causes death in circumstances which do not amount to murder or by criminal negligence". Views differ as to which of the two routes is to be preferred from the Crown's perspective. On one view, the criminal negligence route is easier to prove, particularly where the result was unintended in a case under s 289 (duty of persons in charge of dangerous things). In the context of a one-punch fatality:

[I]t must surely be easier to say that such a forceful punch was not taking reasonable care of their safety or health. Regardless of what happens after the punch, s 266 [s 289 in Queensland] expressly provides that the accused is "held to have caused any consequences which result to the life or health of any person by reason of any omission to perform that duty".⁶²

Crown is obliged to establish that the accused intended that the event in question should occur or foresaw it as a possible outcome, or that an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome" – Fairall P, *Review of Aspects of the Criminal Code of the Northern Territory* (March 2004) p 41.

⁵⁷ *R v Adomako* [1995] 1 AC 171 at 189-190.

⁵⁸ See *Nydam v The Queen* [1977] VR 430; *R v Lavender* [2004] NSWCCA 120, following *R v Bateman* (1925) 19 Cr App R 8 at 11.

⁵⁹ Jeremy Bentham, the "father" of codification, conceived of a code as having "no blank spaces": Hart HLA (ed), "Jeremy Bentham", *Of Laws in General* (Athlone Press, 1970) p 246.

⁶⁰ Shanahan M, Ryan S, Rafter A, Costanzo J and Hoare A, *Carter's Criminal Law of Queensland* (19th ed, LexisNexis Butterworths, 2013).

⁶¹ *Griffiths v The Queen* (1994) 125 ALR 545 at 547. In *Griffiths*, the High Court was considering s 289 (Duty of persons in charge of dangerous things) and s 23 of the Queensland Code, where a 16-year-old boy had been convicted of the manslaughter of his best friend with a rifle shot to the head. The Crown case was based on the evidence of two girls that the appellant had confessed to killing his friend but that it had been an accident.

⁶² Edelman J, "Preventing Intentional 'Accidents': Manslaughter, Criminal Negligence and Section 23 of the Criminal Codes" (1998) 22 Crim LJ 71 at 78.

The alternative view is that Lord Hewitt's standard for criminal negligence in *R v Bateman* represents a higher standard of proof than satisfying the objective standard of reasonable foresight of the possibility of death under s 23(1)(b).

[H]aving shown an unlawful killing, the Crown would only have to exclude the excuse of accident by showing that the victim's death was reasonably foreseeable. This stream of law represents an easier route to conviction for the prosecution.⁶³

Effectively, there are two different standards of negligence in the Queensland Code. This is reflected in the reasonably foreseeable consequences test in s 23(1)(b) as explained in *R v Taiters*,⁶⁴ compared to the importation of common law criminal negligence as formulated in *R v Bateman* into the duty-imposing provisions. Irrespective of which route (or stream) is taken, the differing standards of proof have led to adverse judicial comment:

It is, as the present case illustrates, plainly undesirable that there should be differing criteria of criminal responsibility for negligent conduct according to whether the case is or is not capable of being brought within the literal wording of s 289 of the Code.⁶⁵

This lack of symmetry in the objective standard of negligence in the Queensland Code has prompted judicial calls for a general criminal negligence provision outside of the duty-imposing provisions:

While s 289 has the effect of rendering a person liable in respect of criminal negligence relating to the control of dangerous things, there is no corresponding section relating to criminal negligence generally, particularly in respect of acts not involving dangerous things.⁶⁶

The option of a general negligence provision will be considered below as part of the discussion of the reform of the duty provisions. The allied question is whether the Crown should be able to pursue either of the alternative routes for criminal negligence manslaughter.

The differing standard of proof is not an issue in itself, provided that the legislature has consciously made a decision to impose the physical and fault elements (or absence of a fault element) for a particular offence. Thus, for example, the Northern Territory legislature has dealt with the vexed question of one-punch fatalities by introducing the new s 161A under the *Criminal Code 1983* (NT) (NT Code).⁶⁷ This new section has a fault element of intention as regards engaging in conduct involving a violent act (such as the defendant intended to throw the punch), but for the result of that conduct (the defendant causes the death) strict liability applies.

161A Violent act causing death

- (1) A person (the *defendant*) is guilty of the crime of a violent act causing death if:
- (a) the defendant engages in conduct involving a violent act to another person (the *other person*); and
 - (b) that conduct causes the death of:
 - (i) the other person; or
 - (ii) any other person.

Maximum penalty: Imprisonment for 16 years.

- (2) Strict liability applies to subsection (1)(b).

It can be seen from s 161A(2) that there is no fault element for the result of the conduct. Therefore, if the Crown decided it was unable to prove beyond reasonable doubt the objective fault

⁶³ White B, Willmott L and Garwood-Gowers A, "Manslaughter under the Griffith Code: Rowing Not So Gently Down Two Streams of Law" (2005) 29 Crim LJ 217 at 224. The learned authors in support cite McPherson JA in *R v Stott* [2002] 2 Qd R 313 at 321-322; 123 A Crim R 359.

⁶⁴ *R v Taiters* (1996) 87 A Crim R 507 at 512.

⁶⁵ *R v Stott* [2002] 2 Qd R 313 at 322 (McPherson JA). The case concerned the supply of a lethal dose of heroin.

⁶⁶ *R v Hodgetts* [1990] 1 Qd R 456 at 470 (Derrington J); 44 A Crim R 320. The case concerned two butchers who, for a joke, put meat preservative into a soft drink container knowing an itinerant would likely drink from the container. The itinerant duly did so, but unbeknownst to the two accused the victim had a heart condition and died.

⁶⁷ *Criminal Code Amendment (Violent Act Causing Death) Act 2012* (NT).

element of negligence for manslaughter⁶⁸ under s 43AL,⁶⁹ then s 161A would allow the Crown to proceed with a charge for which there is no fault element for the result of conduct.

Section 161A can be favourably contrasted with the clumsy and obscure s 281 (Unlawful assault causing death) in the WA Code.⁷⁰ Section 281, which was introduced in 2008, requires neither intention nor foresight as to the result of the assault (effectively a partial mens rea offence), but nothing in the language of the section directly indicates the lack of a fault element for the result of the assault to the lay reader. The sole purpose of s 281(2) is to obviate s 23B (Accident).

A more modern approach

The design and language of s 161A of the NT Code follows from the Northern Territory's insertion of Ch 2 of the Commonwealth Code as Pt IIAA of the NT Code effective from 20 December 2006.⁷¹ The Chapter is an exhaustive attempt to match in a seemingly geometric pattern a physical element with a requisite fault element.⁷² The architecture of Ch 2 of the Commonwealth Code readily enables the legislature to select from a suite of physical and fault elements, or to dispense with a fault element in the case of a strict liability offence.

Attention has been drawn to Windeyer J's observation in *Mamote-Kulang v The Queen* that a modern approach required the elements of offences to be stated positively rather than, as in s 23 of the Queensland Code, their absence stated as a matter of defence or excuse.⁷³ Inserting a general negligence provision into the Queensland Code, suggested by Derrington J in *R v Hodgetts*,⁷⁴ is complicated by the opening words of s 23 ("Subject to the express provisions of this Code relating to negligent acts and omissions") and the absence of an explicit fault element in any of the duty provisions (ss 285-290) in Ch 27.

Furthermore, given the sunk costs and the historical development of case-based code interpretation, there is a reluctance to restructure fundamental provisions of a long-standing code. For example, in 2008, the Queensland Law Reform Commission recommended that s 23(1)(b) should be retained because the Commission was apparently unable to envisage any other alternative other than its repeal. The Commission pointed out that the repeal of s 23(1)(b) would have far-reaching consequences because accident applies generally to criminal offences and not just to manslaughter.⁷⁵ The Commission concluded that the excuse of accident was "a critical provision of the Code" and therefore the "Code should continue to include an excuse of accident".⁷⁶

⁶⁸ Under s 160 of the NT Code, the fault element is recklessness or negligence.

⁶⁹ *Nydam v The Queen* [1977] VR 430. The test in *Nydam* is followed in s 43AL of the NT Code, which in turn is based on s 5.5 of the *Criminal Code 1995* (Cth).

⁷⁰ Section 281 reads as follows: "(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."

⁷¹ *Criminal Code Amendment (Criminal Responsibility Reform) Act 2005* (NT). Since 20 December 2006, the NT Code contains two separate and mutually exclusive criminal responsibility sections. There is the original Pt II which still covers the vast majority of offences, and there is Pt IIAA which is effectively Ch 2 of the Commonwealth Code which presently predominantly applies only to a very narrow range of offences against the person listed in Sch 1. The Northern Territory government originally indicated that all offences would come under Pt IIAA within five years but Sch 1 has remained largely unchanged for the past seven years, except for the addition of a few new offences such as s 174FA (Hit and run), s 176A (Drink or food spiking), s 180A (Endangering occupants of vehicles and vessels), and Pt VII, Div 6, ss 241-244 (Criminal damage).

⁷² Section 43AC(b) of the NT Code states "for each of the physical elements for which a fault element is required, one of the fault elements for the physical element [must be proved]".

⁷³ *Mamote-Kulang v The Queen* (1964) 111 CLR 62 at 76.

⁷⁴ *R v Hodgetts* [1990] 1 Qd R 456 at 470.

⁷⁵ Queensland Law Reform Commission, *A Review of the Excuse of Accident and the Defence of Provocation*, Report No 64 (September 2008) p 184 at [10.3].

⁷⁶ Queensland Law Reform Commission, n 75, p 185 at [10.5].

Historically, there have been several amendments to s 23 in both the Griffith Codes. For example, the “eggshell skull” rule has been inserted into s 23(1A) of the Queensland Code⁷⁷ and into s 23B(3)-(4) of the WA Code.⁷⁸ However, the essential architecture of s 23 has been retained, and the amendments have sought to clarify the meaning of s 23 following the outcome of such cases as *R v Van Den Bemd*.⁷⁹

When the Queensland government did establish a Criminal Code Review Committee in 1990 under Mr O’Regan QC,⁸⁰ it ignored both the American Model Penal Code and the Model Criminal Code Officers Committee (MCCOC) which was undertaking a General Principles review at the same time (1990-1992). Goode has referred to the O’Regan review in less than flattering terms:

The O’Regan review was scarcely fundamental. It was in large part a tidying up and modernising exercise which did not examine the foundational structure of the Griffith Code in any meaningful way. Not one of the O’Regan recommendations was enacted.⁸¹

What followed was a redraft of the entire Criminal Code enacted as the *Criminal Code 1995* (Qld) which “paid no attention to the MCCOC project”.⁸² A change of State government meant that the 1995 Code failed to come into operation. A further review, which also ignored the MCCOC reports, produced the *Criminal Law Amendment Act 1997* (Qld). Goode concluded that “[t]hree superficial but supposedly major reviews of a *Criminal Code* ... produced what can only be described as a mouse”.⁸³ Such timidity was maintained by the Queensland Law Reform Commission’s failure to recommend any reform to s 23 in 2008.⁸⁴

For present purposes, given that the continued retention of s 23 as the cornerstone of criminal liability in the Griffith Codes appears to be unalterable, it is now necessary to revert to the question posed above: “How best to reform the duty provisions of the Griffith Codes?” For ease of analysis, the duty provisions in ss 285-290 of the Queensland Code will be utilised.

Reform of the duty provisions

The first reform required is to explicitly refer to the fault element of negligence in each of the duty provisions, unless they are all subsumed into a general negligence provision, thus overcoming Dixon CJ’s criticism in *Vallance v The Queen*.⁸⁵ The opening phrase in s 23 “Subject to the express provisions of this Code relating to negligent acts and omissions” requires a strained interpretation of the words “to have reasonable skill and to use reasonable care” in s 288 (or “to use reasonable care and take reasonable precautions” in s 289) to import the criminal standard of negligence and to exclude s 23 itself. A definition of negligence would need to be inserted into the Code either in s 1 or as a preliminary section to Ch 27 (Duties relating to the preservation of human life). The definition would follow *Nydam v The Queen* and s 5.5 of the Commonwealth Code.

To reinforce the point concerning the significance of the absence of a fault element in the duty provisions, it is conceivable that negligence is not the only fault element that could be applied. For

⁷⁷ Section 23(1A) states: “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.”

⁷⁸ Section 23(3)-(4) states: (3) “If death or grievous bodily harm (a) is directly caused to a victim by another person’s act that involves a deliberate use of force, but (b) would not have occurred but for an abnormality, defect or weakness in the victim, the other person is not, for that reason alone, excused from criminal responsibility for the death or grievous bodily harm. (4) Subsection (3) applies (a) even if the other person did not intend or foresee the death or grievous bodily harm; and (b) even if the death or grievous bodily harm was not reasonably foreseeable.”

⁷⁹ *R v Van Den Bemd* (1994) 179 CLR 137; 70 A Crim R 494. *Van Den Bemd* was statutorily overruled in 1997 with the introduction of s 23(1A) of the Queensland Code.

⁸⁰ Queensland Criminal Code Review Committee, *Report* (1992). The O’Regan Committee’s recommendations aimed to retain the Code’s structure while recasting its language as gender neutral and in plain English, as well as abolishing archaic offences.

⁸¹ Goode, n 53 at 165.

⁸² Goode, n 53 at 165.

⁸³ Goode, n 53 at 165.

⁸⁴ Queensland Law Reform Commission, n 75.

⁸⁵ *Vallance v The Queen* (1961) 108 CLR 56 at 61.

example, take s 286 (Duty of person who has care of a child). Under s 286(2), there is a wide definition of a person who has care of a child. Under s 286(1)(b), such a person has a duty to take reasonable precautions to avoid danger to a child's life, health and safety, and under s 286(1)(c) to take reasonable action to remove the child from any such danger. If one posits a situation where the mother is a drug addict and is administering heroin to the child to prevent the child from crying, and her partner knowing this does nothing when the mother's sister would gladly have taken the child, then a prima facie case of manslaughter would apply. However, if the partner freely admitted in a police interview that he took no action because he wanted the child dead and intended that result to occur, then would the applicable charge be murder? This raises the question as to whether the accused could rely on s 23(1)(b) in that case.

The second reform required is to clarify the meaning of causation, which is currently dealt with using deeming provisions ("the person is held to have caused any consequences" in ss 285-290) to satisfy s 293. It can be seen that 4 out of the 25 questions listed in the Patel flowchart dealt with causation issues. Questions 1, 2, 15 and 22 all made reference to the "substantial cause" test. However, no specific test is identified in the Griffith Codes, unlike the NT Code.⁸⁶ The High Court in *Royall v The Queen*⁸⁷ identified four possible tests for establishing legal causation, with the cases showing no consistent pattern of application: (1) the operating and substantial cause test; (2) the natural consequence test; (3) the reasonable foresight of the consequences test; and (4) the novus actus interveniens test. As Colvin and McKechnie pointed out:

[C]ausation remains largely a matter of common law in the code states. The common law dictates general principles of causation that must be applied. The Codes merely supplement these general principles with specific rules for some recurring issues.⁸⁸

A criminal code should be as comprehensive as practicable. As said "people must be able to find out what the law is ... the law must avoid taking people by surprise".⁸⁹ Robinson, Cahill and Mohammad have developed two criteria to evaluate a code's effectiveness in stating the rules of conduct (defined as conduct that is prohibited or required by the criminal law): "First, the code must be comprehensive in describing the rules of conduct. Second, it must communicate those rules effectively to the general public."⁹⁰ Under the criterion of comprehensiveness, they argued that "a truly comprehensive criminal code must sufficiently define all relevant terms that reference to outside sources is unnecessary".⁹¹ With this injunction in mind, a comprehensive definition of causation is set out below which would be located in Ch 28 (Homicide).

Causing death or harm

- (1) A person's conduct causes death or harm if it substantially contributes to the death or harm.
- (2) Conduct includes direct or indirect means, threats, intimidation or deceit.
- (3) Substantially means more than trivial or minimal but need not be the sole cause or even the main cause of the victim's death.
- (4) A new intervening act must be voluntary in the sense that the intervening act is free, deliberate and informed, and later conduct can only constitute a new intervening act if it was not itself caused by the earlier conduct. The test to be applied is that the later conduct must be so independent of the accused's acts, and in itself so potent in causing death, that the contribution made by the accused is reduced to insignificance.

⁸⁶ See s 149C of the NT Code (Causing death or harm) which states: "For an offence under this Part, a person's conduct causes death or harm if it substantially contributes to the death or harm."

⁸⁷ *Royall v The Queen* (1991) 172 CLR 378 at 441-442.

⁸⁸ Colvin and McKechnie, n 17, p 44 at [3.14].

⁸⁹ Gardner J, "Introduction" in Hart HLA, *Punishment and Responsibility: Essays in the Philosophy of Law* (2nd ed, OUP, 2008) p xxxvi.

⁹⁰ Robinson P, Cahill M and Mohammad U, "The Five Worst (and Five Best) American Criminal Codes" (2000) 95(1) *Northwestern University Law Review* 1 at 5.

⁹¹ Robinson et al, n 90 at 9.

- (5) Any person who causes to another person any harm from which death results, kills that person, although the immediate cause of death be treatment proper or improper, applied in good faith.⁹²

The third reform required is to amend s 303 (Manslaughter). It is wholly unsatisfactory to define manslaughter residually as an unlawful killing in circumstances other than murder. Section 303 should be rewritten consistent with Windeyer J's suggestion in *Mamote-Kulang v The Queen*⁹³ that the elements of an offence should be specifically stated. Section 160 (Manslaughter) of the NT Code is used as the template below, although without the alternative fault element of recklessness, since recklessness is unknown to the Griffith Codes.

A person is guilty of the crime of manslaughter if: (a) the person engages in conduct; and (b) that conduct causes the death of another person; and (c) the person is negligent as to causing the death of that or any other person by the conduct.⁹⁴

The fourth reform required is to clarify that s 24 (Mistake of fact) of the Queensland Code is excluded from a consideration of the duty provisions under s 24(2) below.

24 Mistake of fact

- (1) A person who does or omits to do an act under an honest and reasonable, but mistaken, belief in the existence of any state of things is not criminally responsible for the act or omission to any greater extent than if the real state of things had been such as the person believed to exist.
- (2) The operation of this rule may be excluded by the express or implied provisions of the law relating to the subject.

In the second Patel trial, if s 24(1) above applied, it required the jury to proceed on the basis of facts as the accused believed them to be. While mistake of fact has a general application, the excuse was particularly relevant, as Fryberg J pointed out to the jury,⁹⁵ regarding the need for the operation (see Q4 of the flowchart); the non-existence of liver disease (see Q6); the stoma working adequately (see Q14); and the post-operative nutrition being adequate (see Q16). Under s 24(1), the question was whether the accused's beliefs were reasonable because the Crown accepted it could not prove these beliefs were not honestly held. The onus was on the Crown to prove unreasonableness, and unless the Crown satisfied the jury on that point, then the jury was instructed to assess Dr Patel's criminal liability on the basis that his beliefs were correct.

Just as there are two standards of negligence in the Griffith Codes (the duty provisions and s 23), so too are there two different sides to reasonableness. On the one hand there is the duty "to have reasonable skill and to use reasonable care" in s 288, which is a purely objective test; while, on the other hand, there is the operation of a reasonable but mistaken belief in the state of things in s 24, which combines both subjective (belief) and objective (reasonable) factors. Given the absence of a specific fault element in the duty provisions and the lack of a definition of negligence in the Griffith Codes, it is unsurprising that there is doubt as to whether s 24 applies to the duty-imposing provisions of the Codes.

It is true that the application of s 24 to s 266 (Western Australia) was affirmed in *Pacino v The Queen*. This conclusion was left undisturbed in the two later cases of *Birks v Western Australia* and *Heaton v Western Australia*; however, in both cases,⁹⁶ the Court of Appeal held that in the circumstances it was unnecessary for the trial judge to give a direction on s 24. In *R v Lavender*, the High Court was more circumspect.

⁹² Subsection (2) combines s 293 (Definition of killing) and s 295 (Causing death by threats). Subsection (5) mirrors s 166 of the *Crimes Act 1961* (NZ), and replaces s 298 (Injuries causing death in consequence of subsequent treatment). The use of "any harm" is very broad and reflects the design of the proposed section to make the chain of causation difficult to break. If the legislature wishes to adopt a less draconian approach, then it needs to specify the gravity of the harm rather than delegate the task to the judiciary.

⁹³ *Mamote-Kulang v The Queen* (1964) 111 CLR 62 at 76.

⁹⁴ Under s 43AD(1) of the NT Code, conduct is defined as "an act, an omission to perform an act or a state of affairs".

⁹⁵ Email from Kay Naudzius, Executive Secretary at the Supreme Court of Queensland to Andrew Hemming (28 January 2014) containing Fryberg J's summing up as a 35-page PowerPoint attachment. Section 24 was covered in slides 32 and 33.

⁹⁶ *Birks v Western Australia* (2007) 168 A Crim R 350 at [76]; *Heaton v Western Australia* [2013] WASCA 207 at [59]-[60].

The direction sought [a belief that it was safe to proceed] would be *inconsistent* with what has been described as the *objectivity* of the test for involuntary manslaughter. The respondent's opinion that it was safe to act as he did was not a relevant matter. If there had been some particular fact or circumstance which the respondent knew, or thought he knew and which contributed to that opinion, and the jury had been informed of that, and counsel had asked for a direction about it, then it *may* have been appropriate to invite the jury to take that into account.⁹⁷

The better view is to exclude s 24 because it encompasses a subjective state of mind, whereas the test of negligence is purely objective. In the case of Dr Patel, the objective test was, as Fryberg J identified, the standard of a reasonably competent surgeon working in the situation of the accused. This objective question becomes muddled if the subjective beliefs of the accused are injected into the minds of the triers of fact. The solution is to exclude mistake of fact where the fault element is negligence. Thus, for example, s 43AW of the NT Code is entitled "Mistake or ignorance of fact – fault elements other than negligence".

The fifth and final reform required is to clarify that omissions are covered under the duty provisions. Presently, as Colvin and McKechnie pointed out, omissions are implied in the duties through common law equivalence:

The Codes do not expressly state any general principle in respect of liability for omissions ... The specific duties are very similar to those recognised at common law. Therefore, although the Codes impose no general liability for omissions, liability can attach to a breach of one of the specific duties and resulting injury to the life or health of a person.⁹⁸

The solution is to include a definition of omissions in s 1 similar to s 4.3 of the Commonwealth Code,⁹⁹ where the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that there is a duty to perform.

Armed with a definition of negligence and a definition of omissions in s 1, a comprehensive definition of causation in Ch 28, a revised definition of manslaughter in s 303, and the exclusion of s 24, a rewritten s 288 can now be set down.

Section 288 Persons administering surgical or medical treatment

- (1) A person who administers surgical or medical treatment to another is criminally negligent if he or she fails to exercise reasonable skill and care, and is deemed to have caused any consequences resulting from such failure.
- (2) In the event the person receiving the treatment dies, then the charge of manslaughter applies.

The alternative would be to collapse the duty provisions into a general negligence provision,¹⁰⁰ which would cover the duties relating to the preservation of human life in Ch 27. The five duty provisions share a common structure, such as holding the person to have caused any consequences from the breach of the specified duty, and could be listed as alternatives under a generic stem. Such a general negligence provision could also preclude the Crown from using the alternative route of s 23 for consistency if the legislature was concerned about different standards of proof. There is a related issue relating to the uncertainty as to exactly which provisions are caught by the opening words of

⁹⁷ *R v Lavender* (2005) 222 CLR 67 at [59] (Gleeson CJ, McHugh, Gummow and Hayne JJ) (emphasis added).

⁹⁸ Colvin and McKechnie, n 17, p 41 at [3.8].

⁹⁹ Section 4.3 states: "An omission to perform an act can only be a physical element if: (a) the law creating the offence makes it so; or (b) the law creating the offence impliedly provides that the offence is committed by an omission to perform an act that there is a duty to perform by a law of the Commonwealth, a State or a Territory, or at common law." The word "physical" will require amendment because the Griffith Codes do not utilise the Commonwealth Code's nomenclature of physical and fault elements.

¹⁰⁰ However, such a general negligence provision would not account for the scenario of the drug addict's partner referred to above. The High Court seems to have accepted McPherson JA's dictum in *R v Stott* [2002] 2 Qd R 313 at 319. "McPherson JA observed that the provisions of Ch 27 were probably originally designed to cater for questions of causation arising out of cases of "pure" omission or failure to act". Generally speaking, the law does not render a person liable for the consequences of such an omission where there is no obligation to act": *Patel v The Queen* (2012) 247 CLR 531 at [14].

s 23,¹⁰¹ and whether the reference to “this Code” precludes the application of s 23 to negligent acts and omissions for non-code offences.¹⁰² Legislative clarification as to the reach of the exclusion of s 23 is essential.

An example of a general negligence provision can be found in s 174E (Negligently causing serious harm) of the NT Code. In the first Patel trial, Dr Patel was also found guilty of causing grievous bodily harm to a fourth patient, Mr Vowles. In the Northern Territory, s 174E would apply to such a case which states that: “A person is guilty of a crime if: (a) the person engages in conduct, and (b) that conduct causes serious harm to another person, and (c) the person is negligent as to causing serious harm to the other person or any other person by the conduct.”

So how would the suggested revision of s 288 above (combined with the other relevant definitions for negligence, causation and manslaughter) have impacted on Dr Patel’s trial? Could the number of questions in the flowchart be reduced? The first impact would be the removal of all the questions dealing with the accused’s beliefs (Q4, Q6, Q14 and Q16). In addition, given that there were three paths (by way of positive answers to Q2, Q15 or Q22) by which the jury could have arrived at the consideration of Q25 above of whether the accused was criminally negligent, the proposed definition of “substantially” (more than trivial or minimal but need not be the sole or even the main cause of the victim’s death) in the test for causation simplifies the jury’s task.

With negligence defined in s 1 consistent with *Nydam v The Queen*, and the definition of manslaughter specifying negligence as the fault element, it is contended that two questions could have been put to the jury as follows:

- (1) Did the accused’s conduct substantially, in the sense it was more than minimal, cause the victim’s death by the recommendation of surgery, which he knew or ought to have known the victim had a substantial risk of not surviving, from any of the factors identified in the evidence, either singly or in combination?
- (2) Did the accused demonstrate such a great falling short of the standard of a reasonably competent surgeon in the situation of the accused and was there such a high risk of the victim’s death, that the accused’s conduct merits criminal punishment?

Clearly, these two questions would require explanation and clarification in the trial judge’s summing up. The purpose is to demonstrate the task of instructing the jury in a trial of criminal medical negligence would be simplified if the duty provisions were reformed.

CONCLUSION

This article has criticised s 23, the keystone of the Griffith Codes, which are locked into calcified 19th century criminal law principles. The negative manner in which s 23 is expressed creates difficulties that have been highlighted by the High Court since the early 1960s. Nevertheless, there is little prospect that the Griffith Codes will embrace 20th century developments in criminal law theory, and consequently it can be assumed that the principal section dealing with criminal responsibility will remain in the Codes. As a second best solution, reform of the duty provisions following the Patel trials has been advocated in conjunction with necessary ancillary amendments and insertions.

The reforms advocated hinge on the inclusion of a definition of negligence and the specification of negligence as the requisite fault element for the duty provisions or, alternatively, a general negligence provision. Consistent with this treatment, negligence is the fault element for manslaughter. In order to reinforce the objective standard applied to negligence, mistake of fact has been excluded from the duty provisions. Fisse has highlighted the disparity between the theory that a code should be internally self-consistent and self-sufficient with the practice that “inevitable ambiguities of language

¹⁰¹ For example, are all the provisions in Ch 27 excluded from the operation of s 23, and does a provision such as the duty provision in s 328(1), which covers negligent acts causing harm, fall within the ambit of s 23?

¹⁰² See, for example, s 291(4) of the *Gaming Machine Act 1991* (Qld) which deals with gross negligence in the context of unlawful interference with gaming equipment; s 39(2) of the *Wine Industry Act 1994* (Qld) which covers negligent defacing or interference with genuine evidence of age; and s 122(b) of the *Metropolitan Water Supply and Sewerage Act 1909* (Qld) which refers to negligent breaking or injury to pipes or fittings in the context of tampering with works.

make this impossible".¹⁰³ The purpose of these suggested reforms is to move the duty provisions of the Griffith Codes closer to the Code benchmark of internal self-consistency and self-sufficiency.

¹⁰³ Fisse B, *Criminal Law* (5th ed, The Law Book Company Ltd, 1990) p 4.

