Is Leaving God to Make the Choice an Answer to a Charge of Murder by Reckless Indifference to Human Life or Manslaughter? A Case Study of Queensland Criminal Law

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The criminal law punishes persons who commit a guilty act with the requisite guilty mind. This article considers the criminal responsibility of parents and other persons who claim not to have possessed a guilty mind but instead left the choice to God as to whether a child survived the withdrawal of medication. The critical question is whether a jury can infer actual knowledge that death would probably result when a person consciously avoids considering the ramifications of withholding lifesaving medicine, such as insulin to a child with diabetes, and instead hands moral responsibility to God. This article explores whether murder under the circumstance of reckless indifference to human life, defined as an act committed with an awareness that death will probably arise from that act or omission, encompasses a defendant whose awareness is affected by a religious belief that his or her religious faith required God to make the decision of life or death. To avoid the need for the jury to infer actual knowledge from the objective circumstances of the case, the argument is made for an objective test for recklessness based on the natural and probable consequences test. The Crown's options in framing the charges to be laid and the reasons why a particular choice may be made are considered, particularly in relation to manslaughter. In addition, this article examines the reach of criminal responsibility where the parents of the child are joined in prayer in their own home by members of the religious group to which the parents belong.

I Introduction

This article explores whether murder under the circumstance of reckless indifference to human life, defined as an act committed with an awareness that death will probably arise from that act or omission, encompasses a defendant whose awareness is affected by a religious belief that his or her religious faith required God to make the decision of life or death. This article will not focus on broad moral, philosophical, and theological matters, as in Australia there is no general common law or constitutional exemption for criminal acts done with religious motivations. Whether public policy should weigh religious values in determining criminal liability is outside the scope of this article. Instead, the article is concerned not only with the outcome of an on-going high-profile set of prosecutions in Queensland, the Elizabeth Struhs case (discussed below), but also the implications the Struhs case has for similar future cases where a sincere religious belief is invoked as a defence to criminal charges, particularly as it relates to unlawful child killings.

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In the Struhs case, a young girl with diabetes died after her parents (with support from their religious group) refrained from providing her with insulin due to the belief that God should determine whether the girl should live or die. The Struhs case is particularly noteworthy as a case study because until the definition of murder in the *Criminal Code 1899* (Qld) was widened in 2019 to include reckless indifference to human life, the only available charge for denying insulin to a dependent child with diabetes and delegating the moral responsibility of whether the child survived to God would have been manslaughter or an offence relating to the preservation of human life. This case will be used as a demonstration of the difficulty the Crown faces with a subjective test of proving the defendant had actual knowledge that death would probably result, especially where the defendant's subjective religious belief is that God will decide. There is an intersection between the facts in the Elizabeth Struhs case and the question of objectivity in the offence of reckless indifference to human life. The jury will have to determine whether, in the face of evidence that Elizabeth's parents (as well as members of the religious group to which they belonged) knew Elizabeth had diabetes and could die without insulin, their continued belief that God would decide whether or not to save Elizabeth amounted to conscious avoidance of the ramifications of their inaction.

At the heart of this case is the proposition that criminal law is concerned solely with earthly matters and that spiritual beliefs should play no part in determining the mental element of a crime. In other words, the argument is that religious beliefs are irrelevant in determining criminal responsibility. The counter argument is that the accused's beliefs about leaving God to decide whether or not to intervene affects whether the religious group was recklessly indifferent to human life, bearing in mind the test for the mental element of murder by reckless indifference is not an objective one such as the response of an ordinary reasonable person under the same circumstances.

However, the test for criminal negligence manslaughter is objective and probably reflects the decision by the Crown to downgrade the charge of murder to manslaughter for 12 of the 14 members of the religious group between the committal hearings in November 2022 and the court appearances in April 2023, which in turn adds weight to the argument that objective recklessness, meaning a reasonable person would have recognised the risk and avoided the behaviour, should be the test for murder by reckless indifference to human life, at least for murder or manslaughter offences against vulnerable children. This argument is reinforced when the admissions made by various members of the religious group at their committal hearings as to their knowledge that Elizabeth could die without insulin are taken into consideration (discussed in Part II below).

While it is acknowledged that objective recklessness blurs the distinction between the fault elements of recklessness and negligence, a striking feature of the *Criminal Code 1899* (Qld) is that in *Widgee Shire Council v Bonney*[1] Griffith CJ, the Code's architect, 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'. Consequently, in the absence of any definitions of fault elements in the *Criminal Code 1899* (Qld), the legislature can insert an explicit fault element for any specific offence, unless it chooses to leave the interpretation to the courts.

[1] (1907) 4 CLR 997, 981.

As Goode has pointed out, 'the Griffith Codes did not, and do not, deal with the (for them) entirely novel idea of recklessness'.[2] This means that the judiciary is obliged to turn to the common law for an interpretation of recklessness. The leading case is *Crabbe v The Queen*[3] where the High Court held that for common law reckless murder it was necessary for the prosecution to prove that the accused was aware of the probability of death and not merely the possibility of death. This is why the test for recklessness in Queensland is subjective and involves probable foresight of harm rather than possible foresight of harm, which is further discussed in Part III below.

The distinction between probable and possible foresight of death may assist the reader in understanding the title of this article, namely, whether leaving the choice to God is an answer to a charge of murder by reckless indifference to human life. The question reduces to the meaning of an awareness of the probability of death in the context of the Crown having to prove such an awareness beyond reasonable doubt. The concern is that wilful blindness, which is equated to actual knowledge, may be used to shield an accused from the Crown being able to prove the fault element of subjective recklessness beyond reasonable doubt.

The jury may reason either: (1) that the accused did *not* have a probable foresight of death, because otherwise he or she would not have left the choice to God (which may amount to wilful blindness), or (2) that the accused *did* have the foresight to recognise death was a probable or possible outcome and therefore decided to place the human outcome in God's hands. In the former case the Crown must prove actual knowledge beyond reasonable doubt, while in the latter case the Crown must prove the fault element of subjective recklessness beyond reasonable doubt.

As will be discussed in Part III and Part IV, the Crown decision to charge 12 of the 14 members of the religious group with manslaughter leaves open the prospect that the Crown will prosecute the manslaughter charges by either of two routes under the *Criminal Code 1899* (Qld)[4]: Chapter 27 'Duties relating to the preservation of human life' (specifically either s 285 'Duty to provide necessaries' or s 286 'Duty of person who has care of child') or s 303 'Manslaughter'.

In Part III, the four elements that the prosecution must prove beyond reasonable doubt to convict a person of murder by reckless indifference to human life[5] will be discussed. The focus will be upon the fourth element, namely, that in committing the acts or omissions which caused the victim's death, the defendant knew or was aware those acts or omissions would probably cause the victim's death. This is central to addressing the topic of whether leaving God to make the choice over life or death is an answer to a charge of murder by reckless indifference to human life.

As will be discussed, the requisite knowledge may be inferred from the circumstances in which death occurred and from the proven conduct of the defendant before, at the time of, or after the acts or omissions which caused death. In deciding whether the defendant possessed the requisite knowledge, the jury will be instructed that they can consider anything the defendant has said of relevance as to his or her knowledge. The prosecution will seek to prove from other relevant witnesses, such as Elizabeth's doctor (who will be able to give evidence as to her

[2] Matthew Goode, 'Constructing Criminal Law Reform and the Model Criminal Code' (2002) 26 *Criminal Law Journal* 152, 159.
[3] (1985) 156 CLR 464.
[4] *Griffiths v The Queen* (1994) 125 ALR 545, 547 (Brennan, Dawson and Gaudron JJ).
[5] See s 302(1)(aa) *Criminal Code 1899* (Qld).

medical history and how long she had been dependant on insulin) that Elizabeth's parents were aware of the implications of failure to provide Elizabeth with insulin. The purpose of the evidence is to allow the jury to draw the inference from objective evidence as to their state of knowledge that her parents and members of the religious group were actually aware of the probability of Elizabeth's death.

Thus, depending on the strength of the evidence, the outcome for each defendant in the Elizabeth Struhs case may yield a different verdict. For example, during the committal hearing it was revealed that Elizabeth's mother, Kerrie Struhs, 'had served jail time for failing to get medical assistance for her child in 2019 and had been released the month before Elizabeth's death'.[6] This leaves open the likelihood that prior to the trial the prosecution will apply to the court to adduce evidence of Kerrie Struhs's previous conviction on the grounds it constitutes similar fact evidence, namely, that there is a 'striking similarity' or 'underlying unity' between the facts in the previous conviction and the facts in the case before the court.[7] The significance of introducing similar fact evidence is to buttress the Crown's case in proving beyond reasonable doubt that the accused had actual knowledge of the probability of death.

Murder and manslaughter are alternative verdicts under the *Criminal Code 1899* (Qld).[8] As will be seen in Part III, if the prosecution fails to prove the fourth element of murder by reckless indifference but can prove beyond reasonable doubt the first three elements, namely, that the defendant unlawfully (without authorisation, justification, or excuse)[9] caused the death of the victim, then the defendant will be convicted of manslaughter.[10] However, if in this case the Crown fails to secure convictions for murder by reckless indifference, this raises the question of whether a more objective test should be inserted into s 302(1)(aa) of the *Criminal Code 1899* (Qld).

In light of the subjective nature of the test for murder by reckless indifference, by virtue of the fault element of actual knowledge, the author makes the argument for an objective test for recklessness based on the natural and probable consequences test adopted in *Director of Public Prosecutions v Smith*,[11] which is similar to objective '*Caldwell*'[12] recklessness where the defendant does not foresee the relevant risk but a reasonable person would have foreseen it, or the defendant gives no thought to the relevant risk.

In Part IV, the four elements required to sustain a charge of failure to perform the duty of providing the necessaries of life under s 285 of the *Criminal Code 1899* (Qld) will be examined, an offence with which both of Elizabeth's parents were originally charged in addition to the crime of murder. This involves consideration of the elements of proof for criminal negligence

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[6] David Chen, Georgie Hewson, and Anthea Moodie, 'Fourteen People are Accused of Murdering Elizabeth Struhs: Here's What We Know about the Case Against Them', *ABC News* (online, 26 November 2022) <https://www.abc.net.au/news/2022-11-26/elizabeth-struhs-alleged-murder-and-the-14-people-to-stand-trial/101671336>.

[7] On similar fact evidence, Queensland follows the common law and the leading High Court case is *Pfennig v The Queen* (1995) 182 CLR 461. The test is that propensity or similar fact evidence is admissible if its probative value is such that there is no rational view of the evidence that is consistent with the innocence of the accused: at 485. See also *HML v The Queen* (2008) 235 CLR 334.

[8] See s 576 *Criminal Code 1899* (Qld).

[9] See ibid s 291.

[10] See ibid 303(1) which states: 'A person who unlawfully kills another under such circumstances as not to constitute murder is guilty of manslaughter.'

[11] [1961] AC 290.

[12] *The Queen v Caldwell* [1982] AC 341 ('*Caldwell*').

manslaughter. The subjective nature of reckless indifference to human life means that the test for the mental element of reckless murder differs from the objective test for the mental element of manslaughter by criminal negligence. However, as will be discussed, there is a link between murder by reckless indifference to human life under s 302(1)(aa) and s 285 because s 285 may be an aid in inferring the defendant knew of the probable consequences of the omission to perform a duty to a person unable to provide the necessaries of life for himself/herself.

In Part V, the reach of criminal responsibility is discussed in the context of parties to offences, and in particular s 7 of the *Criminal Code 1899* (Qld) which deals with principal offenders and s 8 which covers offences committed in prosecution of common purpose. Both s 7 and s 8 operate by way of deeming provisions whereby persons who come within the reach of the sections are deemed to have committed the offence. It will be seen that the Crown can tailor the charges under s 7(1)(a)–(d) to account for the nature of each of the accused's participation according to whether he or she aided, enabled, counselled, or procured another person to commit the offence.

The analysis in this article would broadly apply to any jurisdiction in Australia, although it is acknowledged that the *Criminal Code 1899* (Qld) does contain distinct provisions reflecting 19th century jurisprudence.[13] Such broad application is reflected in common law reckless murder applying in South Australia and Victoria,[14] while New South Wales,[15] Queensland, and Tasmania[16] have statutorily adopted murder by reckless indifference to human life. It matters not that the person had no wish to cause death. Manslaughter[17] and accessorial criminal responsibility[18] apply in slightly different forms in all Australian jurisdictions. For example, if the case had occurred in New South Wales, the Crown would have the choice between murder by reckless indifference to human life under s 18(1)(a) of the *Crimes Act 1900* (NSW) or manslaughter under s 18(1)(b) of the *Crimes Act 1900* (NSW), which, as with s 303(1) of the *Criminal Code 1899* (Qld), is a residual section: 'Every other punishable homicide shall be taken to be manslaughter.' This analysis will also be conducted based on an examination of all possible avenues open to the prosecution under the *Criminal Code 1899* (Qld).

II Factual Background to the Elizabeth Struhs Case

The genesis for this article was the laying of murder or manslaughter charges against a total of 14 members of a religious group in Toowoomba after the death on 7 January 2022 of an eight-year-old girl, Elizabeth Struhs. Elizabeth had Type I diabetes and Queensland police allege she was denied insulin over a period of five days by her parents in the belief God's will prevails and God makes the decision over life and death. In effect, the parents, and by association the

[13] For example, s 23 'Intention – motive', and ch 27 'Duties relating to the preservation of human life' (ss 285–290).

[14] The fault element for common law reckless murder is knowing that it was probable that death or really serious injury would result (*R v Crabbe* (1985) 156 CLR 464).

[15] *Crimes Act 1900* (NSW) s 18(1)(a).

[16] *Criminal Code 1924* (Tas) s 157(1)(c). The Tasmanian version of reckless murder extends knowledge to 'ought to have known', and the section uses 'likely' rather than probable. 'Likely' and 'probable' are synonymous and can be contrasted with something that is merely 'possible' (*R v Crabbe* (1985) 156 CLR 464).

[17] *Crimes Act 1900* (ACT) s 15; *Crimes Act 1900* (NSW) s 18(1)(b); *Criminal Code 1983* (NT) s 160(c); *Criminal Code 1899* (Qld) s 303(1); *Criminal Code 1924* (Tas) s 156(2)(b); *Criminal Code 1902* (WA) s 280; *Nydam v The Queen* [1977] VR 430.

[18] *Criminal Code 1995* (Cth) s 11.2(1); *Criminal Code 2002* (ACT) s 45(1); *Crimes Act 1900* (NSW) s 346, s 351B; *Criminal Code 1983* (NT) s 43BG(1); *Criminal Code 1899* (Qld) ss 7–8; *Criminal Law Consolidation Act 1935* (SA) s 267; *Criminal Code 1924* (Tas) s 3(1); *Crimes Act 1958* (Vic) s 181, ss 323–5, ss 324A–324B; *Criminal Code 1902* (WA) ss 7– 8.

religious group, delegated their moral responsibility to God as they believed it was not their decision to make. All 14 persons charged do not believe they are guilty of any crime because they believe in God and that God in his wisdom knows best. They do not believe they are responsible for Elizabeth's death because they believe God chose to take her. The religious group's answer to the charges is that while they had knowledge of diabetes and insulin, God is capable of all things and is omnipotent.

Another unusual aspect of the case is that following court appearances in April 2023, in addition to murder charges against Elizabeth's father, Mr Jason Struhs, and the leader of the religious group, Mr Brendan Stevens, 12 other people have been charged with manslaughter[19] by virtue of s 7 'Principal offenders' and s 8 'Offences committed in prosecution of common purpose' of the *Criminal Code 1899* (Qld).

The Toowoomba Magistrates Court was told in November 2022 at the committal hearings for the 14 members of the religious group charged in connection with Elizabeth's death that Elizabeth's cause of death was diabetic ketoacidosis and that symptoms would have included excessive urination, thirst, abdominal pain, vomiting, weakness, lethargy, altered levels of consciousness, incontinence, and finally coma until respiratory failure and death.[20] Thus, Elizabeth's death would have been slow and painful.

As will be discussed in Part III, at trial the Crown will rely on the jury inferring actual knowledge that death would probably result from the withholding of insulin from both the objective circumstances and from comments made at the three committal hearings (held at the same time to accommodate the 14 defendants) by members of the religious group. For example, Mrs Kerrie Struhs revealed in a police statement that she knew her daughter's life depended on Elizabeth being given insulin; this was read out in court by Magistrate Kay Philipson during Mrs Struhs's committal hearing: '[Mrs Struhs] goes into detail about being told by her husband that if Elizabeth did not get her insulin, she would die.'[21] Similarly, Magistrate Kay Philipson said that the evidence supported the murder charge against Mrs Loretta Stevens, a member of the religious group, because she knew Elizabeth had diabetes and could die without insulin. '[Mrs Stevens] was aware Mr Struhs planned to and did stop giving Elizabeth insulin. She thereafter went to the Struhs's residence to care for Elizabeth and saw and could describe Elizabeth's deterioration.'[22] On the day before Elizabeth died, Ms Keita Martin, another member of the religious group, assisted in caring for Elizabeth, including taking Elizabeth to the toilet. Magistrate Louise Shephard stated at Ms Martin's committal hearing that Ms Martin had observed 'Elizabeth could not walk, was not talking and her eyes were closed'.[23]

Furthermore, at the committal hearing for Mr Brendan Stevens, the leader of the religious group, Magistrate Clare Kelly told the court: 'The religious beliefs held by the religious community include the healing power of God and the shunning of medical intervention in

[19] Padraig Collins, 'Fourteen Members of Religious Cult will Face Trial over Death of Eight-year-old Girl who was Allegedly Taken Off her Diabetes Medicine so she Could be "Healed by God"', *Daily Mail Australia* (online, 6 April 2023). At the committal hearing in November 2022 all 14 members of the religious group were charged with murder, but for 12 members the charge of murder was downgraded to manslaughter in April 2023. <https://www.dailymail.co.uk/news/article-11944629/Religious-group-face-trial-death-girl-allegedly-taken-medicine-healed-God.html>.

[20] Chen, Hewson, and Moodie (n 6).

[21] Ibid.

[22] Ibid.

[23] Ibid.

human life.'[24] For another member of the religious group, Ms Acacia Stevens, 'it was a trial of faith and they trusted God would heal Elizabeth'.[25] Lachlan Schoenfisch told the court at his committal hearing that the religious group followed the Bible which 'did not say anything about calling doctors'.[26]

Members of the religious group did not believe their actions created any criminal responsibility, as exampled by the evidence of Ms Therese Stevens at her committal hearing, because she believed Elizabeth would rise again and there was no malicious intent behind her actions. 'We did not kill her, there was no hate behind it all. She had a sickness and she died of it. We expect in his time, [God] will rise her again, and I think the charge of murder is false and does not apply to us.'[27] Another member of the religious group, Mrs Samantha Schoenfisch, told the court at her committal hearing: 'At no point was anyone intending any sort of harm to Elizabeth or any sort of pain or anything, and absolutely no indifference — the charge of indifference I find disgusting.'[28]

III Elements to be Proved for Murder by Reckless Indifference to Human Life

In 2019, the Queensland Government introduced legislation that followed the example set in New South Wales by expanding the definition of murder to include reckless indifference to human life. Understanding the elements of murder by reckless indifference to human life is the key to addressing the topic of this article, namely, whether leaving the choice to God is an answer or defence to the charge. The Explanatory Notes to the Criminal Code and Other Legislation Amendment Bill 2019 (Qld) gave the following background as to the reasons behind the proposed expanded definition of murder in the *Criminal Code 1899* (Qld).

> Many unlawful child killings in Queensland result in an offender being convicted of manslaughter rather than murder for a range of reasons, including difficulty in establishing intent even where the death is due to physical abuse …
>
> Including recklessness as an element of murder in section 302 of the *Criminal Code* will capture a wider range of offending as murder in Queensland. Reckless murder exists in a number of other Australian jurisdictions reflecting that intention and foresight of probable consequences are morally equivalent – that is a person who foresees the probability of death is just as blameworthy as the person who intends to kill. This change, depending on the circumstances of the particular case, will apply across the board to not just include recklessness in relation to the deaths of children but will be applicable to any person, including other categories of vulnerable persons such as the disabled and the elderly.[29]

Thus, while the focus of the expanded definition of murder was to address community concerns that offenders who physically abused children were too often being convicted of manslaughter

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[24] Ibid.
[25] Ibid.
[26] Ibid
[27] Ibid.
[28] Ibid.
[29] Explanatory Notes, Criminal Code and Other Legislation Amendment Bill 2019 (Qld) 2. <https://www.legislation.qld.gov.au/view/pdf/bill.first.exp/bill-2018-101>. The Bill also amended s 324 of the *Criminal Code 1899* (Qld) to increase the maximum penalty for failure to supply necessaries under s 285 of the Code from three years' imprisonment to seven years' imprisonment and to reclassify the offence as a crime.

rather than murder, the reach of reckless indifference to human life was also intended to apply to any person, including other categories of vulnerable persons.

There are four elements that the prosecution must prove beyond a reasonable doubt on a charge of murder by reckless indifference to human life: 1) That [X] is dead; 2) That the defendant caused [X]'s death; 3) That the defendant did so unlawfully; and 4) That in committing the acts or omissions which caused [X]'s death, the defendant knew those acts or omissions would probably cause [X]'s death.

The focus here is on element 4, but it is necessary to briefly comment on elements 2 and 3. For element 2, the defendant caused [X]'s death, the well-known passage from the judgement of Burt CJ in *Campbell v The Queen*[30] is often quoted in support of the view that causation is a matter of common sense for the jury to determine.

> It would seem to me to be enough if juries were told that the question of cause for them to decide is not a philosophical or a scientific question, but a question to be determined by them applying their common sense to the facts as they find them, they appreciating that the purpose of the enquiry is to attribute legal responsibility in a criminal matter.[31]

A person's conduct causes death if it substantially contributes to the death, where 'substantially' means by more than a trivial or minimal amount[32] but it need not be the sole cause or even the main cause of the victim's death.[33] The leading Australian case on the substantial cause test is *Royall v The Queen,*[34] in which two members of the High Court approved *Hallett v The Queen*[35] where the Full Court of the Supreme Court of South Australia stated:

> The question to be asked is whether an act or a series of acts ... consciously performed by the accused is or are so connected with the event that it or they must be regarded as having a sufficiently substantial causal effect which subsisted up to the beginning of the event, without being spent or without being in the eyes of the law sufficiently interrupted by some other act or event.[36]

In *R v Sherrington & Kuchler,*[37] the Queensland Court of Appeal followed the decision in *Royall* 'that a person causes the death of another if his act or conduct is a substantial or significant cause of death, or substantially contributed to the death'. Thus, in the Elizabeth Struhs case, the prosecution will have to prove beyond reasonable doubt that the withholding of insulin substantially contributed to her death, which the jury will be directed to decide as a matter of common sense based on the facts presented in court.[38]

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[30] *Campbell v The Queen* [1981] WAR 286.
[31] Ibid 290. See also *Timbu Kolian v The Queen* (1968) 119 CLR 47, 69 (Windeyer J).
[32] See *R v Lloyd* [1967] 1 QB 175, 176; *R v Biess* [1967] QR 470, 475.
[33] *R v Pagett* (1983) 76 Cr App R 279, 288 (CA).
[34] (1991) 172 CLR 378. Toohey and Gaudron JJ favoured the substantial cause test; Brennan and McHugh JJ favoured the reasonably foreseeable consequence test; and Mason CJ, Deane and Dawson JJ favoured the natural consequences test.
[35] *Hallett v The Queen* [1969] SASR 141.
[36] Ibid 149.
[37] [2001] QCA 105 [4] (McPherson JA).
[38] For a fuller discussion on causation, see Andrew Hemming, 'In Search of a Model Code Provision for Murder in Australia' (2010) 34 *Criminal Law Journal* 81, 85–7.

For element 3, the defendant unlawfully caused [X]'s death, 'unlawfully' means without authorisation, justification, or excuse under s 291 of the *Criminal Code 1899* (Qld). Authorisation refers to police officers in the performance of their duty; justification refers to a defence such as self-defence, or sudden or extraordinary emergency (sometimes known as the defence of necessity); and excuse refers to defences such as age,[39] compulsion, mental disorder, mistake of fact, and accident, where the defendant admits the criminal act but denies any criminal intent.

Clearly, in the Struhs case neither authorisation or justification apply, and there is very limited scope to argue an excuse defence. For example, the defence of honest and reasonable mistake of fact applies only to strict liability offences, which do not require the prosecution to prove a mental element on the part of the defendant in order to find him or her guilty. The court is only required to be satisfied the accused committed the act. The defence of honest and reasonable mistake of fact will succeed if the accused can demonstrate that he or she held a positive belief in a state of affairs that, had it existed, would render the accused's act innocent. Similarly, the defence of compulsion under s 31 of the *Criminal Code 1899* (Qld) does not extend to an act or omission which would constitute the crime of murder.

As mentioned in Part I, murder and manslaughter are alternative verdicts under the *Criminal Code 1899* (Qld).[40] If the Crown can prove the first three elements of murder by reckless indifference beyond reasonable doubt, in the event the Crown fails to prove the fourth element of murder by reckless indifference, then the defendant will be convicted of manslaughter in the alternative as the jury will be asked by the judge in his or her summing up to first decide on their verdict on the more serious charge of murder. This is so because manslaughter is treated as a residual offence under s 303(1) of the *Criminal Code 1899* (Qld), which states: 'A person who unlawfully kills another under such circumstances as not to constitute murder is guilty of manslaughter.'

As previously observed in Part I, the Crown has the option of prosecuting the manslaughter charges by either of two routes in the *Criminal Code 1899* (Qld): s 285 'Duty to provide necessaries' or s 303 'Manslaughter': 'the crime of manslaughter can be committed either by a voluntary act which causes death in circumstances which do not amount to murder [s 303] or by criminal negligence [s 285]'.[41] If the Crown chooses the s 303 route and the Crown can prove an unlawful killing (the first three elements above), then the Crown would only have to exclude the excuse of accident under s 23(1)(b) of the *Criminal Code 1899* (Qld) by showing that the victim's death was reasonably foreseeable.[42] The two different routes for the

[39] See s 29 'Immature age' *Criminal Code 1899* (Qld).
[40] See s 576 *Criminal Code 1899* (Qld).
[41] *Griffiths v The Queen* (1994) 125 ALR 545, 547 (Brennan, Dawson and Gaudron JJ).
[42] Section 23(1)(b) *Criminal Code 1899* (Qld) states: '(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for - (b) an event that (i) the person does not intend or foresee as a possible consequence; and (ii) an ordinary person would not reasonably foresee as a possible consequence.' Note that the first part of (1) above refers to 'subject to the express provisions of this Code relating to negligent acts or omissions' and has been interpreted to relate to the duty provisions in ss 285–290 of the Code, thereby excluding the operation of s 23(1)(b) from those duty provisions: *Callaghan v The Queen* (1952) 87 CLR 115, 119 (Dixon CJ, Webb, Fullagar and Kitto JJ). For a fuller discussion of the unsatisfactory outcome of having two different standards of proof for manslaughter under the Code, see Andrew Hemming, 'The Patel Trials: Further Evidence of the Need to Reform the Griffith Codes' (2014) 38 *Criminal Law Journal* 218.

prosecution of manslaughter result from the exclusion of s 23(1)(b) above from the duty provisions contained in Chapter 27 (ss 285–90) of the *Criminal Code 1899* (Qld).[43]

For element 4, reckless indifference to human life is the doing of an act with the foresight of the probability of death arising from that act.[44] In some cases there may be little difference in moral culpability between doing an act with an intention to kill (or to inflict grievous bodily harm) and doing an act in the recognition that it would probably cause death.[45] For example, Douglas Crabbe drove his 25-tonne Mack truck at speed into the crowded bar of the Inland Motel at the base of Uluru in the Northern Territory on 18 August 1983. Five people were killed and sixteen seriously injured. Crabbe was convicted of reckless murder at common law as, under the circumstances of the case, the jury were able to infer that Crabbe was aware of the probability of death (not merely the possibility of death) despite Crabbe having pleaded memory loss at trial.

The High Court in *Crabbe v The Queen*[46] took the opportunity to discuss the doctrine of wilful blindness which the High Court recently confirmed in *Stubbings v Jams 2 Pty Ltd*[47] as follows:

> [165] In *R v Crabbe*, this Court defined the doctrine of wilful blindness in the following way:[48]
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> > When a person deliberately refrains from making inquiries because he prefers not to have the result, when he wilfully shuts his eyes for fear that he may learn the truth, he may for some purposes be treated as having the knowledge which he deliberately abstained from acquiring.
>
> [166] In the same case,[49] the Court also referred with approval to the following description of the doctrine of wilful blindness by Professor Glanville Williams:[50]
>
> > A court can properly find wilful blindness only where it can almost be said that the defendant actually knew. He suspected the fact; he realised its probability; but he refrained from obtaining the final confirmation because he wanted in the event to be able to deny knowledge. This, and this alone, is wilful blindness. It requires in effect a finding that the defendant intended to cheat the administration of justice.

Thus, the High Court has not rejected the doctrine of wilful blindness or conscious avoidance but rather has equated wilful blindness with actual knowledge. For present purposes, it requires the jury to find that the accused in the Struhs case intended to cheat the administration of justice by refraining from obtaining final confirmation that Elizabeth was dying. For the defence, it

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[43] *Callaghan v The Queen* (1952) 87 CLR 115, 119 (Dixon CJ, Webb, Fullagar and Kitto JJ).
[44] *The Queen v Crabbe* (1985) 156 CLR 464; *Royall v The Queen* (1991) 172 CLR 378; *Campbell v The Queen* [2014] NSWCCA 175 [304].
[45] *Campbell v The Queen* [2014] NSWCCA 175 [311] (Simpson J) citing *The Queen v Crabbe* (1985) 156 CLR 464: 'The conduct of a person who does an act, knowing that death or grievous bodily harm is a probable consequence, can naturally be regarded for the purposes of the criminal law as just as blameworthy as the conduct of one who does an act intended to kill or to do grievous bodily harm.'
[46] (1985) 156 CLR 464.
[47] [2022] HCA 6 [165]–[166] (Steward J). Footnotes have been inserted into the quotation to assist the reader.
[48] (1985) 156 CLR 464, 470 [165] (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ).
[49] Ibid 470–1 [166] (Gibbs CJ, Wilson, Brennan, Deane and Dawson JJ).
[50] Glanville Williams, *Criminal Law: The General Part* (Stevens, 2nd edition, 1961) 159.

will be necessary to convince the jury that the accused were not denying actual knowledge but had a religious belief that it was God's choice whether or not to save Elizabeth, at least to the extent that the Crown is unable to prove beyond reasonable doubt that the accused were recklessly indifferent to Elizabeth's deteriorating medical condition.

The following suggested judicial direction to the jury on the mental element for murder by reckless indifference to human life is taken from the *Criminal Trial Courts Bench Book* of New South Wales:[51]

> If, at the time [the accused] committed the act that caused the death of [the deceased], [he/she] foresaw or realised that this act would *probably* cause the death of [the deceased] but [the accused] continued to commit that act regardless of that consequence, then [the accused] would be guilty of murder.
>
> What is at the nub of this mental state is that [the accused] must foresee that death was a probable consequence, or the likely result, of what [he/she] was doing. If [the accused] did come to that realisation, but decided to go on and commit the act regardless of the likelihood of death resulting, and if death does in fact result, then [the accused] is guilty of murder. The conduct of a person who does an act that the person knows or foresees is likely to cause death is regarded, for the purposes of the criminal law, to be just as blameworthy as a person who commits an act with a specific intention to cause death.
>
> For this basis of murder, [the accused's] actual awareness of the likelihood of death occurring must be proved beyond reasonable doubt. It is not enough that [he/she] believed only that really serious bodily harm might result from [his/her] conduct or that [the accused] merely thought that there was the possibility of death. Nothing less than a full realisation on the part of [the accused] that death was a probable consequence or the likely result of [his/her] conduct is sufficient to establish murder in this way.
>
> Again, you are concerned with the state of mind that [the accused] had at the time [he/she] committed the act causing death. What you are concerned about when considering the mental element of the offence of murder is the actual state of mind of [the accused], that is, what [he/she] contemplated or intended when [the act causing death] was committed.[52]

While the suggested direction uses the word 'act' rather than 'act or omission', nothing really turns on the distinction as in the Struhs case the word 'conduct' could be readily substituted. More importantly, the above suggested judicial direction to the jury uses words such as 'foresaw' or 'realised' or 'knows' or 'awareness' of the probability or likelihood of death to describe the mental element required to be proved beyond reasonable doubt for murder by reckless indifference to human life. However, there is a qualification in terms of 'nothing less than a full realisation' or 'actual awareness' on the part of the accused is required to be proved beyond reasonable doubt. This qualification refers to the mental state of the accused at the time

[51] Judicial Commission of New South Wales, *Criminal Trial Courts Bench Book* (online; last retrieved August 2023) 1043 [5-6310] <https://www.judcom.nsw.gov.au/publications/benchbks/criminal/murder.html>.
[52] Ibid 1043 [5-6310] (emphasis added). Author's emphasis to show that the use of 'probably' to interpret reckless indifference to human life in s 18(1)(a) of the *Crimes Act 1900* (NSW) is based on common law reckless murder as stated by the High Court in *Crabbe v The Queen* (1985) 156 CLR 464.

the conduct causing death was committed and reflects the subjective nature of the test for murder by reckless indifference to human life.

Following the introduction of s 302(1)(aa) 'Murder by reckless indifference' into the *Criminal Code 1899* (Qld), the *Queensland Supreme and District Court Benchbook* inserted an entry to assist judges in directing juries on this category of murder,[53] similar to the *Criminal Trial Courts Bench Book* of New South Wales. The Queensland Benchbook stressed the importance of emphasising to the jury that reckless indifference involves a subjective analysis.

> Reckless indifference to human life requires that the defendant must actually have known the death would *probably*[54] result from the defendant's acts or omissions and it is not enough that that danger may have been obvious to a reasonable person or to members of the jury.[55]

Where a subjective test[56] is applied, the Crown must prove that the accused had the requisite state of mind at the time he or she carried out the external element. Thus, the nub of the defence is that the accused did not possess actual knowledge of the probable death of [X], but as will be discussed in Part IV, the accused cannot rely on the defence of honest and reasonable mistake of fact as this is a defence that only applies to strict liability offences. However, the use of a subjective test is 'somewhat artificial as an accused, in many cases, will deny that he or she possessed the requisite state of mind necessary to commit the offence'.[57] Barwick CJ in *Pemble v The Queen*,[58] pointed out that the jury will normally have to infer the accused's state of mind from what the accused has actually done and the surrounding circumstances:

> The state of mind of the accused is rarely so exhibited as to enable it to be directly observed. Its reckless quality if that quality relevantly exists must almost invariably be a matter of inference. Although what the jury think a reasonable man might have foreseen is a legitimate step in reasoning towards a conclusion as to the accused's actual state of mind, a firm emphasis on the latter as the fact to be found by the jury is necessary to ensure that they do not make the mistake of treating what they think a reasonable man's reaction would be in the circumstances as decisive of the accused's state of mind... that conclusion [as to the accused's state of mind] could

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[53] *Queensland Supreme and District Court Benchbook,* Unlawful killing: Murder s 302(1)(aa) Murder by Reckless Indifference (January 2020) [No 183.1]–[No183.12] <https://www.courts.qld.gov.au/__data/assets/pdf_file/0008/641429/sd-bb-183a-unlawful-killing-murder-s-302-1-a-a.pdf>.

[54] Author's emphasis to show that the use of 'probably' to interpret reckless indifference to human life in s 302(1)(aa) of the *Criminal Code 1899* (Qld) is based on common law reckless murder as stated by the High Court in *Crabbe v The Queen* (1985) 156 CLR 464.

[55] *Queensland Supreme and District Court Benchbook* (n 53) [No 183.4], citing *Pemble v The Queen* (1971) 124 CLR 107; *R v TY* (2006) 12 VR 557; *R v Barrett* (2007) 171 A Crim R 315.

[56] Colvin has described a subjective test of criminal responsibility as meaning that 'liability is to be imposed only on a person who has freely chosen to engage in the relevant conduct, having appreciated the consequences or risks of that choice, and therefore having made a personal decision which can be condemned and treated as justification for the imposition of punishment': Eric Colvin, 'Ordinary and Reasonable People: The Design of Objective Tests of Criminal Responsibility' (2001) *Monash University Law Review* 197, 197. Colvin identified the alternative objective approach as 'measuring the conduct of an accused against that of some "ordinary" or "reasonable" person, placed in a similar situation [which] is "objective" because it does not depend on any finding that the accused's state of mind was blameworthy in itself': at 197.

[57] Jonathan Clough and Carmel Mulhern, *Criminal Law* (LexisNexis, 2nd ed, 2004) 17.

[58] (1971) 124 CLR 107.

> only be founded on inference, including a consideration of what a reasonable man might or ought to have foreseen.[59]

In Part IV, the elements of manslaughter by criminal negligence for failure to perform the duty of providing the necessaries of life under s 285 of the *Criminal Code 1899* (Qld) will be discussed. However, the *Queensland Supreme and District Court Benchbook* helpfully discusses the bridge between s 285 and murder by reckless indifference in terms of s 285 aiding in inferring whether the defendant knew of the probable consequences of the omission. This is because knowledge of a particular child's medical condition, such as insulin dependency, will aid the trier of fact to infer actual knowledge of the probability of death for the purpose of proving a reckless indifference to human life.

> If an alleged case of murder by reckless indifference by a parent or carer in respect of a child or person in care is founded upon a failure to provide the necessaries of life the potential application of s 285 (Duty to provide necessaries) may be considered.
>
> Relevant considerations might include the following:
>
> (a) Section 285 does not alter or substitute the need to prove the knowledge of probable consequence required to prove the murderous element of reckless indifference to life. It may however aid in inferring whether the defendant knew of the probable consequences of the omission, in that it was an omission to perform a duty owed to a person unable to provide himself or herself with the necessaries of life.
>
> (b) In *Koani v The Queen* (2017) 263 CLR 427 the High Court concluded a conviction for murder with intent to kill was incompatible with the unlawful killing being by way of criminal negligence per s 289 [Duty of persons in charge of dangerous things], because the requisite intent and acts or omissions did not coincide. Such incompatibility will not arise in the present context as long as the trial judge ensures … that the jury is unanimous as to which acts or omissions caused death and instructs the jury of the need to be satisfied the defendant had the requisite knowledge of probability of death in respect of every one of those acts and omissions.[60]

In the Struhs case, each of the omissions was the same, namely, the repeated failure to supply Elizabeth with insulin over a five-day period. More generally, the same logic as to the bridge between s 285 and murder by reckless indifference would apply to a parent who left a child in

[59] *Pemble v The Queen* (1971) 124 CLR 107, 120–1 (Barwick CJ). See also *R v Clare* (1993) 72 A Crim R 357, 369 and *R v Cutter* (1997) 94 A Crim R 152, 156–7 and 164–6.

[60] *Queensland Supreme and District Court Benchbook* (n 53) [No 183.5]–[No 183.6]. In *Koani v The Queen* (2017) 263 CLR 427, the appellant was charged with murder having pleaded guilty to manslaughter in accepting his failure to use reasonable care and to take reasonable precautions in his use or management of the gun was a gross omission to perform the duty imposed by s 289 'Duty of persons in charge of dangerous things' of the *Criminal Code 1899* (Qld). The prosecution declined to accept the appellant's plea in discharge of the indictment and at his trial the appellant was convicted of murder. The High Court held unanimously that the Queensland Court of Appeal erred in concluding that a criminally negligent act or omission could found a conviction for the offence of murder under s 302(1)(a) of the *Criminal Code 1899* (Qld).

a car with insufficient oxygen to breathe, or negligently (as opposed to intentionally[61]) starved a child to death.

The artificiality of the use of a subjective test referred to by Clough and Mulhern above[62] and the inference of the accused's state of mind referred to by Barwick CJ in *Pemble v The Queen*[63] above, could be readily overcome by the adoption of an objective test for recklessness based on the natural and probable consequences test adopted in *Director of Public Prosecutions v Smith*,[64] which is similar to objective *Caldwell*[65] recklessness where the defendant does not foresee the relevant risk but a reasonable person would have foreseen it. The unanimous decision of the House of Lords in *Director of Public Prosecutions v Smith*[66] adopted an objective test for criminal responsibility until replaced by statute.[67] The objective test was set out by Viscount Kilmuir who gave the sole judgment.

> [T]he sole question is whether the unlawful and voluntary act was of such a kind that grievous bodily harm was the natural and probable result. The only test available for this is what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result.[68]

In *Caldwell*,[69] Lord Diplock had ruled as follows:

> In my opinion, a person charged with an offence under section 1(1) of the Criminal Damage Act 1971 is 'reckless as to whether any such property would be destroyed or damaged' if (1) he does an act which in fact creates an obvious risk that property will be destroyed or damaged and (2) when he does the act he either has not given any thought to the possibility of there being any such risk or has recognised that there was some risk involved and has nonetheless gone on to do it.[70]

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[61] See *The King v Macdonald and Macdonald* [1904] St R Qd 151, where Mr and Mrs Macdonald were convicted of the wilful murder of Mr Macdonald's 14-year-old daughter from a previous marriage in circumstances in which they were found to have intentionally starved the child to death, which constituted an omission to perform the duty imposed by s 285 of the *Criminal Code 1899* (Qld) to provide her with the necessaries of life. The court held that reliance on an omission to perform a duty under s 285 was not incompatible with proof of murder with intent.

[62] Clough and Mulhern, n 57.

[63] (1971) 124 CLR 107.

[64] *Director of Public Prosecutions v Smith* [1961] AC 290.

[65] *Caldwell* (n 12).

[66] *Director of Public Prosecutions v Smith* (n 64). In *Director of Public Prosecutions v Smith*, a policeman tried to prevent the defendant from driving off with stolen goods by jumping on the bonnet of the car. The defendant not only drove away at speed but also succeeded in dislodging the police officer by zigzagging. The policeman fell into the path of an oncoming vehicle and was killed. Smith's claim that he never intended to kill but only to shake the policeman off is 'a classic ruthless risk taker reaction': John Stannard, 'A Tale of Two Presumptions' (1999) 21 *Liverpool Law Review* 275, 277.

[67] *Criminal Justice Act 1967* (UK), s 8 provides that: 'A court or jury, in determining whether a person has committed an offence - (a) shall not be bound in law to infer that he intended or foresaw a result of his actions by reason only of its being a natural and probable consequence of those actions; but (b) shall decide whether he did intend or foresee that result by reference to all the evidence, drawing such inferences from the evidence as appear proper in the circumstances.' The decision in *DPP v Smith* [1961] AC 290 was treated as wrongly decided by the Privy Council in *Frankland v R* [1987] AC 576.

[68] *Director of Public Prosecutions v Smith* (n 64) 327, concurred in by Lord Goddard, Lord Tucker, Lord Denning, and Lord Parker of Waddington.

[69] *Caldwell* (n 12). Caldwell had done some work for the owner of a hotel as the result of which he had a quarrel with the owner, got drunk, and set fire to the hotel in revenge. The fire was discovered and put out before any serious damage was caused and none of the ten guests in the hotel at the time was injured. Caldwell was indicted on two counts of arson under s 1(1) and (2)a of the *Criminal Damage Act 1971*.

[70] Ibid 354 (Lord Diplock).

The above objective test for recklessness was overruled in *R v G*,[71] on the grounds that 'the model direction formulated by Lord Diplock is capable of leading to obvious unfairness … [which is] … the bedrock on which the administration of criminal justice … is built'.[72] Lord Bingham held that recklessness required a positive mental state of actual awareness both of the existence of the risk and of the unreasonableness of taking the risk.[73]

However, it can be seen from the cases of *DDP v Smith* and *Caldwell* that an objective test for recklessness has received powerful support in the past in the House of Lords, and such a test would serve to rehabilitate objective recklessness and avoid juries having to develop 'a split personality'[74] when weighing up combined subjective and objective tests, such as the test to be found in the definition of reckless in s 5.4(2) of the *Criminal Code 1995* (Cth).[75] Awareness of a substantial risk in s 5.4(2)(a) below is the subjective test while lack of justification to take the risk in 5.4(2)(b) is an objective test, which reflects that the definition of reckless is designed to be distinguished from negligence.

> (2) A person is reckless with respect to a result if:
>
> (a) he or she is aware of a substantial risk that the result will occur;
>
> and
>
> (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

Thus, an objective definition of reckless indifference could be inserted into a new s 302(6) in the *Criminal Code 1899* (Qld) as follows:

> (6) For the purpose of sub-section 302(1)(aa) above, 'reckless indifference' is to be determined against the standard of what the ordinary responsible person would, in all the circumstances of the case, have contemplated as the natural and probable result of the act or omission.

Arguably, leaving God to make the choice as to whether a child lives or dies is an example of a ruthless risk taker having a 'wicked disregard of the consequences to life'.[76] This article argues that any tension between subjective and objective recklessness should be resolved objectively from the public policy perspective of meeting community expectations that defendants are not being sufficiently punished with the alternative verdict of manslaughter for unlawful child killings, especially given the level of trust between a parent and child.[77] This

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[71] *R v G* [2003] UKHL 50.
[72] Ibid [33] (Lord Bingham of Cornhill).
[73] Ibid [41] (Lord Bingham of Cornhill).
[74] Model Criminal Code Officers Committee, Parliament of Australia, *Fatal Offences Against the Person* (Discussion Paper, June 1998) assessing the ordinary person in the law of provocation: at 79.
[75] For a fuller discussion, see Andrew Hemming, 'Reasserting the Place of Objective Tests in Criminal Responsibility: Ending the Supremacy of Subjective Tests' (2011) 13 *University of Notre Dame Australia Law Review* 69.
[76] J H A MacDonald, *A Practical Treatise on the Criminal Law of Scotland* (W Green & Son, 1869) 89.
[77] See, for example, *Winner v The Queen* (1995) 79 A Crim R 528, a case where the appellant drove a car as close as possible to a child cyclist in order to frighten him. The appellant, having consumed a large amount of alcohol, was driving in a stolen car when he veered suddenly across two lanes of traffic and struck and killed a cyclist

policy position reflects the justification for the introduction of the reckless indifference to human life provision in s 302(1)(aa) in the *Criminal Code 1899* (Qld).[78]

Alternatively, if the concern is that objective recklessness must be weighed against the predominance of subjective fault for criminal law punishment, then one option would be to consider distinguishing between types of offences, such as the murder or manslaughter of children, as has happened with lowering the admission requirements of similar fact or tendency evidence for child sexual offences following the recommendations of the Royal Commission into Institutional Responses to Child Sexual Abuse.[79]

IV Elements to be Proved for Manslaughter by Criminal Negligence for Failure to Perform the Duty of Providing the Necessaries of Life

Both of Elizabeth's parents were originally charged with failing to perform the duty of providing the necessaries of life to their daughter, in addition to murder by reckless indifference at the committal hearing in November 2022. Following court appearances in April 2023, Elizabeth's mother, Kerrie Struhs, now faces a manslaughter charge only. The Crown may choose to prosecute manslaughter in her case through failure to provide the necessaries of life to her daughter Elizabeth.

Section 285 'Duty to Provide Necessaries' of the *Criminal Code 1899* (Qld) is as follows:

> It is the duty of every person having charge of another who is unable by reason of age, sickness, unsoundness of mind, detention, or any other cause, to withdraw himself or herself from such charge, and who is unable to provide himself or herself with the necessaries of life, whether the charge is undertaken under a contract, or is imposed by law, or arises by reason of any act, whether lawful or unlawful, of the person who has such charge, to provide for that other person the necessaries of life; and the person is held to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty.

As was explained by the High Court in *Callaghan v The Queen*,[80] the offences relating to the preservation of human life in the *Criminal Code 1899* (Qld), such as s 285 'Duty to provide necessaries', are expressed in terms of gross omission to perform that duty unconnected to criminal liability per se. For the trier of fact to arrive at a manslaughter conviction under s 303 of the Queensland Code, in conjunction with s 300,[81] following the s 285 route, a four-step process must occur.

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riding near the kerb. He then drove away. The proceedings were heard by the primary judge sitting alone. The Court of Criminal Appeal held that the trial judge was entitled to infer the requisite intent for murder on the basis of the objective evidence alone, given the relevant portion of the definition of murder in s 18(1)(a) *Crimes Act 1900* (NSW) is 'where the act of the accused … causing the death charged, was done or omitted with reckless indifference to human life'.

[78] Explanatory Notes, Criminal Code and Other Legislation Amendment Bill 2019 (Qld) (n 29).

[79] *Royal Commission into Institutional Responses to Child Sexual Abuse* (Final Report, December 2017) 105 [44]. As a result of these recommendations, in some jurisdictions which have adopted the uniform evidence legislation such as New South Wales, Tasmania, the Northern Territory, and the Australian Capital Territory, s 97A inserts a rebuttable presumption that tendency evidence has significant probative value for child sexual abuse prosecutions.

[80] (1952) 87 CLR 115, 119 (Dixon CJ, Webb, Fullagar and Kitto JJ).

[81] Section 300 *Criminal Code 1899* (Qld) (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,

First, the defendant must have caused the death of the victim under s 293. It is essential the act or omission which amounts to a failure to perform the duty is the act or omission that causes death.[82] The deeming provision in s 285 ('the person is held to have caused any consequences which result to the life or health of the other person by reason of any omission to perform that duty') satisfies s 293 where the relevant question is whether the death is a consequence resulting from any omission to perform that duty.

Secondly, the defendant must have had a duty to the victim, as explained by French CJ in *Burns v The Queen*.[83]

> Criminal liability does not fasten on the omission to act, save in the case of an omission to do something that a person is under a legal obligation to do. As a general proposition, the law does not impose an obligation on individuals to rescue or otherwise to act to preserve human life. Such an obligation may be imposed by statute or contract or because of the relationship between individuals. The relationships of parent and child, and doctor and patient, are recognised as imposing a duty of this kind. A person may voluntarily assume an obligation to care for a helpless person and thereby become subject to such a duty. Outside limited exceptions, a person remains at liberty in law to refuse to hold out her hand to the person drowning in the shallow pool.[84]

The duty in Jason and Kerrie Struhs's case as the parents of Elizabeth was 'to provide for that other person the necessaries of life' under s 285. Thirdly, the defendant must have omitted to perform that duty. Fourthly, the defendant must have been grossly negligent to the criminal standard in performing that duty.

In cases of manslaughter by criminal negligence, juries should be directed in accordance with *Nydam v The Queen*.[85] The test for the offence was described in *Nydam v The Queen* as follows:

> In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.

The test for criminal negligence is objective.[86] In *Patel v The Queen,*[87] the High Court explained the nature of the test.

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any person who causes the death of another, directly or indirectly, by any means whatever, is deemed to have killed that other person.'

[82] *Justins v The Queen* (2010) 79 NSWLR 544 [97]; *Lane v The Queen* [2013] NSWCCA 317 [61].

[83] *Burns v The Queen* [2012] HCA 35.

[84] Ibid [97] (French CJ) (citations omitted).

[85] [1977] VR 430, 445 which the High Court approved in *The Queen v Lavender* (2005) 222 CLR 67 at [17], [60], [72], [136] and *Burns v The Queen* (2012) 246 CLR 334 at [19] (French CJ).

[86] *The Queen v Lavender* [2005] HCA 37 [60] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[87] *Patel v The Queen* (2012) 247 CLR 531.

> The test does not require that an accused have an appreciation of, or an indifference to, the risk created by the conduct in question. The only criterion necessary is an intention to do the act which inadvertently causes death or grievous bodily harm.[88]

The High Court in *Patel v The Queen* went on to discuss whether special knowledge (which is on point with the medical regime of a dependent child in the Struhs case) meant the standard of conduct was higher.

> There may be cases where the standard to be applied must take account of special knowledge on the part of a person, as relevant to how a person with that knowledge would act. But that is not to use a person's knowledge to determine their guilt. A person's special knowledge may mean that the standard of conduct expected of them is higher.[89]

In assessing the comparison between the conduct of the accused person and the conduct of a reasonable person, Johnson J in *The Queen v Sam (No 17)*[90] articulated the personal attributes of the accused that may be assigned to the reasonable person and stressed the need for objectivity with regard to the reasonable hypothetical person, which in turn reflects the value placed by the law upon human life.

> [14] What is required then, is a comparison between the conduct of the accused person and the conduct of a reasonable person who possesses the same attributes of the accused (such as age, special knowledge and skills) in the circumstances in which he or she found himself, having regard to the ordinary firmness of character and strength of mind which a reasonable person has: *The Queen v Lavender* (2005) 222 CLR 67 at 72-74; *R v Edwards* [2008] SASC 303 at [416]. The accused person's own knowledge of the circumstances is relevant when considering the circumstances in which the reasonable person is placed: *The Queen v Lavender* at 88; *R v Edwards* at [417]. The need for objectivity with regard to the reasonable hypothetical person is in conformity with the other form of involuntary manslaughter, namely manslaughter by unlawful and dangerous act and, in this way, both forms of involuntary manslaughter reflect the value placed by the law upon human life: *The Queen v Lavender* at 87; *R v Edwards* at [418].[91]

In the context of the Struhs case, it should be stressed that the defence of honest and reasonable mistake of fact[92] does not apply to the offence of manslaughter by criminal negligence, as explained by the High Court in *The Queen v Lavender*.

> [58] … [T]he prosecution had to persuade the jury beyond reasonable doubt that the conduct of the respondent was not only unreasonable, but that it was 'wickedly negligent'. If the jury were not satisfied of that, the charge of manslaughter failed. If the jury were satisfied of that, how could they entertain the possibility

[88] Ibid [88] (French CJ, Hayne, Kiefel and Bell JJ).
[89] Ibid [90] (French CJ, Hayne, Kiefel and Bell JJ).
[90] *The Queen v Sam (No 17)* [2009] NSWSC 803.
[91] Ibid [14] (Johnson J).
[92] See s 24 *Criminal Code 1899* (Qld). Section 24(1) states: '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.'

> that the respondent held an honest *and reasonable* belief that it was safe to proceed?
>
> [59] … The belief concerning which counsel sought a direction was a (supposed) 'belief that it was safe to proceed'. Such a state of mind involves an opinion. It might be based upon certain factual inferences or hypotheses … but it necessarily involves an element of judgment. Indeed, it involves a conclusion by the respondent that his conduct was reasonable. The direction sought 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.[93]

Thus, in the absence of the defence of honest and reasonable mistake of fact and the clear omission to perform the duty under s 285, the verdict turns on whether each parental defendant was grossly negligent to the criminal standard in performing that duty, which is determined by an objective test. The withholding of the insulin was an intentional act, which will likely be judged as such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and having constituted such a high risk to Elizabeth's life, that the conduct merits criminal punishment.

V The Reach of Accessorial Criminal Responsibility

As previously mentioned, twelve members of the religious group, including Elizabeth's mother and brother, have been charged with manslaughter. This raises the law in relation to the reach of accessorial criminal responsibility and engages s 7 and s 8 of the *Criminal Code 1899* (Qld). While s 7 below is entitled 'Principal offenders', it really covers enabling, aiding, or counselling another person to commit the offence. By contrast, s 8 below deals with the formation of a common purpose by two or more persons to prosecute an initial unlawful purpose in conjunction with one another (here, the initial withholding of insulin), and then be deemed criminally responsible for an offence that was a probable consequence of the initial criminal purpose (here, the death after it became clear Elizabeth was in terminal decline). Significantly, both sections operate via deeming provisions whereby persons coming within the reach of the sections are either deemed to have taken part in committing the offence (s 7) or deemed to have committed the offence (s 8).

> 7 Principal offenders
>
> (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;

[93] *The Queen v Lavender* [2005] HCA 37 [58]–[59] (Gleeson CJ, McHugh, Gummow and Hayne JJ) (emphasis in original).

> (c) every person who aids another person in committing the offence;
>
> (d) any person who counsels or procures any other person to commit the offence.
>
> 8 Offences committed in prosecution of common purpose
>
> When 2 or more persons form a common intention to prosecute an unlawful purpose in conjunction with one another, and in the prosecution of such purpose an offence is committed of such a nature that its commission was a probable consequence of the prosecution of such purpose, each of them is deemed to have committed the offence.

Clearly, there is considerable overlap between the two sections. For example, in the case of the religious leader, Brendan Stevens,[94] criminal responsibility could be sheeted home via either s 7(1)(d) 'any person who counsels or procures any other person to commit the offence', or s 8 'the formation of a common intention to prosecute an unlawful purpose'. Similarly, it is understood Elizabeth's father, Jason Struhs, withdrew his young child's insulin[95] which falls within s 7(1)(a) 'every person who actually does the act or makes the omission which constitutes the offence', and, despite struggling when his daughter became ill, he kept his 'faith' under the religious group's common purpose. Samantha Schoenfisch allegedly encouraged Jason Struhs to stay strong when he became upset over his daughter's condition[96] (s 7(1)(d)), and Keita Martin allegedly assisted in taking Elizabeth to the toilet when she could no longer walk, was not talking, and her eyes were closed[97] (s (7)(1)(b) and (c)).

The applicability of s 7 will depend on each member of the religious group's actual role in supporting Elizabeth's parents' purpose. In the absence of any evidence of withdrawal after it became clear Elizabeth was dying, each member of the religious group would appear to have had a common purpose, and therefore criminal responsibility for all 14 defendants comes within the reach of s 8. Judicial interpretation of s 8 has focused on the meaning of the two words 'probable consequence' within the section.

Extension of criminal responsibility is confined to only such offences as are objectively the probable consequence of the common intention. Thus, foresight of the offence is immaterial; rather, the meaning of probability varies with the context[98] and is to be contrasted with possibility and refers to the probable consequences of the common plan as opposed to what the parties might have foreseen.[99]

As to evidence of withdrawal from the common purpose, the onus of disproving termination and lack of taking all reasonable steps to withdraw rests with the prosecution, but an evidential onus[100] needs to be satisfied by the defendant.[101] There is authority for the proposition that the accessory's withdrawal must be communicated to the principal offender.[102] The well-known

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[94] Chen, Hewson, and Moodie (n 6).
[95] Ibid.
[96] Ibid.
[97] Ibid.
[98] *Darkan v The Queen* (2006) 227 CLR 373, 395 (Gleeson CJ, Gummow, Heydon and Crennan JJ).
[99] *The Queen v Keenan* (2009) 236 CLR 397, 434 (Kiefel J).
[100] Satisfying an evidential onus requires the defendant to meet the standard of there being a reasonable possibility.
[101] *R v Menitti* [1985] 1 Qd R 520, 530 (Thomas J).
[102] *White v Ridley* (1978) 140 CLR 342, 350–1 (Gibbs J).

passage from the judgment of Sloan JA in *R v Whitehouse*[103] is apposite where His Honour defines 'timely communication' as serving 'unequivocal notice' that the other party proceeds without further aid and assistance from the person who is withdrawing. On the question of taking reasonable steps, in Queensland it is sufficient to have taken reasonable steps to undo previous participation.[104]

The meaning of reasonable steps was discussed by Hammond J in *R v Pink*.[105]

> [T]he withdrawal may only be affected by taking all reasonable steps to undo the effect of the party's previous actions. As with any test of 'reasonableness', it is impossible to divorce that consideration from the facts of a given case. The accused's actions may have been so overt and influential that positive steps must be taken by him to intercede and prevent the crime occurring.[106]

Thus, if at trial members of the religious group claim they withdrew from the common purpose, they will have to satisfy the evidential onus of there being a reasonable possibility they took reasonable steps to undo their previous participation (which the Crown will have to negative beyond reasonable doubt).

VI Conclusion

When, in 2019, the Queensland Government introduced legislation to expand the definition of murder from intention to kill or cause grievous bodily harm to include murder by reckless indifference to human life, the stated justification was to address community concerns that offenders who physically abused children were too often being convicted of manslaughter rather than murder.

As discussed in Part III above, the critical distinction between murder by reckless indifference to human life and the residual offence of manslaughter is whether the Crown can prove the mental element for reckless indifference to human life, which requires that in committing the acts or omissions which caused [X]'s death the defendant knew those acts or omissions would probably cause [X]'s death. This means that the defendant was aware or knew of the danger to life that his or her conduct represented and proceeded regardless. The danger is the probable or likely death of another person.

This article has sought to address the task of the Crown proving beyond reasonable doubt the mental element of awareness or actual knowledge of the probability of death when faced with evidence of a religious belief on the part of the defendant that it was God's choice whether or not to intervene to save [X] and an expressed lack of intention to cause death to [X]. In this regard, the Crown can call in aid anything the defendant has said of relevance as to his or her actual knowledge of the probability of death. The Crown can invite the jury to infer the requisite actual knowledge from the circumstances in which death occurred and from the proven conduct of the defendant before, at the time of, or after the acts or omissions which caused death. For example, Kerrie Struhs had been released from prison the month before Elizabeth's death for failing to get medical assistance for her daughter in 2019.[107]

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[103] (1941) 1 WWR 112, 115–16.
[104] *White v Ridley* (1978) 140 CLR 342, 350 (Gibbs J); *R v Menitti* [1985] 1 Qd R 520, 530 (Thomas J).
[105] *R v Pink* [2001] 2 NZLR 860.
[106] Ibid [22].
[107] Chen, Hewson, and Moodie (n 6).

However, this article has argued for a more objective test for murder by reckless indifference to life, namely, what the ordinary responsible man would, in all the circumstances of the case, have contemplated as the natural and probable result. This would obviate the artificiality of a subjective test that requires the jury to infer actual knowledge or awareness from the objective circumstances of the case. In effect, it would narrow the respective gap between the fault elements of recklessness and negligence.

The narrowing can be seen by comparing the natural and probable consequences test for objective recklessness and the objective test for manslaughter by criminal negligence which involves such a great falling short of the standard of care that a reasonable person would exercise in the circumstances and constitutes such a high risk to another person's life that the conduct merits criminal punishment. The latter is the test the Crown must meet to convict Kerrie Struhs of failure to perform the duty of providing the necessaries of life under s 285 of the *Criminal Code 1899* (Qld) if that is the manslaughter route the Crown chooses.

Finally, this article has discussed the law in relation to accessorial liability of the 12 members of the religious group who attended Elizabeth's home in the five days prior to her death. Individual criminal responsibility under s 7 of the *Criminal Code 1899* (Qld) will fall to be determined by the role each member played in supporting Jason and Kerrie Struhs. However, the reach of s 8 would cover all members of the group who shared a common purpose to test their faith that it was God's choice whether or not to intervene to save Elizabeth's life.

In conclusion, this article has sought to address the topic of whether leaving God to make the choice is an answer to a charge of murder by reckless indifference to human life or manslaughter from a legal rather than a philosophical perspective. As was mentioned earlier, at the heart of this case is the proposition that the criminal law is concerned solely with temporal or earthly matters and that spiritual beliefs play no part in determining the mental element of a crime. If the jury accepts this proposition, then leaving God to make the choice of life or death is no answer to any murder or manslaughter charge.

However, the outcome of the Struhs case has wider implications for similar future cases where a sincere religious belief is invoked as a defence to criminal charges, particularly as it relates to unlawful child killings. If the jury does not convict the two defendants charged with murder by reckless indifference to human life but instead returns manslaughter verdicts, this raises the question of whether the present requirement that the Crown prove subjective recklessness, namely, actual knowledge that death would probably result, should be replaced with a more objective test for recklessness based on the natural and probable consequences test, at least for unlawful child killings.