CASE ANALYSIS

CAUSATION IN HOMICIDE, 'FRIGHT, ESCAPE OR SELF-PRESERVATION' CASES: *YARRAN v THE STATE OF WESTERN AUSTRALIA*

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Situations in which a deceased person has died in the course of 'fright, escape or self-preservation'[1] have long posed complex causation questions for the criminal law. The Western Australian Court of Criminal Appeal has had the opportunity in recent years to consider the situation where a victim's death follows threats or intimidation delivered by the defendant. In Yarran v The State of Western Australia, decided in 2019, the Court focused on the role that section 272 of the Criminal Code Act Compilation Act (1913) plays in resolving the difficult causation issues which can arise in these sorts of cases. While the earlier case of TB v The State of Western Australia[2] had resolved some of the questions associated with the operation of section 272, Yarran directly raised the issue of the victim's reaction to the threats or intimidation: what relevance should the "unreasonableness" or "disproportion" of a victim's response to an accused's threats have to the question whether the accused 'caused' that response under s272? Is the nature of the victim's response part of the legal causation inquiry, or does it only concern the criminal responsibility (scope of liability) inquiry within the excuse of Accident? This article explains the court's approaches to this question and highlights some of the more general, fundamental questions raised by the case around the relationship between the different causation provisions in the WA Criminal Code.

I INTRODUCTION

Yarran v The State of Western Australia[3] (*Yarran*) was decided by the Western Australian Court of Criminal Appeal under the *Criminal Code Act Compilation Act 1913* (WA) (*Code*). For context, it is useful to outline briefly the framework of criminal laws in Australia and the legislative context of causation in homicide law under the *Code*.

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[1] So termed by Stanley Yeo in 'An Australian Evaluation of Causation Cases', (1993) 57(4) *The Journal of Criminal Law* 390, 390.
[2] *TB v The State of Western Australia* [2015] WASCA 212
[3] [2019] WASCA 159.

Australian criminal law is primarily the responsibility of states and territories.[4] Each jurisdiction has a large, central piece of crimes legislation, but there is a difference in the sources of criminal law as between the 'code states' and so called 'common law states'. The 'code states' are Queensland, Western Australia and Tasmania, and now also the Northern Territory and the ACT[5]. In these jurisdictions the common law has been abolished as a source of law for offences, and in most cases for excuses and defences, by codification.[6] The other jurisdictions (Victoria, New South Wales and South Australia) are governed predominantly under legislation but the common law remains a source of law where the legislation does not cover the field. The construction of legal principle in the code jurisdictions is therefore more strictly a matter of statutory interpretation, depending on the primary principles of legislative 'text, context and parliamentary purpose'.[7] Although there is considerable alignment between how code and common law courts conceptualise requirements such as 'causation' in the criminal law, there is no automatic application of the approaches taken in the different jurisdictions.[8]

Criminal liability under the *Code* comprises proof of both the enumerated elements of an offence *and* the absence of any of the excuses or defences created by Chapter V of the *Code* that are raised on the facts. Chapter V is titled 'Criminal Responsibility', and the excuse in that chapter relevant to this note is that of 'Accidental Event' (Accident) in s 23B. Liability for Manslaughter comprises proof of the elements of 'killing' and the absence of Accident; liability for Murder comprises proof of a 'killing', an intention to kill or cause a life endangering injury, and the absence of Accident. 'Killing' is defined in s 270 of the *Code* as where a person causes the death of another person, and the foundational case on the interpretation of what 'cause' means in this provision is

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[4] The Commonwealth also exercises criminal jurisdiction incidental to its substantive Constitutional powers, for example, under the *Crimes Act 1914* (Cth) and the *Criminal Code Act 1995* (Cth).
[5] In 2002, the ACT enacted ch 2 ('General Principles of Criminal Responsibility') and some other chapters of the Model Criminal Code: see Criminal Code 2002 (ACT) at pt 2.2.
[6] See, e.g. *Criminal Code Act 1913* (WA), ss 4, 7; *Criminal Code 2002* ACT, s 5.
[7] See, e.g., *Interpretation Act 1984* (WA), ss 18, 19; *Interpretation Act 1987* (NSW), ss 33-34; *Interpretation of Legislation Act 1984* (Vic), s 35.
[8] The differences between the so called 'code' and 'common law' criminal law jurisdictions are also the result of legal cultural differences arising from this legal framework. See Ian Leader-Elliot, 'The Australian *Criminal Code*: Time for Some Changes' (2009) 37 *Federal Law Review* 205, 206; Stella Tarrant, 'Building Bridges in Australian Criminal Law: Codification and the Common Law' (2013) 39 *Monash Law Review* 838, 838-840.

Krakouer v Western Australia (‘*Krakouer*’).[9] The Court of Appeal in *Krakouer* held that causation comprises both factual and legal causation, factual causation being satisfied by the ‘but for’ test. Legal causation is established by proof that the accused’s conduct remained a substantial or significant contribution to the death, at the time of death. The accused’s conduct need not be the sole or even the main contribution.[10] After the question of (factual and legal) causation has been answered under s 270 of the *Code*, the question of ‘criminal responsibility’ is finally determined under Chapter V by considering the elements of (as is relevant here) Accident under s 23B. The Accident excuse is reflected, in part, by remoteness or ‘scope of liability’ in a civil action in negligence, conceptually adjacent to causation but not contained within it.[11] The test for Accident in s 23B of the *Code* is that an event (the outcome of the accused’s conduct) was neither subjectively foreseen by the accused nor objectively reasonably foreseeable. Normative questions of responsibility under the *Code* therefore arise in deciding both legal causation and whether the harm suffered by the victim was reasonably foreseeable (not an accident).

The concept of ‘causation’ in *Krakouer* as comprising factual and legal causation is consistent with the formulation in *Royall v The Queen* (‘*Royall*’),[12] a homicide case decided by the High Court in 1991 on appeal from the New South Wales Court of Criminal Appeal. However, although *Krakouer* adopts the ‘substantial or significant contribution’ test for legal causation endorsed by Brennan, Deane and Dawson JJ in *Royall*, it does not determine how causation should be approached in ‘fright, escape or self-preservation’ cases, despite *Royall* being such a case on its facts. Under the *Code*, ‘fright, escape or self-preservation’ cases are provided for specifically, in s 272. Thus, it was left to the Court of Appeal in subsequent cases to consider if, and if so how, the general principles of causation in s 270 and *Krakouer* would apply where the issue of causation arises because the victim has died as a result of their own response to the accused’s threats or intimidation.

Section 272 makes it clear that an accused may have caused the death of another for the purposes of homicide offences where the death resulted directly from the victim’s own response to the accused’s conduct. *Yarran* addresses a more specific question concerning the nature and quality of the victim’s

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[9] [2006] WASCA 81.
[10] Ibid [76] (McLure J).
[11] The Civil Liability legislation confines causation to ‘factual causation’, leaving the normative issues to be considered under ‘scope of liability’. See, eg *Finch v Rogers* [2004] NSWSC 39, [148].
[12] [1991] HCA 27.

response: if there is a question as to the 'unreasonableness' or 'disproportion' of the victim's response, should this be considered as part of the inquiry into 'causation' or as part of the 'criminal responsibility' inquiry required in the accident excuse? In *Yarran*, Buss P took the latter view, Mazza and Beech JJA the former view.

II *YARRAN* – FACTS AND FINDINGS

Charges of manslaughter were brought against the three co-accused as joint principals. The allegation was that by way of threatening and intimidating behaviour they had forced the victim and two other people into a car while armed. The threatening and intimidating behaviour included confronting the victim and her two friends while armed, confining and then separating them in a house, slamming a machete on a coffee table, hitting one of the victim's friends on the head with the machete drawing blood in the victim's presence, strip searching the victim's friends in her presence and stealing from them, ordering another person to strip search the victim and while driving the car threatening to kill the victim and her friends by burning the car with them in it.[13] The victim had undone her seatbelt and either fallen or jumped from the moving car; she died as a result of significant brain injuries incurred when her head struck the road.

The State relied on s 272 of the *Code* to prove the accused had killed the victim. That section is referred to as one of the *specific* 'deeming' causation provisions, distinct from the *general* causation provision in s 270. Section 272 reads:

> A person who, by threats or intimidation of any kind, or by deceit, causes another person to do an act or make an omission which results in the death of that other person, is deemed to have killed him.

The state's case was that the three men's threats and intimidation had caused Ms Fairhead, the victim, to open the door of the moving vehicle in circumstances in which she was not wearing a seatbelt[14] and that this act had resulted in her death.

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[13] *Yarran* (n 3) [30], [238].

[14] Note the characterisation at *Yarran* (n 3) [239] by Mazza and Beech JJA: 'All that mattered was whether she opened the car door *intending to exit the vehicle* ' (emphasis added). Does the victim's intention matter? Does this bear on the reasonableness or proportion of the response?

Prior to trial judge Hall J's summing up, the prosecutor contended that the question whether the victim's reaction in opening the car door was 'unreasonable or disproportionate' was not part of the determination required under s 272.

The prosecution, defence counsel and trial judge discussed this contention, with the trial judge ultimately ruling that any argument that Ms Fairhead's action '[broke] the chain of causation' would be 'sufficiently dealt with by telling the jury that…legal causation requires [that any threats and intimidation] be a substantial or significant cause' of her action.[15] Hall J added that 'if the jury is satisfied [that any threats and intimidation were] a substantial and significant cause [of Ms Fairhead's action], then that would seem to negative any possibility that [her action] was an overreaction.'[16]

It was this ruling that formed the basis of the main ground of appeal. The appellants argued that the trial judge made errors of law that led to a miscarriage of justice in failing to direct the jury that the chain of causation would be broken,[17] and s 272 would not apply, should they find that Ms Fairhead's act was unreasonable or disproportionate. A further, related, error was argued to lie in the trial judge's decision that the issue of the reasonableness or proportion of the victim's response was sufficiently dealt with by telling the jury that legal causation required the relevant threats or intimidation be a substantial or significant cause of her act. In other words, it was argued that the jury should be instructed to the effect that the question of the nature of the victim's response (whether it was unreasonable or disproportionate) is a distinct question from that of whether the accuseds' threats or intimidation were one of the bases for the victim *deciding to respond* as they did (and if so, were the threats or intimidation a substantial or significant contribution to that decision).

While the Court of Criminal Appeal was united in allowing the appeal against conviction, the justices were split on their interpretation of s 272 where there is a question around the reasonableness or proportion of the deceased's reaction to the threat or intimidation given by the accused.

Buss P delivered a separate judgment, while Mazza and Beech JJA delivered a joint judgment. Both judgments acknowledged that the particular question of whether the deceased's reaction should feature as a distinct consideration under s 272 had not been addressed by the Western Australian courts. While the

[15] *Yarran* (n 3) [56].
[16] Ibid.
[17] Referencing the common law concept of *novus actus interveniens* – *Yarran* (n 3) [280].

previous case of *TB v The State of Western Australia* (*TB*)[18] also dealt with a threats/intimidation situation, the facts did not raise a question around the reasonableness or proportion of the deceased's response. That case, however, did serve to clarify the approach to causation under s 272. It noted that there are essentially two causal questions within that section; one relates to the connection between the accused's threats or intimidation and the deceased's act or omission, and the other concerns the connection between the deceased's act or omission and his or her death:

> Where an accused is tried on a charge of unlawful killing involving fright, escape or self-preservation, in which the State relies on s272 of the Code, the State must prove beyond reasonable doubt three things:
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> (a) the accused made threats or performed acts of intimidation as alleged by the State;
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> (b) the alleged threats or intimidation 'caused' the victim to do an act or make an omission; and
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> (c) the alleged act done or omission made 'resulted' in his or her death.[19]

Both judgments in *Yarran* adopted this construction of the section and addressed the question raised in the case by focussing on the first causal question (whether an accused's threats or intimidation caused the victim's response). However there was a notable difference in their approaches to the question of where and how the *nature* of the deceased's reaction should be determined in assessing the accused's liability.

Buss J agreed with the prosecution that the trial judge was not required to refer to the issue of the nature of the victim's response in connection with s 272. The question of whether an accused's threat or intimidation was a substantial or significant contribution to the deceased's act or omission, he found, was determinative of this causation question that the jury needed to consider.[20] He concluded that on a proper reading of s 272 a positive answer to this question did not prevent the existence of the causal link, and any question about the unreasonableness or disproportion of the response should be dealt with under s 23B of the *Code* (the accident excuse). According to Buss P, the question whether

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[18] [2015] WASCA 212.

[19] *Yarran* (n 3) [278], [153]-[156], adopting *TB* (n 2) [155]-[158].

[20] *Yarran* (n 3) [171].

the victim's response was unreasonable or disproportionate was one of '*criminal responsibility*' under Chapter V of the *Code*, not one of causation.

> If the State fails to negate accident, the victim's alleged act or omission in response to the accused's alleged threats or intimidation will be 'an event which occurs by accident', within s23B(2). The accused will not be criminally responsible for the death which he or she is deemed by s272 to have caused.[21]

In justifying this approach, Buss P considered the High Court's decision in *Royall*,[22] in which the issue of the victim's attempt to escape from the accused arose in the context of a range of possible explanations for the victim's death following a fall from a sixth floor apartment window. The High Court judges agreed that the issue of the victim's reaction raised a question solely of causation, under s 18(1)(a) of the *Crimes Act 1900* of NSW ('*Crimes Act* (NSW)'). Buss P distinguished that conclusion from the situation in *Yarran* on three grounds. First, he noted the different statutory contexts in each jurisdiction, observing that the *Crimes Act* (NSW) does not contain provisions equivalent to ss 272 and 23B of the *Code*, meaning that the issue in *Royall* was necessarily identified as one of causation since there was no statutory defence of accident available to resolve it. Second, he found that the relevant causal connection identified in the relevant section of the *Crimes Act* (NSW) is between the alleged act of the accused and the *death* of the victim, whereas s 272 of the *Code* refers to the connection between the alleged acts or threats of the accused and the *victim's alleged act or omission*. Third, he noted that *Yarran* raised points concerning ss 272 and 23B of the *Code* which 'must be resolved upon a proper construction of s272 and s23B in the context of the *Code* as a whole including, in particular, in the context of the interaction between s272 and s23B.'[23]

This last observation led to him concluding that:

> On a proper construction of the Code with respect to homicide and the provisions of the Code with respect to criminal responsibility, there is a distinction between the concept of and test for causation under s272 and the concept of and test for the defence of accident under s 23B. Section 272 is concerned with deemed causation in relation to a person's death. Section 23B is concerned with criminal responsibility; relevantly, with criminal responsibility for a death which the accused is deemed, by s 272, to have caused.[24]

[21] Ibid [185].
[22] [1991] HCA 27.
[23] *Yarran* (n 3) [166].
[24] Ibid [176].

Noting that the scope of s 23B is wider than that of causation under s 272, and that there could be more than one 'event' that could occur by accident under s 23B, he concluded that the victim's response within s 272 may be one such event.[25]

On the basis that the trial judge's direction did not explicitly link the defence of s 23B with the issue of the deceased's reaction, Buss J allowed the appeal.

Mazza and Beech JJA found that a trial judge instructing a jury in a fright, escape or self-preservation case where there was a question around the unreasonableness or disproportion of the deceased's response is required to specifically raise this as a possible break in the causal chain between the accused's threats/intimidation and the deceased's act or omission.

> On a proper construction of s272 of the Code, a conclusion that the deceased's response to the accused's threats or intimidation (or deceit) was unreasonable or disproportionate may prevent satisfaction of the requirement, under s272 of the Code, that the threats or intimidation (or deceit) caused the deceased to do the act.[26]

Moreover, they found that more was required from the trial judge than noting that the threats or intimidation must be a substantial or significant cause.

> [W]ether a broad direction as to causation, to the effect that causation requires a substantial or significant contribution, is sufficient will depend upon the circumstances of the case. In *Krakouer*, Steytler P (Wheeler JA agreeing) held that, in the circumstances of that case, the jury needed more than the general direction as to substantial or significant cause. We reach a like conclusion in the present case.[27]

Mazza and Beech JJA looked to the reasoning of McLure JA in *Krakouer*[28] to explain why the question of an unreasonable or disproportionate response in the causal inquiry requires more than a general direction as to 'substantial and significant contribution'. In making this point, they cited McLure JA's direct reference to the 'substantial or significant contribution' test as being one which could address the issue of the effect of any 'intervening acts of the victim'[29]:

> In *Krakouer*, McLure JA observed that the legal test of causation – that the act substantially or significantly contributed to the relevant consequence – answers

[25] Ibid [179]-[181].
[26] Ibid [285].
[27] Ibid [305].
[28] Ibid [295].
[29] Ibid.

> questions relating to, among other things, the effect of 'intervening acts of the victim'. We agree that any issue of unreasonable or disproportionate response feeds into the legal test of causation. However, that does not determine, or reflect, the manner in which a jury is to be directed. …. The judgements in *Royall* (with the exception of McHugh J) make clear that, in a common law fright, escape or self-preservation case, it is not sufficient to direct the jury in general terms by reference to whether the accused's acts were a substantial or significant cause of death. In such a case, the jury must be directed that an unreasonable or disproportionate response by the deceased will break the chain of causation between the accused's act and the deceased's death.[30]

According to Mazza and Beech JJA, the considerations that inform the common law position in fright, escape or self-preservation cases 'apply with equal force' in the framework of s 272. However, that different framework results in a 'different operation' in two respects.[31] First, as noted, whereas the common law consideration is about whether the accused's threats or intimidation caused the *death* of the victim, the consideration in s 272 is whether the accused's threats of intimidation caused the *victim's response*. Second, the causal link between these two latter behaviours is resolved by asking whether there is a significant or substantial contribution (as per the *Krakouer* test); in the context of s 272 this may, on the facts, require the jury to consider: 'whether, in their view, the deceased's act was an unreasonable or disproportionate response to the threats or intimidation' as part of determining whether the contribution was significant or substantial.[32]

The judgment frames this question as part of the attribution of the *criminal responsibility* to the accused, a point that will be addressed in the following analysis section. For present purposes, the important distinction which the judgment draws between the common law and the *Code* position on the effect of 'fright, escape or self-preservation' cases lies in the effect which the unreasonableness of the victim's response has on the causal inquiry:

> So, whereas, at common law, an unreasonable or disproportionate response by the deceased will break the chain of causation between the accused's act and the deceased's *death*, under s 272 of the Code, in our view, an unreasonable or disproportionate response by the deceased may break the chain of causation between the accused's threats and the *deceased's act*. Whether it does so is a question for the jury and the jury's attention should be directed to that question.[33] (emphasis added)

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[30] Ibid [295].
[31] Ibid [293].
[32] Ibid [285].
[33] Ibid [294].

Their Honours set out at paragraph [294] a model direction to the jury in a case where, on the evidence, there is a question as to the unreasonableness or disproportion of the deceased's response. The question should be identified for the jury, and a direction to the following effect given:

> (1) The jury should consider whether the deceased's act in response was unreasonable or disproportionate, taking into account all the circumstances, including the nature of the accused's threats or intimidation (or deceit), as they find it to be, and the fear (or misapprehension) the threats or intimidation (or deceit) were likely to have induced.
> (2) If the jury so find, they may take that into account in determining the element of causation – that the accused's threats (or intimidation or deceit) substantially or significantly contributed to the deceased's act in response. Whether the unreasonableness or disproportion of the deceased's act in response means that the causation element is not satisfied is a matter for the jury.
> (3) The onus remains on the prosecution to satisfy the jury beyond reasonable doubt that the accused's threats (or intimidation or deceit) substantially or significantly contributed to the deceased's doing of the act.

In terms of s 23B of the *Code*, their Honours comment, at [309], on the meaning of an 'event' that occurs by accident within that section, affirming the established position in *R v Taiters*,[34] that an 'event' is a reference to one of the circumstances alleged to render the accused liable to punishment. It is the consequence of the accused's act or omission which constitutes an element of the offence.[35] In contrast to Buss P's construction, they held that where a case is based on s 272 of the *Code* it is the victim's death which is the event, not the deceased's act.[36] However, their Honours conclude that s 23B would likely be of little practical consequence to the issue of an unreasonable or disproportionate response under s 272, noting that '[i]n at least most circumstances, only if the deceased's act was an unreasonable or disproportionate response to the accused's threats…would that act be unforeseeable, and thus an accident'.[37]

III Analysis

The differing approaches to the interpretation and scope of s 272 in this case indicate that there remains uncertainty around the *Code's* approach to fright,

[34] [1997] 1 Qd R 333.
[35] *Yarran* (n 3) [309].
[36] *Yarran* (n 3) [315]–[316].
[37] Ibid [318].

escape and self-preservation situations. The judgments raise questions not only as to the specific operation of s 272, but also about the broader relationship between the different causation provisions in the *Code* as well as the relationship of causation to understandings of criminal responsibility in Chapter V.

The majority judgment requires any question about the unreasonableness or disproportion of the victim's response to be considered as a question of causation under s 272; a determination must be made about the nature of the response, whether it was reasonable or proportionate (balanced against the threats or intimidation the victim was subjected to), and that finding should be taken into account when finally determining whether an accused's threats or intimidation were a significant or substantial contribution to the victim's response. This two-stage process is handed to the jury to complete. However, this conflation of the assessment of the reasonableness or otherwise of the victim's response with the determination of which factors contributed to the victim's (subjectively determined) response is more complex than the judgment makes it seem. Whether a victim's response was 'reasonable' or 'proportionate' or otherwise requires an objective, normative assessment and is not commensurate with a determination of *why* (subjectively) a victim did as they did: which factors, and with which weight, contributed to the victim's decision to act and action. A determination that a victim's response was unreasonable or disproportionate to the accused's threats may indicate that other factors were at play (that the victim decided to act in response to things other than the accused's threats, or in combination with that reason). But an accused's conduct may be a substantial or significant contribution to a victim's decision to respond in the way they did, whether or not that response was (objectively) unreasonable or disproportionate.

The majority decision therefore lacks clarity on how the characterisation of the victim's response determines the accused's causal responsibility for that response. In parts it suggests that, under s 272, a finding that a victim's response was (objectively) unreasonable or disproportionate will break the chain of causation between the accused's conduct and the victim's response, even in circumstances where the accused's conduct was a substantial or significant contribution to the victim's decision to respond as they did ('irrationally'). This is significant because it means that s 272 allows for some victims to take themselves (and their deaths) beyond the scope of causation due to their 'irrational' response to the accused's threats, perhaps due to 'excessive fear'. In other words, s 272 does not on this construction require an accused to 'take their

victim as they find them'.[38] In other parts, the majority reasoning suggests the more limited construction, that if the victim's response is found to be unreasonable or disproportionate to the accused's threats, this may be evidence that indicates the victim was acting for other reasons. Presumably, then, if there was evidence of other reasons, a jury would be permitted to conclude that the accused's threats were less than a significant or substantial contribution to the victim's decision to respond as they did.

Buss P's approach avoids this problem in that the question of the unreasonableness or disproportion of the victim's response is not to be determined as a matter of causation under s 272 at all. According to his construction, if the accused's threats or intimidations were a substantial or significant contribution to the fact of the victim's response, the accused is held to have caused the response, and the objective, normative assessment of whether the response was unreasonable or disproportionate is considered in a different inquiry. However, excluding the question of reasonableness or proportion from the causation question entirely, as Buss P appears to do, may also be problematic. Presumably a jury is permitted to consider the nature and any apparent disproportion of a victim's response as evidence that there may have been factors other than the accused's conduct that were a reason(s) for the response, and then what weight each factor played in the response. Buss P does not appear to contemplate this use of evidence of apparent 'irrationality', but it is difficult to see how such evidence would not be relevant for this limited purpose. Moreover, if on Buss P's construction this is not permitted, the determinations of causation under s 272 run the risk of being reduced to merely a 'but for', factual inquiry.

Two further points can be made in relation to what remains to be considered after *Yarran*. First, there is curiously little interrogation of the second causation question raised by s 272 – the link between the victim's reaction and the death. Both judgments noted that the State's case was that whether the victim fell or jumped from the car was irrelevant to the imposition of causal responsibility on the accused,[39] and the court appeared to accept this position; the focus of the court's attention was whether her opening of the door in circumstances in which she was not wearing a seatbelt (and then 'exiting the vehicle') was a reasonable or

[38] See *R v Blaue* [1975] 1 WLR 1411, 1415 where the English court referred to this as a long-held policy of the law, specifically reflected in section 274 of the *Code*.
[39] *Yarran* (n 3) [205].

proportionate response.[40] The second causal question (whether the victim's act 'resulted' in their own death) was satisfied where the death was a 'as a matter of objective fact' a 'consequence' of the victim's act.[41] The appellant's submission that the trial judge should have instructed the jury that the victim's inadvertent fall from the car, or alternatively her voluntary exit from the car, following her opening of the car door, could have constituted a novus actus interveniens (effectively severing the causal chain) was dismissed by the court. Mazza and Beech JJA noted that rather than being an independent act breaking the chain of causation, the victim's fall from the car 'is part of what establishes the causal link embedded in the word 'results''.[42] In this respect it would seem that there was agreement that the first causal question in s 272 effectively determines the entire s 272 analysis (although there is no express statement to this effect). There are deficiencies with this approach, in terms of both possible alternative fact scenarios, and doctrinal analysis.

With respect to alternative facts, consider, for example, that the victim was pushed from the vehicle by a third party, perhaps a friend of the victim? Is this irrelevant to the determination of whether death 'results' from the victim's action – in this case the opening of the car door? While the facts didn't raise this possibility, it is clearly one which merits examination in scenarios involving a number of participants.

With respect to the doctrinal point, the court's analysis of what it characterises as the second causation question assigns no real meaning to the stipulation in s 272 that the victim's act or omission 'resulted' in their death, yet the deeming effect of the section only comes into play when that stipulation is met. Both judgments appear to conflate this second requirement with the 'deemed' causation itself. This is problematic for a number of reasons. One lies in fundamental principles of statutory interpretation. There is an established statutory presumption that each legislative word has work to do; a court must 'strive' to give each word of a statute meaning.[43] Given the further legal presumption that different words used in a provision are assumed to have different meanings,[44] the term 'results' merits analysis in the same way that

[40] Ibid [60], [297]–[298].
[41] Ibid [160], [278].
[42] Ibid [348].
[43] *Commonwealth v Baume* (1905) 2 CLR 405, 414; *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 382.
[44] *Kline v Official Secretary to the Governor General* (2013) 249 CLR 645, [32] (French CJ, Crennan, Kiefel and Bell JJ)).

'causes' does. Moreover, failing to give substance to the 'results in' requirement has significant conceptual implications for how s 272 assigns causal responsibility. Arguably on the court's view one of two parts to the whole of the 'chain' of causation within s 272, between the accused's conduct and the harm giving rise to the offence of manslaughter (the death), is imputed (remembering that both these causal connections must be established before the deeming effect of the section comes into play). Although, according to the court, the death must have been, as a 'matter of objective fact', a 'consequence' of the victim's conduct, these are paraphrases of 'results in' rather than tests to be applied; it was accepted that how the victim *exited the car after* she opened the door was of no legal consequence.[45]

On this construction a person may be deemed to have caused the death of another person under s 272 in circumstances where there was no assessment on the facts of the connection between the victim's act or omission and their death, and therefore, ultimately, between the accused's conduct and the death. Given the distinctive legal meaning'[46] associated with causation under the criminal law, specifically legal causation, this is concerning. While it is different from causation as a matter of fact, logic or philosophy[47], this does not mean it is divorced from these conceptions of causation. Legal causation involves normative judgments about the sufficiency of the connection between act and consequence such that it justifies the imposition of *criminal* liability. A person must have caused the harm for which they are punished. A causation deemed by legislation, in the absence of an actual assessment of such connection (in this case via the concept of 'results in'), contradicts fundamental principles of criminal liability. 'Attribution of causal responsibility is a preliminary step towards the eventual attribution of criminal culpability to the accused'.[48]

The court's failure to assess the second causation requirement significantly risks anomalous determinations, for example as in our illustration where a third party manifestly unconnected to the accused intervenes unexpectedly to push the victim out of the open door of a moving car. In such a case the accident excuse in s 23B will rationalise the ultimate result because the death will be judged to

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[46] Simon Bronitt and Bernadette McSherry, Principles of Criminal Law (Lawbook Co, 4th ed.) 197.
[47] See *Campbell v The Queen* [1981] WAR 286, 290, cited by Mason CJ in *Royall v The Queen* (1991) 172 CLR 378, 387.
[48] Eric Colvin, 'Causation in Criminal Law' (1989) 1(2) *Bond Law Review* 253, 253.

have been unforeseeable,[49] but this does not address the construction of causation in s 272 suggested in *Yarran*. The question of what it means for a victim's reaction to threats or intimidation in s 272 to have 'resulted in' their death therefore needs further articulation.

The second point that remains to be considered after *Yarran* is the relationship between the general causation provision of s 270 and the specific causation sections which follow (ss 271-275). If the facts of a given case fall within one of the specific provisions, then either a causal link between the accused's acts or omissions and the victim's death is established or the facts are declared to be immaterial to a finding of a causal link.[50] In *Yarran*, Buss P referred to these sections as applying to 'commonly encountered difficult [cases]' within the general field of s 270.[51] He repeated his own finding in the earlier case of *TB* that the deeming provisions do 'not limit the generality of s270'.[52] Quite what this means in terms of the role of s 270 where one of the specific deeming causation provisions is invoked is not entirely clear. In reaching this conclusion, Buss P identifies the term 'directly or indirectly' in s 270, perhaps indicating that the specific sections should be similarly interpreted without reference to the directness of the link between the accused's act or omission and the victim's death. While Mazza and Beech JJA state their intention to 'return to the relationship between s 270 of the Code, on the one hand, and s 271-275, other', later in their judgment,[53] they do not comment further on the relationship except to say that there is a difference in the causation question in s 270 and that in s 272 – the former is about causation of death, while the latter is about causation of the victim's reaction.[54]

In the absence of any clear commentary, one possible interpretation of Buss P's claim is that if the requirements of the particular deeming provision are not satisfied by the facts of a case then the correct way to approach the causation

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[49] Recognised by the joint judgement at *Yarran* (n 3) [347].
[50] The sections dealt with 'death from an act done at childbirth (s 271), 'causing death by threat' (s 272), 'acceleration of death/' (s 273), 'death from bodily injury that might have been avoided or prevented' and 'death from, or from treatment of, grievous bodily harm' (s 275).
[51] *Yarran* (n 3) [143], relying on *Martin v The Queen No 2* (1996) 86 A Crim R 133. Also see *Krakouer* (n 9) [138] (McLure J), adopted by Buss JA (with Mazza JA and Cheney J agreeing) in *TB* (n 18) [139].
[52] *Yarran* (n 3) [142].
[53] Ibid [276].
[54] Ibid [277]. They also note at [315] that ss 271, 272, 273 and 274, like s 270, all provide that the accused is 'deemed to have killed' the victim where the sections are fulfilled, but this is in relation to identifying the relevant event for the purposes of s 23B rather than a comment on the relationship between the general and the specific causation provisions.

question is to revert back to s 270. By way of example, if s 275 is relied upon to deem a causal link between the accused's action and the victim's death, it must be established that the accused 'does grievous bodily harm' to the victim and the victim has 'recourse to surgical or medical treatment' which is 'reasonably proper' and 'applied in good faith'. If, however, the facts do not establish the infliction of grievous bodily harm, then s 275 cannot apply, and the resolution of the causation inquiry occurs via s 270. Unfortunately, we are left none the wiser on whether this is a correct interpretation of the relationship between the causation provisions, an issue which merits a level of interrogation beyond the scope of this paper.

IV CONCLUSION

The *Yarran* appeal represented a further opportunity for the Western Australian Court of Criminal Appeal to address the uncertainty around the operation of the causation provisions in the *Code*. While the decision represents a welcome endorsement of its previous approach to the interpretation of s 272 in some respects, it fails to settle the particular relevance of the deceased's reaction in fright, escape or self-preservation cases. In particular it leaves open the role which the accident excuse may and should play in this sort of scenario, and the meaning attributed to criminal responsibility. Additionally, it raises questions about the relationship between the general causation provision of s 270, and the more specific provisions associated which follow. Finally, and not for the first time, the Court found itself considering the relevance of common law authorities to the interpretation of the *Code*. It is suggested that the specific interpretative challenges which continue to be raised by the causation provisions are indicative of a deeper conceptual uncertainty associated with the meaning and scope of criminal responsibility under the *Code*, one which increasingly merits a fundamental interrogation.