

# CRIMINAL LAW GUIDEBOOK: QUEENSLAND AND WESTERN AUSTRALIA

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## ASSESSMENT PREPARATION

### CHAPTER 2

#### ACTIVE LEARNING QUESTIONS

##### 1. Why is negligence the underlying fault element of the Griffith Codes?

Fairall has pointed out, '[i]n Queensland and Western Australia, Courts have interpreted the Griffith Codes in such a way that negligence is the underlying fault standard', citing as authority *Stephen Edward Taiters* (1996) 87 A Crim R 507, 512: 'The Crown is obliged to establish that the accused intended that the event in question should occur or foresaw it as a possible outcome, or that an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome': P. Fairall, *Review of Aspects of the Criminal Code of the Northern Territory*, March 2004, 41.

The description of 'underlying' is appropriate because the Codes do not specify a fault element for offences bar a few exceptions such as murder. The fault elements of recklessness and knowledge are not recognised in the Codes. There is authority that recklessness has been imported into the Codes through a broad definition of the word 'wilful' to encompass both intention and recklessness in the offence of wilful damage in s 469 of the Qld Code and criminal damage in s 444 of the WA Code: see *Lockwood: Ex parte A-G* [1981] Qd R 209 and *Pace* (1994) 12 WAR 35. Similarly, the fault element of knowledge is not recognised in the Codes, although for stealing offences knowledge that the owner has been deprived of his or her property equates to intention: see definition of stealing in s 391 (Qld) and s 371 (WA). Thus, the Codes effectively rely on just two fault elements: primarily negligence, and occasionally intention.

## 2. Explain how the two limbs of s 23 operate.

Section 23 is the principal section dealing with criminal responsibility in both Codes, and is expressed in negative rather than positive terms in stating that a person is not criminally responsible for an act or omission that occurs independently of the person's will (act or omission has to be voluntary), or for an event (result or consequence) that occurs by accident (the reasonably foreseeable consequences test).

The *Criminal Code 1899* (Qld) under s 23(1)(a) absolves a person from criminal responsibility if the act or omission occurs independently of the will.

### Section 23 Intention & Motive

- (1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for (a) an act or omission that occurs independently of the exercise of a person's will.

The first limb of s 23, which deals with the independent exercise of the person's will in s 23(1)(a) (Qld) and s 23A(2) (WA), covers the requirement that the act or omission must be voluntary. An example of an involuntary act would be a spasm, a reflex action, or an act performed during sleep. There is a presumption that the relevant act was willed or voluntary: *R v Falconer* (1990) 171 CLR 30 at 40 (per Mason CJ, Brennan and McHugh JJ). The defendant faces an evidential onus to show that the act was involuntary: *R v Youssef* (1990) 50 A Crim R 1 at 3 (per Hunt J).

The word 'accident' was not defined in s 23(1)(b) of the *Criminal Code 1899* (Qld). Following the passage of the *Criminal Code and Other Legislation Amendment Act 2011* (Qld), s 23(1)(b) has been amended as follows: '(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.' The purpose of the amendment was to omit the term 'accident' and legislatively enshrine the 'reasonably foreseeable consequence' test. The equivalent section in the *Criminal Code 1913* (WA) is s 23B(2) which states that: 'A person is not criminally responsible for an event which occurs by accident.' The equivalent section in the *Criminal Code 1924* (Tas) is s 13(1) which states that: 'No person shall be criminally responsible for an act, unless it is voluntary and intentional; nor, except as in hereafter expressly provided, for an event which occurs by chance.' Dixon CJ described 'an event which occurs by chance', which corresponds to s 23(1)(b) above, as a 'somewhat difficult phrase': *Vallance v The Queen* (1961) 108 CLR 56, 61.

## 3. Does s 23 operate in the same way in both Codes?

The central significance of s 23 and the fact it has been amended in slightly different ways in each Code, requires each section to be set out separately and in full.

**Queensland****23 Intention—motive**

(1) Subject to the express provisions of this Code relating to negligent acts and omissions, a person is not criminally responsible for—

(a) an act or omission that occurs independently of the exercise of the person's will;  
or

(b) an event that—

(i) the person does not intend or foresee as a possible consequence; and

(ii) an ordinary person would not reasonably foresee as a possible consequence.

*Note—*

*Parliament, in amending subsection (1)(b) by the Criminal Code and Other Legislation Amendment Act 2011, did not intend to change the circumstances in which a person is criminally responsible.*

(1A) However, under subsection (1)(b), the person is not excused from criminal responsibility for death or grievous bodily harm that results to a victim because of a defect, weakness, or abnormality.

(2) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

(3) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

**Western Australia****23 INTENTION AND MOTIVE**

(1) Unless the intention to cause a particular result is expressly declared to be an element of the offence constituted, in whole or part, by an act or omission, the result intended to be caused by an act or omission is immaterial.

(2) Unless otherwise expressly declared, the motive by which a person is induced to do or omit to do an act, or to form an intention, is immaterial so far as regards criminal responsibility.

**23A. UNWILLED ACTS AND OMISSIONS**

(1) This section is subject to the provisions in Chapter XXVII and section 444A relating to negligent acts and omissions.

(2) A person is not criminally responsible for an act or omission which occurs independently of the exercise of the person's will.

#### 23B. ACCIDENT

(1) This section is subject to the provisions in Chapter XXVII and section 444A relating to negligent acts and omissions.

(2) A person is not criminally responsible for an event which occurs by accident.

(3) If death or grievous bodily harm —

(a) is directly caused to a victim by another person's act that involves a deliberate use of force; but

(b) would not have occurred but for an abnormality, defect or weakness in the victim,

the other person is not, for that reason alone, excused from criminal responsibility for the death or grievous bodily harm.

(4) Subsection (3) applies —

(a) even if the other person did not intend or foresee the death or grievous bodily harm; and

(b) even if the death or grievous bodily harm was not reasonably foreseeable.

An examination of each s 23 in the Codes above reveals a common architecture: namely, a negative statement of criminal responsibility divided into the two components of voluntariness and accident. Each s 23 in the Codes also qualifies the operation of s 23 as being subject to the express provisions dealing with negligent acts and omissions, which is a reference to the duty provisions in the Codes (ss 285–290 in Qld and ss 262–267 in WA). Each s 23 in the Codes has been amended to accommodate the 'eggshell skull' rule that an abnormality or defect of the victim is irrelevant to sheeting home criminal responsibility: see 23(1A) in Qld and s 23(3)(b) and (4) in WA. Both Queensland and Western Australia make the result immaterial unless expressly declared to be an element of the offence: s 23(2) (Qld) and s 23(1) (WA). Queensland has specifically adopted the reasonably foreseeable consequences test for accident in s 23(1)(b), while Western Australia relies on the judicial interpretation of s 23B(2) to apply the same test.

The common law 'eggshell skull' rule applies the principle of defendants taking their victims as they find them. The effect of 23(1A) in Qld and s 23(3)(b) and (4) in WA, is to statutorily enshrine the common law rule into s 23 of the Codes. The rule excludes the defence of accident (second limb of s 23) because, whilst the result may have been unforeseeable to an ordinary person due to an unusual defect, weakness, or abnormality in the victim's constitution, the person inflicting the harm is not absolved from criminal responsibility.



Thus, the conclusion to be drawn is that while s 23 is set out in slightly different language between the Queensland and Western Australian Codes, s 23 operates in the same way in both Codes.

#### **4. How does s 23 interact with s 28 Intoxication?**

The first limb of s 23 has no applicability where the person is voluntarily intoxicated: see *R v Kusu* [1981] Qd R 136.

In a well-known passage, Barwick CJ in *R v O'Connor* (1980) 146 CLR 64, 72, identified two states of intoxication. The first went to voluntariness, and the second to the prevention of the formation of an intention to do the proscribed conduct.

But the state of intoxication may, though perhaps only rarely, divorce the will from the movements of the body so that they are truly involuntary. Or, again, and perhaps more frequently, the state of intoxication, whilst not being so complete as to preclude the exercise of the will, is sufficient to prevent the formation of an intent to do the physical act involved in the crime charged.

In *R v Kusu* [1981] Qd R 136 Campbell J specifically rejected the argument that the super-intoxicated state identified by Barwick CJ in *O'Connor* was relevant to the law in Queensland as identified in the Code. Hence, the first limb of s 23 dealing with an act which occurs independently of the exercise of the person's will has no applicability where the person is voluntarily intoxicated: self-induced intoxication will not give rise to a defence to a charge which does not involve a specific intent based on either s 23 or s 28.

#### **5. How is it possible to prosecute criminal negligence manslaughter in the Codes under two different routes involving two different standards of proof?**

The architecture of the Griffith Codes permits the prosecution of criminal negligence under two alternative routes: one route outside s 23 and one route where s 23 is applicable. See *Patel v The Queen* [2012] HCA 29 [19] (French CJ, Hayne, Kiefel and Bell JJ): '[T]here is authority for the view that, as an alternative to a case alleging criminal negligence, the prosecution could have simply alleged that the appellant directly or indirectly caused the deaths, relying upon ss 293 and 303.' This alternative path would mean that s 23(1) was applicable, with the Crown in Dr Patel's case having to show that the deaths were a foreseeable consequence of the surgical acts: *Kapronovski v The Queen* (1973) 133 CLR 209.

The authority for the two alternative routes for manslaughter under the *Criminal Code 1899* (Qld) is *Griffiths v The Queen* (1994) 125 ALR 545, 547 where Brennan, Dawson and Gaudron JJ stated 'the crime of manslaughter can be committed either by a voluntary act which causes death in circumstances which do not amount to murder or by criminal negligence'.

Effectively, there are two different standards of negligence in the *Criminal Code 1899* (Qld). This is reflected in the reasonably foreseeable consequences test in s 23(1)(b) as explained in *R v Taiters* (1996) 87 A Crim R 507, 512, ‘that an ordinary person in the position of the accused would reasonably have foreseen the event as a possible outcome’, compared to the importation of common law criminal negligence as formulated in *R v Bateman* (1925) 19 Cr App R 8, 11 into the duty-imposing provisions. The authority for such importation is *Callaghan v The Queen* (1952) 87 CLR 115.

## 6. How has the judiciary dealt with automatism under the Codes?

A state of automatism was first recognised at common law by King CJ in *R v Radford* (1985) 42 SASR 266, 274-275, where his Honour distinguished between a ‘disease of the mind’ or mental illness, and a temporary disorder or disturbance of an otherwise healthy mind caused by external factors. The latter is known as sane automatism and if not negated by the Crown leads to a complete acquittal. King CJ’s statement of the common law was approved by the High Court in the Western Australian case of *R v Falconer* (1990) 171 CLR 30.

The fundamental distinction between s 23 and s 27 Insanity is between the reactions of a healthy mind to psychological trauma resulting in a dissociative state which may amount to non-insane automatism under s 23, and the reactions of a person suffering from a mental disease under s 27.

Automatism goes to the *actus reus* and not the *mens rea*. The focus is upon voluntariness and not the formation of intention. Section 23(1)(a) Qld and s 23A(2) WA absolves a person from criminal responsibility if the act or omission occurs independently of the will. Automatism was unknown when Griffith drafted his Code and has to be implied into s 23(1)(a) Qld and s 23A(2) WA, although on the authority of *R v Falconer* (1990) 171 CLR 30 there is no difference in the operation of automatism between the common law as expressed in *R v Radford* (1985) 42 SASR 266, and the Griffith Codes.

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### PROBLEM QUESTION

#### ASSUME THE FOLLOWING FACTS

John had a long history of alcohol abuse. Despite going ‘on the wagon’ numerous times and attendance at AA meetings, all attempts to deal with his drinking problem had failed. One evening John returned home from the pub highly inebriated and had to be let in by his wife, Susan, as he was incapable of putting his key in the door. John then vomited in the hall. This prompted a violent quarrel and ended with John hitting Susan on the head with a heavy walking stick taken from the



hall stand. Susan collapsed and died shortly afterwards. The post mortem revealed that Susan had very constricted arteries and the blow had triggered a massive brain haemorrhage. John was overcome with remorse and claimed he never intended to kill Susan whom he had loved dearly in their 30 years of marriage.

**(a)** Outline the instructions the judge will give to the jury on s 23 and s 28.

**(b)** Assume the same facts in the scenario above up until the quarrel. Now, instead, as Susan later explains to the police: 'I was enveloped in a red mist. I stood out from myself and saw someone I did not recognise hitting John about the head with the walking stick in the hall stand. When I recovered, I found John dead beside me and a bloodied walking stick in my hands.'

Advise Susan on the defence of automatism (i) assuming Susan was sober at the time John died, and (ii) assuming Susan was intoxicated at the relevant time.

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## ANSWERS

**(a)** On the facts, the judge will instruct the jury on s 23 Intention and Motive, and s 28 Intoxication. Section 23 has two limbs: the voluntary limb and the accident limb. Under s 23(1)(a) Qld or s 23A(2) WA, a person is not criminally responsible for an act or omission that occurs independently of the exercise of the person's will. This covers the requirement that the act or omission must be voluntary. An example of an involuntary act would be a spasm, a reflex action, or an act performed during sleep. On the authority of *R v Kusu* [1981] Qd R 136, the first limb of s 23 has no applicability where the person is voluntarily intoxicated, and the judge will instruct the jury to that effect.

As to the second limb of accident or the reasonably foreseeable consequence test, Susan comes under the eggshell skull rule given her very constricted arteries. This rule is found in s 23(1A) Qld and s 23B(3) and (4) WA, to the effect that the person (here John) is not excused from criminal responsibility for death or grievous bodily harm that results to a victim (here Susan) because of a defect, weakness, or abnormality. Thus, the judge will instruct the jury that in deciding whether the Crown has proved that a reasonable person would have foreseen Susan's death as a result of being struck on the head by a heavy walking stick, the fact that Susan had a weakness is no excuse.

The Queensland Benchbook No 75.4 outlines directions to the jury where the victim has a weakness which may even be unknown to the victim (adjusted for the facts here).

That might well lead you to think that no reasonable person would have foreseen the possibility that Susan would die as a result of being hit in the way she was.

However, I am bound to tell you that in law this may not matter in this instance. That is so because under our law a person is not excused of manslaughter if the death of the victim is the result of a defect, weakness or abnormality from which the victim suffered. If, therefore, you are satisfied beyond reasonable doubt that the aneurism of which Dr Tong told you was a 'defect, weakness or abnormality' from which Susan suffered, and also that Susan's death

resulted because of it, then it is open to you as the jury to find John guilty of unlawfully killing Susan, even though no reasonable person would or could have foreseen her death as a possible result of the hit delivered by John. In that event, you may return against John a verdict of manslaughter.

On the question of intoxication, as John was voluntarily intoxicated, only s 28(3) is relevant here.

(3) When an intention to cause a specific result is an element of an offence, intoxication, whether complete or partial, and whether intentional or unintentional, may be regarded for the purpose of ascertaining whether such an intention in fact existed.

Section 28(3) above reflects the availability of the excuse of intoxication where the crime is one of specific intent. Murder requires the specific intention to kill or cause grievous bodily harm. Thus, the trial judge will instruct the jury that unless the Crown has satisfied them beyond reasonable doubt that John was capable of forming the intention to kill or cause grievous bodily harm to Susan, then they must acquit John of murder and then consider manslaughter in the alternative. Manslaughter is a crime of basic intent and therefore s 28(3) does not apply.

The Queensland Benchbook No 75.3 examines the alternative verdicts of murder and manslaughter (adjusted for the facts here).

If you are satisfied beyond reasonable doubt that when he hit Susan, John intended to cause her death or do her grievous bodily harm, then you may find John guilty of murdering Susan. For that purpose, the question is not whether John meant to hit Susan - you may think he certainly did - but whether in hitting her he intended to kill her.

If you are not satisfied John had such an intention so as to make him guilty of murder, then you must go on to consider whether or not he is guilty of manslaughter. Manslaughter in circumstances like these is killing another human being but without having the intention to kill or having any excuse in law for doing so.

In law a killing is excused if an ordinary person in the position of the accused John in this case would not have foreseen the death of Susan as a possible consequence or result of his hitting her in the head. In order to convict the Crown must satisfy you beyond reasonable doubt that an ordinary person in the defendant's position would reasonably have foreseen (Susan's) death as a possible outcome of hitting her in the way he did. Unless the Crown so satisfies you, you must find the defendant not guilty of manslaughter.

**(b)** Susan is relying on the defence of sane automatism. This is a very narrow window to avoid criminal responsibility for killing John, and is based on the first limb of s 23, namely, her act was not her own in the sense it was involuntary. Effectively, Susan is claiming her act of killing John was performed during impaired consciousness depriving her of the will to act. Automatism was unknown when Griffith drafted his Code and has to be implied into s 23(1)(a) Qld and s 23A(2) WA, although on the authority of *R v Falconer* (1990) 171 CLR 30 there is no difference in the operation





of automatism between the common law as expressed in *R v Radford* (1985) 42 SASR 266, and the Griffith Codes.

Sane automatism is a temporary disorder or disturbance of an otherwise healthy mind caused by external factors: *Radford, Falconer*. Provided Susan can satisfy an evidential burden that there is some basis for her entering into a state of automatism, then if not negated by the Crown leads to a complete acquittal.

The Queensland Benchbook No 74.1 and 2 identifies the relevant direction to the jury on the proof required by the Crown as follows:

The need to prove an act was willed does not need proof of any intention or wish to cause a particular result by doing the act. What is needed to prove that an act was willed is proof of a choice, consciously made, to do a (physical) (injury or death causing) act of the kind done.

Obvious examples of acts that are not willed would include a reflex action following a painful stimulus; or a spastic movement, or an act done when sleep-walking, or when concussed and in a state of post traumatic automatism. [A defence of post traumatic automatism must be closely scrutinised: blackout can be one of the first refuges of a guilty conscience and is a popular excuse.]

The prosecution must exclude beyond reasonable doubt the possibility that the (injury or death causing) act occurred independently of the will of the defendant. This is a matter for you to decide; it may help to ask if the prosecution has proved that the defendant made a conscious choice to (do the act). You should ask yourselves if the prosecution has excluded beyond reasonable doubt the possibility of (discharge of the gun without pressure being applied to the trigger, or the possibility of that discharge by) an unwilled reflex or automatic motor action of the defendant. Putting it the other way, have the prosecution proved beyond reasonable doubt that the act (of discharging the firearm) (of inserting the knife in the deceased's body) was an act willed by the defendant?

The above applies if Susan was sober at the time she killed John. In the event Susan was intoxicated, then as discussed in Part (a) above, Susan is unable to rely on sane automatism and the first limb of s 23. In *R v Kusu* [1981] Qd R 136, it was held that where intoxication leads to a state of automatism, there can be no reliance on s 23(1)(a) which requires an act or omission to be accompanied by an exercise of the will.