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Thabo Meli Revisited: The Pernicious Effects of Result-driven Decisions

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Abstract Despite the hackneyed expression that 'judges should interpret the law and not make it', the fact remains that there is some scope within the separation of powers doctrine for the courts to develop the common law incrementally. To this extent, the courts can effectively legislate, but only to this limited extent if they are to respect the separation of powers doctrine. On occasion, however, the courts have usurped the power entrusted to Parliament, and particularly so in instances where a strict application of the existing law would lead to results that offend their personal notions of what is fair and just. When this occurs, the natural consequence is that lawyers, academics and the public in general lose respect for both the judges involved as well as the adversarial system of criminal justice. In order to illustrate this point, attention will focus on the case of Thabo Meli v United Kingdom in which the Privy Council, mistakenly believing that it could not reach its desired outcome through a strict application of the common law rule of temporal coincidence, emasculated the rule beyond recognition in order to convict the accused. Moreover, the discussion to follow will demonstrate that not only was the court wrong in its belief that the case involved the doctrine of temporal coincidence, but the same result would have been achieved had the Council correctly identified the issue as one of legal causation and correctly applied the principles relating thereto.

Keywords Causation; Temporal coincidence; Separation of powers

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augmented by the inherent power of the judiciary to develop the common law incrementally.\(^3\)

As long as *Marbury v Madison*,\(^4\) a watershed case decided by the Supreme Court of the United States, Marshall CJ opined that 'it is emphatically the province and duty of the judicial department to say what the law is'.\(^5\) While this time-honoured truism has rarely, if ever, been disputed by legal scholars, it requires little imagination to understand that a very fine line exists between incrementally developing the common law and usurping the power of the legislature. One of the most common and insidious examples of the latter occurs when judges develop the common law in a manner that is driven more by their desire to achieve what they consider to be a fair and just result in a particular case than their obligation to develop and apply the common law. When this occurs, both the law and the judiciary that is entrusted with its construction and application are deservedly brought into disrepute.

In order to illustrate this point, the discussion to follow will focus on an English decision\(^6\) that was decided on what can only be described as a highly questionable and tortured construction of the common law doctrine of temporal coincidence.\(^7\) In addition, the discussion will demonstrate that unbeknownst to the Privy Council, a correct application of the extant English and Australian law would have permitted it to reach the same result without resorting to the type of sophistry noted above.

**Temporal coincidence**

Briefly stated, the doctrine of temporal coincidence applies only to crimes of *mens rea,*\(^8\) that is, crimes which require the prosecution to prove that the accused acted with one or more mental states that contemplate some type of harm or condition that transcends the minimal state of mind necessary to prove a voluntary act or an omission to act (where the law imposes a duty to act) on the part of the accused.\(^9\) The doctrine of temporal coincidence requires the prosecution not only to prove the *mens rea* element of a crime, but its existence at the time of

3 The Full Court of the Federal Court of Australia noted that '[i]n many instances the generality of the statutory language is deliberate and allows the courts to develop a body of law to fill the gaps'; *Telstra Corp. Ltd v Treloar* (2000) 102 FCR 595 at 603. See also *Dictrich v The Queen* (1992) 177 CLR 292 at 309: 'In modern times, the function of the courts in developing the common law has been freely acknowledged' (Brennan J, citing *Myers v Director of Public Prosecutions* [1965] AC 1001 at 1021; *Mutual Life & Citizens' Assurance Co. Ltd v Evatt* (1968) 122 CLR 556 at 563; *Geelong Harbor Trust Commissioners v Gibbs Bright & Co.* [1974] AC 810 at 820–1).

4 5 US (1 Cranch) 137 (1803).

5 Ibid, at 177.

6 *Thabo Meli v The Queen* [1954] 1 WLR 228 (hereafter *Thabo Meli*).

7 *Australian Criminal Law in the Common Law Jurisdictions,* above n. 2 at 29–30.

8 For a thorough discussion of *mens rea,* see P. Gillies, *Criminal Law,* 4th edn (LBC Information Services: 1997) 46–79 (hereafter *Criminal Law*).

9 Ibid, at 48. For an act or omission to be a voluntary one, it must be the result of a conscious decision to either move a portion of one's body or to refrain from doing so: at 29–30, 37–39. See also *R v Russell* [1933] VLR 59; *R v MacDonald* [1904] St R Qd 151.

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the accused’s voluntary act or omission upon which the prosecution seeks to predicate criminal liability.\textsuperscript{10}

For example, suppose that D runs over V who has unexpectedly jumped in front of D’s car in order to commit suicide. Assume further that V does not die immediately, but lingers in hospital for seven days before succumbing. Also assume that in the interim period, D discovers that V is a convicted paedophile and states in front of the hospital staff, ‘I want that man dead’. Does D intend that V will die? Yes. Would it make any sense that D should be convicted of murder under these facts? No, because D’s intention that V should die for his past crimes did not temporally coincide with D’s volitional act of pressing his foot on the accelerator or steering the car in V’s direction.

On the other hand, if D, knowing of V’s past, deliberately runs a stop sign in order to kill V who has the right of way, D’s intention to kill V exists at the time of his volitional act of applying full pressure to the accelerator. Under these facts it is entirely reasonable and justifiable that D should be convicted of murder. Here, there is no question that temporal coincidence exists between D’s \textit{mens rea} and his relevant voluntary act. It is apparent, therefore, that the doctrine of temporal coincidence serves a very legitimate purpose in ensuring that the attribution of criminal responsibility for offences of \textit{mens rea} requires some degree of moral culpability for one’s conduct.\textsuperscript{11}

It should also be noted that with the exception of so-called ‘situational offences’,\textsuperscript{12} the prosecution must prove, in order to secure a conviction, a voluntary act or an omission to act where there was a legal

\begin{itemize}
\item \textsuperscript{10} \textit{Australian Criminal Law in the Common Law Jurisdictions}, above n. 2 at 29–30.
\item \textsuperscript{11} \textit{Criminal Law}, above n. 8 at 42–5. Although the writer was unable to locate any case or academic authority to support this proposition, the underlying rationale for the doctrine of temporal coincidence appears from examples such as these to be based on the notion that the attribution of criminal liability is inextricably tied to the notion of moral culpability. It would be difficult to find the presence of such moral culpability with offences of \textit{mens rea} where the \textit{mens rea} does not coincide temporally with the act or omission upon which liability is sought to be predicated.
\item \textsuperscript{12} \textit{Australian Criminal Law in the Common Law Jurisdictions}, above n. 2 at 27–8; \textit{Criminal Law}, above n. 8 at 28. In explaining the nature of situational type offences, Gillies writes:
\end{itemize}

‘Some offences are of such a nature that their \textit{actus reus} consists of nothing more than D's relationship with, or other implication in, a static situation. Such offences have been termed “situational offences”. The classic example is the offence of being the licensee of prescribed premises on which is found a person during prohibited hours, who is there for an unlawful purpose. Others include being an occupant of a place used for unlawful gaming, or for the purpose of prostitution.

These offences are generally of a minor nature, and have been created by statute. They do not require proof of conduct on the part of D, whether it be activity or inactivity. No doubt the typical “situation” will have arisen because of D’s activity or inactivity, but the \textit{actus reus} does not extend to these acts and thus they will not need to be proven. In short, they are not part of the offence of this type.

It may be that situational offences represent an exception to the general rule that D must act (or fail to act) voluntarily, because their \textit{actus reus} does not include conduct on D’s part. For example, the licensee who is asleep while another person is on the premises during prohibited hours for an unlawful purpose is, notwithstanding the licensee’s unconscious state, prima facie liable for the offence of this type.’ (Ibid. at 32–3; Footnotes omitted.)
duty to act on the part of the accused. There is, however, a rebuttable presumption of sorts that all relevant acts or omissions are voluntary, subject to the proviso that should evidence arise during the course of trial that raises a question as to the voluntariness of the same, the prosecution will be required to prove beyond reasonable doubt that the relevant act or omission was indeed voluntary.

The Privy Council's decision in Thabo Meli

In Thabo Meli, the appellant and three cohorts lured the deceased into a hut, plied him with alcohol and then struck him in the head with an intention to cause his death. Mistakenly believing that the deceased was already dead, the appellant removed the body to a shallow cliff where it was then rolled over and the scene altered to make it appear as though an accident had occurred. According to the medical evidence, however, the deceased was alive at the time he was rolled over the cliff and the blow he received to the head would not have been sufficient to cause his death; rather, the evidence showed that death was instead caused by exposure to the elements. On appeal, the appellant argued that the initial voluntary act of striking the deceased in the head, though accompanied by an intention to kill, was not the legal cause of death. Moreover, it was argued that the volitional act of rolling the deceased's body over the cliff and thereby exposing it to the elements, an act that was unaccompanied by the necessary mens rea for murder, was the legal cause of death. Thus, the appellant argued, the conviction was not sustainable for want of temporal coincidence between the requisite mens rea for murder and the volitional act that actually caused the deceased's death.

In dismissing the appeal, the Privy Council was apparently receptive to the argument that it was indeed the second voluntary act of the appellant in rolling the body over the cliff and exposing it to the

13 Criminal Law, above n. 8 at 28. There is a rebuttable presumption that any relevant act or omission is a voluntary one. If, however, evidence arises that raises a question as to the voluntariness of a relevant act or omission, the ultimate burden of proving voluntariness beyond reasonable doubt rests with the prosecution.
14 Ryan v The Queen (1967) 121 CLR 205 at 215-16.
15 Thabo Meli v The Queen [1954] 1 WLR 228.
16 Ibid. at 228.
17 Ibid.
18 Ibid. at 229.
19 It is well settled in Victoria and elsewhere that an intention to kill is a sufficient mens rea for the crime of murder: R v Jakac [1961] VR 367 at 368; R v Terry [1955] VLR 114 at 115; Hyam v DPP [1975] AC 55; R v Vickers [1972] 2 QB 644. See also Australian Criminal Law in the Common Law Jurisdictions, above n. 2 at 42; Criminal Law, above n. 8 at 629.
20 Thabo Meli v The Queen [1954] 1 WLR 228 at 229.
21 Ibid.
22 Ibid.
elements that was the cause of death, and further, because the appellant mistakenly believed that the deceased was already dead, he could not have then acted with the requisite temporal coincidence to be convicted of murder. As it is well settled that a voluntary act consists of a consciously willed muscular movement, it is apparent that there were a litany of voluntary acts on the part of the appellant without which the deceased would not have ultimately died when and as he did. Thus, as will be addressed below, it is more accurate to depict the result in Thabo Meli as one that involves the correct application of principles of legal causation than those of temporal coincidence. Nonetheless, and ostensibly accepting the appellant’s argument that the conviction could not withstand a straightforward application of the doctrine of temporal coincidence, the Privy Council opined that it was acceptable to regard two or more voluntary acts as one continuous series of acts interconnected by a common purpose to kill and dispose of the body; that is to say that two or more voluntary acts may be viewed as one voluntary act if they are somehow connected by a common purpose as in the present case.

Taken to its logical conclusion, this has the practical effect of emasculating the doctrine of temporal coincidence beyond recognition. The reason for this is that many crimes are predicated on one volitional act by an accused or his or her accomplices that typically lead to many others that are similarly interconnected by a common purpose such as evading detection, apprehension and the like. In the writer’s view, the Privy Council’s decision represents a classic example of result-driven decision-making of the type referred to at the beginning of this article. To be sure, it would strain credulity to treat the Privy Council’s decision as anything other than a blatant example of legislating from the bench in order to achieve what the justices perceived to be a just result. The Privy Council’s decision should be seen for exactly what it is: a crossing of that all-important line between the courts’ inherent power and duty to develop the common law incrementally and usurping the power entrusted to Parliament to legislate for the common good and, in so doing, evincing an utter disdain for well-settled legal precedent.

In analysing the Privy Council’s reasoning in Thabo Meli, it is apparent that the same result could have been achieved through a correct and

23 Above n. 20 at 230.
24 R v Butcher [1986] VR 43 at 52, 56; Ryan v R (1967) 40 ALJR 488 at 492. See also Criminal Law, above n. 8 at 28–30.
25 R. Perkins and R. Boyce, Criminal Law. 3rd edn (Foundation Press: 1982) 773. This point is exemplified in the fact that he term ‘legal cause’ denotes a cause to which the ‘law will attribute legal responsibility for a result’: Royall v The Queen (1991) 172 CLR 378 at 441 (McHugh J); at 387–8 (Mason CJ).
27 Ibid. at 230.
straightforward application of both English and Australian common law principles. Was there a volitional act or omission to act on the part of the accused? The blow to the deceased’s head that was inflicted by the appellant was, as noted above, presumptively volitional in the absence of evidence that would raise a genuine issue as to voluntariness. On the facts of Thabo Meli, there was no evidence to suggest that the accused’s blow to the head of the deceased was anything other than the result of a willed muscular movement or, as it is often described, a conscious decision on the part of the accused to move a part of his body. Was the voluntary act of striking the deceased in the head the legal cause of his death?

Causation

In answering this question, one must delve into the murky waters of the principles governing legal causation in criminal prosecutions. Though a lengthy treatise would be required to do justice to any discussion of the operation and scope of the principles governing legal causation in the context of criminal prosecutions, suffice it to say for present purposes that with the exceptions of accessorial liability and the so-called ‘situational offences’ noted earlier, the prosecution is always required to prove the existence of a legal causal nexus between the accused’s voluntary act(s) or omission(s) and the actus reus elements of the offence; that is, the elements that do not require proof that the accused acted with a state of mind that contemplates something more than what is merely required for an act or omission to be regarded as voluntary. In order to prove this causal nexus, the prosecution must prove: (a) that the relevant voluntary act or omission was a but-for cause of the actus reus elements to the extent that but-for the relevant voluntary act or omission, the actus reus elements would not have come into being when

28 Australian Criminal Law in the Common Law Jurisdictions, above n. 2 at 27–8; Criminal Law, above n. 8 at 28, 32–3.
29 Ibid.
30 R v Butcher [1986] VR 43 at 52, 56.
31 For a comprehensive exposition of the principles governing the doctrine of legal causation in Australia as well as the USA, see K. J. Arenson, ‘Causation in the Criminal Law: A Search for Doctrinal Consistency’ (1996) 20(4) Criminal Law Journal 189.
32 Criminal Law, above n. 8 at 157–8.
33 Australian Criminal Law in the Common Law Jurisdictions, above n. 2 at 29–30.
34 Criminal Law, above n. 8 at 48. But see Fagan v Metropolitan Police Commissioner [1968] 3 All ER 442. In Fagan, the English Court of Appeal held in unambiguous terms that where the common law crime of assault is concerned, liability cannot be predicated on a mere omission to act (at 442). Although the Court of Appeal did not expound further on this declaration, presumably it was referring to voluntary omissions to act where there is a legal duty to act.
and as they did, and (b) the absence of a novus actus interveniens or a superseding event. Although the latter two terms are used interchangeably in the context of legal causation in the criminal law, for convenience purposes the term ‘superseding’ cause will be used throughout the remainder of this article.

An event will be adjudged as ‘superseding’ if it occurred during the time interval between the accused’s relevant voluntary act or omission and the completion of the actus reus elements of the offence, it is itself a but-for cause of the actus reus elements, and is so significant that it, rather than the accused’s relevant act or omission, should be regarded as the legal cause of such elements. When an event rises to the level of ‘superseding’, its legal effect is to sever the causal nexus between the accused’s relevant voluntary act or omission and the actus reus elements in that the accused is not held criminally responsible for any consequences that occur subsequent to its intervention. It is important to note, however, that the event severs the causal chain in only a public policy sense because even though the accused’s volitional act or omission is a but-for cause of the actus reus elements, the public policy interest

35 Perkins and Boyce, above n. 25; Royall v The Queen (1991) 172 CLR 378 at 440. For an explanation of the rare exception to the but-for requirement of legal causation in the context of tort law, see March v Stramare Pty Ltd (1991) 171 CLR 506, the leading High Court decision on legal causation in the civil context. In that decision, Mason CJ opined that ‘the “but-for” test gives rise to a well-known difficulty in cases where there are two or more acts or events which would each be sufficient to bring about the plaintiff’s injury’ (at 516). An uncritical and blind application of a simple but-for test in this type of situation would may well lead to the unpalatable result that neither act or event would be considered as the legal cause of the harm contemplated by the civil wrong at issue. Simply stated, neither act or event would satisfy the test because one could not say that but for any one of the acts or events taken in isolation, the harm would not have occurred when and as it did and, thus, none of the acts or events would satisfy the but-for test and there would be no culpable party. It is rarely the case, however, that one can say that the harm would not have occurred when and as it did if one or more of the acts or events had not occurred. This exception, therefore, is so rarely invoked that one can state that for all practical purposes, the but-for test is an essential component of legal causation. Though the courts have never stated or implied that the test for legal causation is identical in the criminal and civil spheres, there is no reason in logic or principle that this exception should not apply with equal force in criminal cases. See also D. B. Dobbs, P. W. Keeton, R. Keeton and D. Owen, Prosser and Keeton on Torts, 5th edn (West: 1984) 266–9. The but-for requirement is also referred to as the requirement of ‘cause in fact: Perkins and Boyce, above n. 25 at 777.

36 Royall v The Queen (1991) 172 CLR 378 at 398–9 (Brennan J); at 448–51 (McHugh J). For a treatise devoted exclusively to the operation, scope of the term novus actus interveniens, see H. L. A. Hart and T. Honoré, Causation in the Law, 2nd edn (Oxford University Press: Oxford, 1985). In Royall, the novus actus interveniens doctrine of causation was all but rejected in the criminal law sphere as only two of the seven High Court justices even mentioned it. Moreover, neither justice undertook to explain how the doctrine applies in the civil context: at 398–9 (Brennan J); at 448–51 (McHugh J).


38 Criminal Law, above n. 8 at 33–4, 608; Australian Criminal Law in the Common Law Jurisdictions, above n. 2 at 51.

39 McLaughlin, above n. 37; Perkins and Boyce, above n. 25 at 770, 774–7, 781–2.
in confining the accused's criminal liability within reasonable limits. constitutes the major underpinning of the law's refusal to impose liability for consequences that occur subsequent to the intervention of the superseding event.

The so-called rule of intended consequences represents an important limitation on the notion that certain events should be seen as such a dominant cause of a result that they, rather than the accused's volitional act or omission, should be regarded as the legal cause of the same. Under this rule, if the accused intended the actual result of his or her relevant act or omission which was a but-for cause of that result, the law disregards any event or events that would otherwise have been superseding and the accused's volitional act or omission will be regarded as the legal cause of the result. Thus, the fact that the ultimate harm may have occurred in a bizarre or completely different manner than the accused anticipated, will be of no consequence insofar as the application of the rule of intended consequences is concerned. This rule is entirely consonant with the view espoused by McHugh J in *Royall v The Queen*; namely, that the attribution of causal responsibility is inextricably intertwined with the notion of moral culpability, and one should not be seen as morally culpable for results that were neither intended nor reasonably foreseeable. To define a 'superseding' event, however, is to beg the question of when an event will be regarded as such a significant but-for cause of the actus reus elements that the law will regard it as superseding. Regrettably, there is no simple answer to this important question and thus far the Australian courts have applied at least six different tests in directing juries on the law to be applied in making this determination.

Returning to our analysis of *Thabo Meli*, it is the writer's view that on the facts presented, there were only two events that would have warranted a direction to the jury on the question of whether they were superseding and, if so, which test(s) should have been applied in making these determinations: the accused's act of rolling the deceased's body above n. 25 at 770, 774–7, 781–2.

Another rationale for allowing the superseding event to sever the accused's liability in this sense is discussed below. In particular, it was McHugh J's view in *Royall v The Queen* (1991) 172 CLR 378 that one should not be seen as liable for events that were neither intended nor reasonable foreseeable (at 450). As will be seen below, there is one very important exception to the rule that a superseding event severs the causal chain so as to absolve the accused of liability for any harm that ensues after the superseding event comes into operation.

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over the shallow cliff; and the advent of the weather elements which, according to the medical evidence, was the actual cause of death. Under the existing Australian common law doctrine, these events were of an entirely different character and, therefore, required the jury to apply a different set of criteria in making its findings. Because the Australian common law principles governing the doctrine of legal causation in the criminal law sphere are so unsettled at this juncture, it would require another lengthy article to address this issue adequately insofar as the accused's act of rolling the deceased's body over the cliff is concerned. Although there is no authoritative guidance on which of the available tests, if any, the jury should have been directed to apply, the reasonable foresight of consequences test enunciated by McHugh J in *Royall v The Queen* would have been the most appropriate.

Specifically, McHugh J commenced his judgment by agreeing in part with his brethren that satisfying the but-for test is never, by itself, a sufficient basis upon which to attribute legal responsibility to an act or omission of the accused. McHugh J also agreed with other justices that there is an element of common sense in assigning causal responsibility and that juries need not be told that the question is a scientific or philosophical one. His Honour further opined that when the putative superseding event is an act or omission of either the alleged victim or that of a third party (ostensibly one who sustains or causes another to sustain injury in an attempt to aid the alleged victim), something more than a mere common-sense approach is needed.

McHugh J then opined that tort and criminal law principles of legal causation should be identical as they are not only designed to further the same basic interests, but the appropriate test to be applied to such acts or omissions is whether they would have been foreseeable to a reasonable person in the position of the accused. If so, the jury should have been instructed that they were not to be regarded as superseding events that served to mythically sever the causal chain. Conversely, if the acts or omissions would not have been foreseeable to a reasonable person in the accused's position, and in the absence of a successful application of the rule of intended consequences, the jury should have been instructed along the exact opposite lines that the accused's act or omission had severed the causal chain as a matter of public policy, thereby relieving the accused of responsibility for any consequences that ensued after the superseding event intervened. As there was no dispute that the accused

48 With regard to the act of the accused in rolling the body over the cliff, the writer believes that there is no authority that clearly enunciates what criterion or criteria must be applied in making this determination. Under the English common law doctrine of causation, the jury should have been directed to apply the *novus actus interveniens* test to both putative superseding events: *R v Pagett* (1983) 76 Cr App R 279 at 288–9 (Goff LJ).


50 Ibid. at 429–31.

51 Ibid. at 423.

52 Ibid. at 423–4.

53 Ibid. at 424.

54 Ibid. at 428–9.

55 Ibid. at 429.
acted with the intention of killing the deceased, the rule of intended consequences would have been applicable under both English and Australian law with the result that the jury should have been directed to ignore the putative superseding events and find that the accused's voluntary act of striking the deceased in the head was the legal cause of death.

It is noteworthy that although McHugh J favoured a test of reasonable foresight of consequences in instances where the putative superseding event was an act or omission of the alleged victim or a third party, he did not opine on whether the same test should be applied to acts or omissions of the accused. McHugh J's omission on this point is of great importance in cases such as *Thabo Meli* in which an act of the accused is arguably a superseding event. McHugh J's failure either to include or exclude the accused's acts or omissions from this test might be explicable on the basis that the putative superseding event in *Royall v The Queen* was the victim's decision to deliberately jump out of the bathroom window of the sixth floor flat in which she and her boyfriend were cohabiting at the time. On the other hand, McHugh J's test was inclusive of acts or omissions of third parties despite the fact that no act or omission of a third party was alleged to constitute a superseding event in *Royall v The Queen*. This suggests, therefore, that McHugh J's failure to include the accused's acts or omissions was by design and not merely an oversight. If that is correct, on what basis were they excluded? Was McHugh J wary of the possibility that an informed and clever accused might manufacture an act or omission that might satisfy the criterion of being unforeseeable to a reasonable person in his or her position? Is it plausible that any jury would find that an accused's act or omission was unforeseeable to a reasonable person in his or her position? If not, is there any reason in logic or principle for excluding the accused's acts or omissions from the purview of this test? If such acts or omissions were excluded by design, what test, if any, should be applied to the such acts or omissions?

In the writer's view, the most likely explanation for McHugh J's omission is that it was a mere oversight that occurred in the context of a case in which there was no putative superseding act or omission on the part of the accused. If the omission was a mere oversight and the reasonable foresight of consequences test is applied to the appellant's act of rolling the deceased's body over the cliff, it is all but certain that a jury would find that it is quite foreseeable that the appellant, believing he had committed a murder, would attempt to dispose of the body in a manner that would make it appear as though the death was accidental. Thus, the accused's act of rolling the body over the cliff would not rise to the level of a superseding event. In any event, as noted above, the rule of intended consequences would have precluded the act from breaking

56 Above n. 49.
57 Ibid. at 431–2.
the causal chain regardless of whatever determination might have made under the reasonable foresight of consequences test.

As far as which direction should have be given to the jury in regard to its determination of whether the advent of the weather in causing death should have severed the causal chain, the judgment of the Supreme Court of South Australia in *R v Hallett* provides significant Australian authority on this question. In *Hallett*, the appellant was convicted of murder after the jury rejected his claim that he had acted in self-defence in striking the deceased in the head as a means of repelling the deceased's unwelcome sexual advances. The appellant gave further evidence that following the blow to the head, he left the deceased face down on the beach with the tide out and in an unconscious state before walking away. Although the appellant apparently believed that the deceased would soon regain consciousness, he ultimately died of drowning when he failed to do so before the tide came in. On appeal, the appellant claimed that his murder conviction should be quashed on the ground that the incoming tide constituted a 'supervening' event that absolved the accused of murder or any other homicide. In particular, this argument was predicated on medical evidence that the deceased died of drowning in shallow water after the tide had come in.

In dismissing the appeal, the court significantly referred to this case as an 'exposure' type scenario, perhaps implying that it was articulating a rule of law to be applied whenever the alleged superseding event is a natural event or what is often termed an Act of God, as in cases where the putative intervening event is a tidal wave, lightning bolt, volcano, tornado, hurricane and the like.

In a rather confusing opinion, the court did not take issue with the trial judge's direction that satisfying the but-for test was an essential, though not necessarily sufficient element in proving legal causation. The court then referred to and provided examples of what it described as the 'ordinary' and 'extraordinary' operation of natural forces of the type noted above. In opining that the former would not be sufficient to sever the causal chain, although the latter would, it is apparent that the court was adopting the ordinary/extraordinary distinction as the correct test to be applied by juries in natural force or Act of God cases such as *Hallett*.

58 [1969] SASR 141. As indicated in n. 49, in the UK the *novus actus interveniens* test would be applied in making this determination.

59 Ibid.

60 Ibid. at 143, 157.

61 Ibid. at 144, 146.

62 Ibid. at 145.

63 Ibid. at 147-8.

64 Ibid. at 142, 147.

65 Ibid. at 149.

66 Ibid. at 146.

67 Ibid.

68 Ibid. at 149-51.

69 Ibid. at 150.

70 Ibid. This conclusion is, of course, subject to the rule of intended consequences in spite of the court's rather conspicuous failure to so much as mention the rule.
Surprisingly, however, Bray CJ, Bright and Mitchell JJ concluded their opinion by quoting a passage from Lord Parker’s judgment in *R v Smith* that is now known as the ‘operating and substantial cause’ test. In enunciating this test, Lord Parker wrote:

It seems to the court that if at the time of death the original wound is still an *operating cause and a substantial cause*, then the death can be properly said to be the result of the wound, albeit that some other cause is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.

Though Lord Parker’s ‘operating and substantial’ test has often been cited with approval as the appropriate test to be applied in determining whether an event rises to the level of a superseding, the writer’s view is that in cases such as *Hallet*, *Smith*, *Evans and Gardiner (No. 2)*, *Blaue* and no doubt others, this perplexing and rather amorphous test was not the rule of law that was actually applied in determining the outcome. Though the High Court has yet to authoritatively rule on exactly which test should have been used in directing the jury in *Hallet*, the judgment in *Hallet*, when viewed in its entirety, strongly suggests that in cases where the alleged superseding event is an Act of God, it is

72 Ibid. at 42 (emphasis added).
75 [1959] 2 QB 35.
77 [1975] 1 WLR 1411.
78 In each of these cases, the operating and substantial cause test was indeed cited, but as explained in the discussion of *R v Hallet* [1969] SASR 141 above, the test was not actually applied or explained. In *R v Blaue* [1975] 1 WLR 1411, to cite another example, this test was cited with apparent approval early in Lawton LJ’s judgment, but later in the judgment his Lordship made it quite clear that the case was actually decided under the longstanding principle that we take our victims as we find them. Lawton LJ opined that ‘[i]t has long been the policy of the law that those who use violence on other people must take their victims as they find them. This in our judgment means the whole man, not just the physical man. It does not lie in the mouth of the assailant to say that the victim’s religious beliefs, which inhibited him from accepting certain kinds of treatment, were unreasonable. The question for decision is what caused her death. The answer is the stab wound. The fact that the victim refused to stop this end coming about did not break the causal connection between the act and death’ (at 1414); see also *R v Singapore* (1975) 11 SASR 469; *R v Holland* (1841) 2 Mood R 351; 174 ER 313. In *R v Evans and Gardiner (No. 2)* [1976] VR 523 at 528–9 the Full Court of the Supreme Court of Victoria, though extolling the virtues of Lord Parker’s formulation, was conspicuous in its failure to explain what the confusing language actually meant and appeared merely to cite the passage as a way of expressing a legal conclusion that was unsupported by any legal reasoning. Moreover, in *Royall v The Queen* (1991) 178 CLR 378, the leading High Court decision on causation thus far in the criminal sphere, McHugh J not only rejected the test, but severely criticised it as coming perilously close to reducing legal causation to a mere but-for test (at 429). McHugh J concluded that the word ‘operating’ had been construed as denoting nothing more than a simple application of the but-for test, while the word ‘substantial’ had been construed to mean something more than *de minimis*. 

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appropriate to use the ordinary/extraordinary test whereby juries would be directed that it is only in cases where the event can fairly be described as an extraordinary operation of natural forces that it will sever the causal nexus between the accused's voluntary act or omission and the actus reus elements of the offence. Though the Supreme Court of South Australia did not expressly address this question, this approach is very similar to, if not the same as the tort-like reasonable foresight of consequences test enunciated by McHugh J in Royall v The Queen. Whether this is the correct view or not, and assuming arguendo that an Australian court would use the operating and substantial cause test as the Supreme Court of South Australia purported to do at the conclusion of its judgment, there is no basis upon which to justify a finding that the weather elements in Thabo Meli were any more significant than the incoming tide in Hallett in bringing about the death of the deceased. In any event, the rule of intended consequences would have required the jury to ignore their effect and find that the accused's intentional blow to the head was the legal cause of death.

Having demonstrated that Thabo Meli is a case that turned primarily on principles of legal causation rather than the doctrine of temporal coincidence, it is safe to conclude with reasonable certainty that the accused's act of striking the deceased in the head was not only a but-for cause of death, but that neither the act of rolling the deceased's body over the cliff nor the weather elements can be correctly described as superseding events that severed the causal nexus. Having also demonstrated the requisite causal nexus between the accused's voluntary act of striking the deceased in the head and the death that followed, the only remaining issue is whether there was temporal coincidence between the voluntary act and the requisite mens rea for murder.

As noted earlier, an intention to kill is a sufficient mens rea for murder and given that the accused did not dispute that the blow to the head was accompanied by an intention to kill, the common law requirement of temporal coincidence was satisfied. As the accused did not put forth an affirmative defence such as self-defence, duress, necessity and the like, it is apparent that the both the Privy Council and the Australian courts could have reached the same result in Thabo Meli through the correct application of English and Australian common law precepts, thereby obviating the need to resort to the sophistry that prompted the Privy Council to hold that more than one voluntary act or omission can be viewed as one if the acts or omissions are interconnected through a common purpose such as an intent to kill and dispose of the body.79

The result and reasoning of Thabo Meli were reaffirmed 37 years later by the English Court of Criminal Appeal in R v Le Brun.80 In that case, the court held on facts very similar to those in Thabo Meli81 that two or more

79 Thabo Meli v The Queen [1954] 1 WLR 228.
80 [1991] 4 All ER 673.
81 In Le Brun, the appellant had been arguing with his wife one night and struck her in the jaw rendering her unconscious. He then picked her up, whether to hide the body or to carry her home was not clear, but dropped her onto the concrete, causing her to suffer a skull fracture from which she died.
volitional acts or omissions could be treated as one continuous act or omission if the crime consists of a sequence of events that can fairly be regarded as the same transaction—and a causal nexus can be demonstrated between the initial voluntary act or omission that was accompanied by the mens rea and the fatal voluntary act or omission that was not. Although the Court of Criminal Appeal did not expound on the precise meaning of the requirement of a causal nexus, one would have to assume that this would require, at a minimum, that a but-for causal nexus must be proven between the initial and fatal acts. If that assumption is correct, then Le Brun is entirely consonant with the writer's view that the real issue in Thabo Meli was one of legal causation between the initial act that was accompanied by the requisite mens rea and the last and fatal act of rolling the deceased's body over the cliff in the mistaken belief that the deceased was already dead. As Thabo Meli required that two or more voluntary acts or omissions be interconnected by a common purpose to kill and dispose of the body in order to be treated as one continuous act, it may well be that there is little, if any, difference between those conditions and the ones enunciated in Le Brun. Indeed, it would be difficult to envisage a scenario in which the Le Brun criteria could be satisfied without also meeting the Thabo Meli criteria.

Conclusion

The foregoing discussion is not intended to impugn the overall competence and integrity of the judiciaries in the UK, Australia or any other western democracy. Moreover, there is no empirical evidence to suggest that the overwhelming majority of judges and magistrates are anything other than persons of the utmost integrity and competence. Regrettably, however, this commentary has demonstrated that members of the judiciary, as with members of any other branch of government or profession, are not impervious to allowing their objectivity to be compromised, and particularly so in instances where strict adherence to well-settled legal principles would lead to results which they perceive to be contrary to the interests of justice. This sobering reality is further exacerbated by the fact that the judiciary is no less afflicted by ineptitude within its ranks than are other branches of government or professions. The Privy Council's decision in Thabo Meli, subsequently reaffirmed by the English Court of Appeal in Le Brun, serves as a vivid illustration of these observations and, more importantly, what they portend for the public's respect for both the law and the judiciary that is entrusted with its construction and application.

This raises an obvious question that is as old as it is important; namely, what can and should be done to curb result-driven decision-making and its pernicious effects? As is the case with so many difficult issues, the ease with which this particular problem is stated and identified belies the

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82 R v Le Brun [1991] 4 All ER 673 at 678.
83 Ibid. at 678–9.
84 Ibid. at 679.
85 Thabo Meli v The Queen [1954] 1 WLR 228 at 230.
86 Ibid.
enormous difficulty in articulating and implementing a workable solution. In searching for a solution to what has long proved to be an intractable problem, it is often said, with justification, that the best methodology for finding a solution to an insoluble problem is through process of elimination; that is, by first ascertaining what proposals will not rectify the problem. While this may be the most efficacious approach to finding a resolution to the problems raised in this commentary, there is no escaping the reality that any proposed solution will only be as effective as the honesty and integrity of those who administer it. That said, the degree to which a person is considered to be one of honesty and integrity is largely within the eyes of the beholder. Indeed, one man’s hero is another man’s villain. While such observations are far from solutions to the problems raised, the above commentary on the Privy Council’s decision in Thabo Meli serves as an important starting point by poignantly identifying the problems of result-driven decision-making, judicial ineptitude and the deleterious consequences they engender.