THE DEFENCE OF ACCIDENT IN THE TASMANIAN CRIMINAL CODE

by

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INTRODUCTION

Section 13 (1) of the Tasmanian Criminal Code[1] states that D cannot be held criminally responsible for, 'an event which occurs by chance'. The corresponding provision in s. 23 of the Queensland Criminal Code[2] refers to, 'an event which occurs by accident'. No court has as yet found any significance in this semantic difference.[3] Section 13 is a section of general application and it seems clear that the draftsman intended that accident should operate as a defence to all criminal charges.[4] It will be submitted in this article that the defence of accident has little, if any, scope in the Tasmanian Code largely as a result of the interpretation by the judges of the words 'chance event' in s. 13 (1) but also by the failure of the judges to give the accident defence any independent operation. It is submitted that the reason the accident defence has such limited operation is due to two factors.

The first is that the judges in the High Court have rightly seen accident as involving a question of foresight and foreseeability. As Gibbs J. said in *Kaporonovski*:[5]

> It must now be regarded as settled that an event occurs by accident within the meaning of the rule[6] if it was a consequence which was not in fact intended or foreseen by the accused and would not reasonably have been foreseen by an ordinary person.[7]

The words 'chance event' thus require an objective as well as a subjective reference. The event to be a 'chance event' must, in the words of Kitto J. in *Vallance*[8] be, 'both unexpected by the doer of the act and not reasonably to be expected by an ordinary person'. Where the defini-

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1 Herinafter Tasmanian Code.

2 Herinafter Queensland Code. Section 23 of the Western Australian Criminal Code is identical.

3 The words 'accident' or 'accident defence' will be used in this article to describe the concept referred to in s. 13 (1) and s. 23.

4 See for example the comments of Crisp J. in *Vallance* [1960] Tas. S.R. 51 at p. 81 and Barwick C.J. in *Timbu Kolian* (1968) 119 C.L.R. 47 at p. 52.

5 (1973) 133 C.L.R. 209 at p. 231.

6 The second limb of s. 13 (1) and s. 23 referring to an event which occurs by 'chance' or 'accident'.

7 Citing as authority *Vallance* (1961) 108 C.L.R. 56 at pp. 61, 65, 82; *Mamote-Kulang* (1964) 111 C.L.R. 62 at pp. 69, 72, 85; *Timbu-Kolian* (1968) 119 C.L.R. 47 at pp. 67, 71; and *Tralka* [1965] Qd. R. 225 at pp. 228, 233-234.

8 (1961) 108 C.L.R. 56 at p. 65.

tion of a crime in the Code prescribes a specific mental element, or where the judges have stated that a crime requires a specific mental element, it is submitted that the accident defence can have little, if any, operation. If the first task in interpreting the Code and in determining D's criminal responsibility is to examine the section under which he is charged then in many instances the accused will be acquitted because he did not have the required state of mind as prescribed by that section. Burbury C.J. recognised this principle in *Vallance*:[9]

> It will be noted that s. 13 (1) speaks of an intentional act — not an act done with a specific intention. There are some acts which only constitute crimes if accompanied by an intention to bring about a particular result. The acts enumerated in s. 170 which require to be accompanied by a specific intent to maim, disfigure, disable or do grievous bodily harm etc., are examples. In cases of that kind the Crown must prove not only that the act itself was an intentional act but also that it was accompanied by an intention to bring about a particular result. If the Crown fails to prove the specific intention to bring about the particular result the accused cannot be convicted. The accused in such a case does not have to rely on the second limb of s. 13 (1) — absence of criminal responsibility for an event which occurred by chance.

For example, it is submitted later in this article[10] that as a result of the High Court decision in *Vallance*[11] the crime of unlawful wounding in the Tasmanian Code[12] requires the Crown to prove subjective recklessness[13] before D can be convicted. If, as in *Vallance*, D is charged with unlawful wounding as a result of discharging a loaded gun, then he will be acquitted if the jury is not satisfied that, 'in firing the air gun he fired towards the girl foreseeing or adverting to the likelihood of the pellet wounding her but heedless of such a consequence'.[14] There is no scope for the accident defence in this situation.

Provided the accident defence is seen only as a test of foreseeability it is submitted that there are very few crimes in the Code in which the defence can have any independent operation as most crimes require, at the very least, that the accused *ought* to have known that a result would have been brought about by his conduct, *i.e.*, an objective test of foreseeability.

The second reason that the accident defence has assumed so little importance in Tasmania was the introduction by the High Court in *Mamote-Kulang*,[15] of the 'supervening event theory'. This theory sees the relevant 'event' in the Code provisions on accident as some happening of an accidental nature, some unexpected intervening occurrence rather than the consequence brought about by D's actions. The 'super-

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9 [1960] Tas. S.R. 51 at p. 65.
10 See *infra* text at n. 24 *ff*.
11 (1961) 108 C.L.R. 56.
12 Section 172 of the Tasmanian Code.
13 In this context, meaning foresight by the *accused* of the consequences of his conduct.
14 (1961) 108 C.L.R. 56 *per* Dixon C.J. at p. 61.
15 (1964) 111 C.L.R. 62.

vening event' theory, if correct and applicable to all crimes in the Code, reduces the test of accident to one of causation. It will be submitted in this article that, despite the acceptance of the theory by Burbury C.J. in *McDonald*[16] and *McCallum*,[17] it is at best a rather unbelievable fiction and should never be applied where accident is reasonably open on the facts and at worst should be limited to cases of manslaughter where death has been caused as a result of personal violence.

THE VALLANCE DECISION

It is important for a proper understanding of the accident defence to consider the decision of the Court of Criminal Appeal and the High Court in *Vallance*.[18] Vallance was annoyed by some small children who were playing in a scrapyard adjacent to his house. He called on the children to 'clear out'. When they refused, he fetched an air-rifle from the house and fired a shot in their vicinity injuring one of them. Vallance was charged with unlawful wounding. All the judges in the Court of Criminal Appeal in *Vallance*[19] held, without detailed discussion, that s. 172 was silent as to the mental element required for the crime of unlawful wounding.[20] Therefore, it was necessary to turn to s. 13 (1), a section of general application. All three judges held that the word 'act' in s. 13 (1) meant the physical action of the accused,[21] in this case the firing of the gun, and as that was clearly voluntary and intentional no issue arose under the first limb. The second limb, however, could have provided Vallance with a defence. The Tasmanian Court of Criminal Appeal favoured a subjective interpretation of the second limb. As to the meaning to be given to the words 'event which occurs by chance' Burbury C.J. said:[22]

> I have said that the issue is whether the event occurs by chance vis-a-vis the accused. That means that a subjective element is involved. The basic question as I see it is, Did the accused in fact foresee that wounding the girl was a possible or probable consequence of his conduct? The question is not, Ought he to have adverted to the consequences? but, Did he? If he contemplated the wounding of the girl as a possible or probable consequence of his conduct the wounding is not an 'unlooked-for mishap', nor is it an event 'which is not expected'. If a man in fact foresees the actual consequences of his action as possible or probable then he cannot be heard to say that the consequences have occurred by

16 [1966] Tas. S.R. 263.
17 [1969] Tas. S.R. 73.
18 [1960] Tas. S.R. 51 (C.C.A.), (1961) 108 C.L.R. 56.
19 [1960] Tas. S.R. 51.
20 Ibid, *per* Burbury C.J. at p. 62; Crisp J. at p. 87; Crawford J. at pp. 106-107.
21 Ibid, *per* Burbury C.J. at p. 67, 'the word "act" in s. 13 (1) I think clearly refers to the actual physical action of the accused'; *per* Crisp J. at p. 90, '[s. 13 (1)] requires that the primary act shall be voluntary and intentional...'; *per* Crawford J. at 109, 'in s. 13 (1) all that need be intentional in the circumstances of the present case was the act of pulling the trigger while the gun was held as it was'.
22 Ibid, at pp. 75-76. See also to the same effect Crisp J. at p. 96; Crawford J. at pp. 113-114.

> chance. Neither at common law nor under s. 13 (1) of the Code would the 'defence' of accident be open. But as a matter of interpretation of s. 13 (1) it is impossible I think to go further and say that the test of foresight is not whether the accused foresaw the consequences but whether a man of reasonable prudence would have foreseen them. That is the proposed test of foresight of consequences reduced to lower terms by Holmes J. in 'The Common Law', p. 53, cited by Viscount Kilmuir L.C. in *Director of Public Prosecutions* v. *Smith*.[23] But here again that learned author is dealing with the mental element in the crime of murder. I do not think that under s. 13 (1) it is possible to substitute an objective test for a subjective test. Upon its plain interpretation I think it refers to the accused's deficiency of will (where his act is unintentional or involuntary) and to an event not contemplated by him. And as I have said I think that s. 13 (3) shows that it is the subjective test of foresight of consequences which must be adopted.

The Crown's argument that an event could not be said to have occurred by chance if a reasonable man in the position of the 'actor' could, in the circumstances, reasonably have been expected to foresee the event, was rejected.

The trial judge had directed the jury that in order to convict Vallance of unlawful wounding they had to be satisfied that he intended to wound; the trial judge said intention meant, 'the state of mind of a man who not only foresees but also desires the possible consequences of his conduct'.[24] The Court of Criminal Appeal were unanimously of the opinion that this direction was too favourable to the accused and ordered a new trial. The correct direction to the jury on the count of unlawful wounding according to Crisp J. should have been:[25]

> [The accused] would be guilty if they were satisfied to the required legal standard that the wound was either intended by him or that while not being intended in the sense of desired, it as a possible consequence of his act was foreseen by *him* and that he acted as he did in conscious disregard of the risk so foreseen. It follows that in my opinion the direction complained of was defective in that it removed from the jury consideration of the alternative of subjective recklessness or indifference to known risk.

The fact that all judges in the Court of Criminal Appeal stated that 'chance event' required a subjective interpretation meant that Vallance should have been convicted if 'he foresaw the risk of wounding'. The 'event', the wounding in this case, would not have been 'by chance'.

It is submitted that the High Court in *Vallance*[26] agreed with the Court of Criminal Appeal that as far as the crime of unlawful wounding is concerned subjective recklessness was required for conviction. Where the High Court disagreed with the Court of Criminal Appeal was in the correct meaning to be given to the words 'an event which occurs by chance'.

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23 [1961] A.C. 290 at p. 327.
24 [1960] Tas. S.R. 51 at p. 58.
25 Ibid, at p. 98.
26 (1961) 108 C.L.R. 56.

The majority[27] in *Vallance*[28] adopted an objective interpretation of 'chance event' and, in effect, accepted the argument of the Crown on the appeal. But it is important to realise that of the statements on 'chance event' in the High Court only that of Menzies J. was necessary for the decision that unlawful wounding required a direction on recklessness. The statements of the majority on the meaning of the words 'chance event' are, therefore, *obiter*. While all the judges in the High Court in *Vallance* agreed that the crime of unlawful wounding required the Crown to prove that the accused foresaw the likelihood of wounding, only Menzies J. relied on the meaning of the words 'chance event' to come to that conclusion. The other judges in *Vallance* relied on various criteria but none of them relied on 'chance event'. Dixon C.J. took the broad view of 'act' but considered the word 'intentional' denoted the concept of subjective recklessness as it had done at common law.[29] Windeyer J.'s decision is to similar effect.[30] Kitto J. relied on the definition of 'unlawful wounding' in s. 172.[31] Taylor J. similarly found recklessness in the definition of unlawful wounding and by the application of s. 8 of the *Criminal Code Act* which preserves common law defences,[32] thus, Menzies J. was the only judge who followed the Court of Criminal Appeal and stipulated that the words 'chance event' required a subjective direction.[33] It is submitted that it is now beyond dispute that both the Court of Criminal Appeal and the High Court adopted and required subjective recklessness for a s. 172 crime. This fact, ignored or forgotten in Tasmania, has been elsewhere recognised judicially.[34]

As mentioned above, four of the five High Court judges in *Vallance* were of the opinion that the Court of Criminal Appeal's interpretation of a subjective test for accident was incorrect and that an event could not be said to have occurred by accident unless it was, 'unintended, unforeseen and unforeseeable'.[35] The remarks of Kitto J. are typical of the attitude taken by the High Court:[36]

> 'By chance' is an expression which, Janus-like, faces both inwards and outwards, describing an event as having been both unexpected by the doer of the act and not reasonably to be expected by an ordinary person, so that it is at once a surprise to the doer and in itself a surprising thing.

The High Court decision in *Vallance* decided three things:

1. That 'Act' in s. 13 (1) meant the physical action of the accused and not the whole *actus reus* (by majority 3 : 2);

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27 Dixon C.J., Kitto, Taylor and Windeyer JJ.
28 (1961) 108 C.L.R. 56.
29 Ibid, at p. 61.
30 Ibid, at p. 82.
31 Ibid, at pp. 63-64.
32 Ibid, at pp. 67-69.
33 Ibid, at p. 73.
34 See *Kaporonovski* [1972] Qd. R. 455 *per* Hart J. at pp. 500-501.
35 See *Vallance* (1961) 108 C.L.R. 56 at pp. 61, 65, 82.
36 Ibid, at pp. 65.

2. That before an accused could be convicted of unlawful wounding the jury must be satisfied that *he* foresaw the likelihood of wounding, subjective recklessness (by the whole court);
3. That an 'event' does not occur by chance unless it was 'unintended, unforeseen and unforeseeable', an objective test of foresight and foreseeability (by majority 4 : 1).

It is submitted that the decision is also authority for two propositions:

1. That where an accused is charged with unlawful wounding in Tasmania he will have no need to rely on the accident defence. He will be acquitted unless *he* foresaw a wound as likely. Section 172 requires the Crown to prove a mental element. If it is not proved the accused cannot be convicted;
2. That all the judges who sat in *Vallance,* both in the Court of Criminal Appeal and the High Court, saw the relevant 'event' in s. 13 (1) as the wounding, the result of D's action in firing the gun.[37]

THE 'SUPERVENING EVENT' THEORY

Mamote-Kulang[38] was the first decision of the High Court to discuss the 'supervening event' theory. The facts of *Mamote-Kulang* were straightforward. The accused struck his wife a hard blow in the abdomen. The blow resulted in the rupture of her spleen, which was unusually enlarged due to malaria, and resulted in her death. It was argued for the accused that her death was unintended and accidental and s. 23 of the Queensland Code provided him with the defence of accident. It was clearly established that the accused neither foresaw the likelihood of death resulting from his intentional blow; nor could it have been foreseen by a reasonable man. Thus, the death was clearly, 'unintended, unforeseen and unforeseeable', but, according to a majority[39] of the High Court, this was not sufficient to relieve the accused from criminal liability for the death of his wife. They took the view that as there had been a deliberate application of force (by an intentional blow) and that death had resulted directly, then the consequence could not be regarded as accidental. On this view the test for accident is one based on causation and not on foreseeability as had been required in *Vallance.* Taylor and Owen JJ. stated:[40]

> ... the question must be whether in the chain of circumstances leading to the death of the victim there has occurred some event which by reason of the fact that it has occurred by accident was something for which the accused ought not to be held responsible. In other words the section [s. 23] contemplates the intervention in the series of circumstances culminating in death of some happening of an accidental nature, a happening so related to the killing as to

37 Ibid, see particularly Burbury C.J. at pp. 67-68, Crisp J. at pp. 91, 96, Crawford J. at p. 108, Kitto J. at p. 65, Menzies J. at p. 71, Windeyer J. at p. 80.

38 (1964) 111 C.L.R. 62.

39 McTiernan, Owen and Taylor, Windeyer JJ.

40 Ibid, at p. 65-66.

> displace the operation of the very general words of s. 293 that 'any person who causes the death of another directly or indirectly, by any means whatever, is deemed to have killed that other person'.

McTiernan J., in an inadequately short judgment, agreed with Taylor and Owen JJ. that,[41] in the present case, 'what is missing is proof of an accidental cause of death'.

In the same vein is the judgment of Windeyer J. who appears to follow Taylor and Owen JJ. in adopting the 'supervening event' theory when he says:[42]

> ... the question is not whether the death not being intended, would be called accidental in ordinary speech, it is whether the homicide, the act which attracts the criminal law, was an event which occurred by accident. The blow was not an accident, the fact that the deceased woman had an enlarged spleen was not an accident, *no accidental occurrence intervened between the blow and its outcome or event, the death.*[43]

It is submitted that the dissenting opinion of Menzies J. in *Mamote-Kulang* is clearly correct in principle. First, he makes the important point that s. 23, and presumably s. 13 (1), are not dealing with notions of causation and it is wrong to introduce them into the concept of accident. According to Menzies J. the words 'which occurs by accident', or 'which occurs by chance', are not the equivalent of 'which occurs as the result of an accident'. These words are not directed to the notion of causation. It is not necessary to confine s. 23 (s. 13 (1)) to cases where there is an intervening accidental event between the act and its consequence.[44] Secondly, Menzies J. clearly saw the death of Mamote's wife as the relevant 'event' for the purpose of the second limb of s. 23.[45] As mentioned above, there was never any suggestion, in any of the judgments in *Vallance*, that the 'event' referred to in s. 13 (1) should be considered to be other than the event for which the accused must be found criminally responsible.

As I have said, the judges in *Vallance* clearly saw the concept of accident as involving foreseeability. To introduce notions of causation into the concept is to adopt an entirely unwarranted and unnecessary gloss on the accident defence. The decision in *Mamote-Kulang* would, if applied to all cases where accident is raised, severely limit the defence and effectively give it no independent operation. If a 'supervening event' is required before it can be said that a consequence was accidental the accused is in no better a position than if he had relied on the principles of causation applicable to crimes generally.

It is submitted that this fact is recognised by Windeyer J. in *Mamote-*

41 Ibid, at p. 64.
42 Ibid, at p. 82.
43 Author's emphasis.
44 Ibid, at pp. 73, 74.
45 Ibid, at p. 72.

Kulang and it is thus surprising that he sees the need for a 'supervening event' for accident. Windeyer J. commented:[46]

> ... If, although he did intend to hurt, death was caused by some agency unexpectedly intervening, then again he is not criminally responsible: for in that case the death is not a consequence, in the legal sense, of his conduct. Whether that was so or not is a question of causation as a determinant of legal responsibility. It is whether there was a break in the chain of causation, and a new cause. It is a matter of remoteness of consequence, a familiar question in many branches of law: see, for an example of its application in criminal law, the case of *Thomas Joseph Smith.*[47] But in the present case there was no intervening happening. Nothing other than the blow that the accused delivered was in any relevant sense the act which caused the death.

This passage is unexceptionable; on any criminal charge the accused will be acquitted if the 'event' cannot be said to have been caused by his conduct.

In *Mamote-Kulang* there can be no doubt that D caused his wife's death. He struck her a hard blow in the stomach which ruptured her enlarged spleen. One can agree with McTiernan J.[48] that there was, 'no accidental cause of death' and with Windeyer J.[49] that, 'nothing other than the blow that the accused delivered was in any relevant sense that act which caused death' but does it necessarily follow that the death of Mamote's wife was not a 'chance event'?

The answer to that question depends upon whether the courts are prepared to say that the defence of accident has an operation independent of the specific provisions. According to Windeyer J. in *Mamote-Kulang*,[50] 'the act and intent that together make up manslaughter in a case such as this are an act... which was done with intent to inflict some bodily harm... which in fact caused death' but if the death — the relevant event — was 'unintended, unforeseen and unforeseeable' D should be acquitted. The High Court in *Mamote-Kulang* were simply not prepared to give the accident defence an overriding operation in cases of this sort.

According to Windeyer J.,[51] 's. 23 does not... alter the elements of any particular offence created or defined by the Code. It is a provision that hovers, as it were, over them all without altering the nature of them'. To the same effect Taylor and Owen JJ. declared that[52] s. 23, being a section of general application, must be read subject to the specific sections dealing with homicide. If *Mamote-Kulang* is considered to be a case where there is a clash between the specific and general provisions of the Code the decision is more readily understood and explained. But, it is submitted, it is difficult to read the case in this light. Chapter V of

46 (1964) 111 C.L.R. 62 at p. 83.
47 (1959) 43 Cr. App. R. 121 at p. 131.
48 (1964) 111 C.L.R. 62 at p. 64.
49 Ibid, at p 83.
50 Ibid, at p. 83.
51 Ibid, at p. 83.
52 Ibid, at p. 67.

the Queensland Code[53] deals with criminal responsibility generally; the defences provided in the chapter — automatism, mistake, insanity, drunkenness, compulsion — apply to all crimes.[54] If the defence of accident is viewed in the same way it is difficult to accept that *Mamote-Kulang* was rightly decided. Once it is decided that the death of Mamote's wife was accidental, in the sense explained in *Vallance*, D should have been acquitted.

The adoption of the 'supervening event' theory in *Mamote-Kulang* distorts the true test of accident. An occurrence that intervenes between the accused's act and subsequent event which breaks the chain of causation will relieve D from criminal responsibility *not because the event was accidental but because it cannot be said that D has caused, in a legal sense, the inculpative consequence.*[55] The 'supervening event' theory was, 'in the beginning, no more than an unconvincing piece of statutory construction';[56] it accords with no reported decision apart from *Martyr*[57] and is inconsistent with the decision in *Vallance*.

However, *Mamote-Kulang* is a decision of the High Court and it cannot simply be dismissed as incorrect. But the decision left a number of questions unanswered. Does it apply in all cases under the Codes when D is charged with manslaughter? Does it also apply when the offence alleged involves some less serious injury to the person such as assault, wounding or grievous bodily harm?

The applicability of the 'supervening event' theory arose directly for consideration in *Timbu Kolian*.[58] The accused, after an argument with his wife, had left their house and sat down a short distance away in the darkness. His wife followed and continued to berate him. In order to chastise her he picked up a stick and threw it in the direction of her voice. Unknown to him his wife was at this stage holding their baby in her arms. The stick struck the baby causing his death. Had the stick struck the mother instead it would have hurt her but would not have done her physical harm. The trial judge, Clarkson J., concluded that by reason of *Mamote-Kulang* he was bound to convict the accused of manslaughter. Four members of the High Court were able to distinguish that case and hold the defence of accident applied. The position is neatly summed up by Windeyer J.:[59]

> ... now so far as I know it has always been the law and the code has made no alteration in this, that if a man strikes another without his consent, intending to harm or hurt him although not to kill

53 Ch. IV of the Tasmanian Code.

54 Except of course where the definition expressly limits or excludes the operation of the defence; *e.g.* s. 17 (2) of the Tasmanian Code limits the defence of intoxication to crimes requiring a specific intent and s. 20, which deals with compulsion, excludes that defence if a number of named crimes are committed.

55 Author's emphasis.

56 I. D. Elliott, 'Mistakes, Accidents and the Will: The Australian Criminal Codes' 46 *A.L.J.* 328 at p. 334.

57 [1962] Qd. R. 398.

58 (1968) 119 C.L.R. 47.

59 Ibid, at p. 67.

> him, if death ensues as a result of the blow the homicide is criminal. It matters not that the man who delivered the blow did not intend to kill. It matters not that the death occurs because, unknown to him, the person he struck was frail and easily killed. If his blow actually caused the death of the person whom he intentionally hit, it is manslaughter at the least.

Windeyer J. characterised *Mamote-Kulang* as a case where there had been the intentional application of force with an intention to hurt or harm and this was sufficient under the Queensland Code to establish manslaughter. Owen J., with whom Kitto J. agreed, was of much the same opinion:[60]

> The facts in *Mamote-Kulang's* case were very different. There the accused intentionally aimed a blow at and struck his wife, the blow ruptured her spleen, which was greatly enlarged and caused her death. The court held neither the blow nor the fact that the wife had an enlarged spleen nor the death was an event occurring by accident.

Menzies J., who was the sole dissentient, agreed,[61] '... in *Mamote-Kulang* the deceased was killed as a direct result of a blow aimed at her by the accused' ...

It is submitted that the decision in *Timbu Kolian* restricts the operation of the 'supervening event' theory to cases of manslaughter where there is the intentional application of force, directly applied, which can be characterised in the nature of an assault. Having distinguished *Mamote-Kulang*, four of the judges[62] were able to say that the death of the child was an accident. Apart from Owen J., with whom Kitto J. agreed, none of the judges relied on the 'supervening event' theory. It is quite clear in *Timbu Kolian* that no question of causation arose. The stick was thrown by the accused towards his wife. It struck the child causing its death. As mentioned, Owen J. was the only judge who insisted that, for the defence of accident, there has to be some unexpected supervening occurrence. For him,[63]

> ... the aiming of a blow at the wife was intentional but before it reached its target, a wholly unexpected and unforeseeable event intervened. The child's head intercepted the blow aimed by the applicant at his wife. In these circumstances the fact that the blow struck the child was, it seems to me, an 'event' which occurred by accident.

It is submitted that to describe the fact that the wife had the child in her arms as a 'supervening event' belies commonsense.[64] The problem with

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60 Ibid, at p. 71.

61 Ibid, at p. 56.

62 Kitto, Menzies, Windeyer and Owen JJ.

63 Ibid, at p. 71.

64 As Elliott points out (*supra* n. 56 at p. 332), 'Had the mother seen the threatened blow and attempted to shield herself with the child's body, these references to "intervention" and "interception" would have been appropriate. But there was no evidence to support that hypothesis and there was nothing which could be said, without artificiality, to amount to an intervening "happening".'

the judgment of Owen J. is that, like his decision in *Mamote-Kulang*, he is refusing to recognise that the event for the purpose of s. 13 (1), s. 23 must be the inculpative consequence; as in, *Timbu Kolian*, the death of the child.

It is clear from the judgment of Menzies J. that, provided the 'event', in this case the death, was 'unintended, unforeseen and unforeseeable', the accused cannot be held responsible. Consistent with his judgment in *Mamote-Kulang* he sees the question of accident essentially as one of foreseeability,[65]

> ... the death of the appellant's child from being struck upon the head with a stick when the appellant aimed a blow at his wife in the dark and without knowledge or occasion for foreseeing that she was then carrying the child was an event which occurred by accident.

It is possible to say of this judgment that Menzies J. is in fact only applying a subjective test of foreseeability, but it is quite clear that even on an objective basis, the accused could not have foreseen the likelihood of the child being injured when he had no knowledge of the presence of the child in its mother's arms.[66]

The decision of Windeyer J. is interesting. In *Mamote-Kulang* he characterised the 'event' as anything but the inculpative consequence, but in *Timbu Kolian* he recognised the striking of the child on the head, causing its death, was the relevant event and that event occurred by accident:[67]

> An event in s. 23 clearly clearly means a happening for which an accused person could be criminally responsible if it did not occur by accident and he was not otherwise exonerated. Therefore an event in this context refers to the *outcome of some action or conduct of the accused*, for a man cannot be responsible for an event in which he has no part at all; and it would be unnecessary to say so.

In the end, Windeyer J. simply adopted the test of accident defined in *Vallance* and concluded that,[68] 'In the present case the striking of the child causing his death seems to me to answer the description of an event that occurred by accident'.

Of the other judges in *Timbu Kolian* McTiernan J. adopted a broad view of 'act' and did not discuss accident.[69] Barwick C.J. inclined to the view that the relevant 'act' was a composite one including both the wielding of the stick and its later impact.[70] Thus in his opinion D was exonerated by reliance on a defence of involuntariness, not accident. However, Barwick C.J. did not deny that an 'act' which is willed or

65 (1968) 119 C.L.R. 47 at p. 56.

66 Note also that in *Mamote-Kulang* Menzies J. abandoned his subjective interpretation of 'chance event' in favour of the objective test adopted in *Vallance*. See (1964) 111 C.L.R. at p. 72.

67 (1968) 119 C.L.R. 47 at p. 65.

68 Ibid, at p. 67.

69 Ibid, at p. 55.

70 Ibid, at p. 53.

intentional may bring about a consequence which is accidental. He clearly identifies the relevant 'event' in s. 13 (1), s. 23 as the consequence caused by D's actions. Barwick C.J. commented:[71]

> It is the consequences of the act or acts of the applicant so falling within the first part [of s. 13 (1), s. 23] to which, in my opinion, the second part of these sections is directed. I am unable to see that death as a consequence of such an act cannot be relevantly an event. In my opinion, an unintended, unforseeable fortuitous death which results from an act which is a willed act causally related to that death, may be an event which occurs by accident or chance.

These comments are, it is submitted, an implicit rejection of the 'supervening event' theory.

What then is the result of *Timbu Kolian*? Clearly, the excesses of the supervening event doctrine have now disappeared. According to the majority in *Timbu Kolian*, a supervening event is only required where there is a direct application of force intentionally applied by the accused to his victim and death results. As *Timbu Kolion* was not in this category the accident defence as defined in *Vallance* was successful. Secondly, there is a return in the judgments of Barwick C.J., Menzies and Windeyer JJ. to viewing accident as a test of foresight and foreseeability. Thirdly, there seems general agreement among those members of the High Court who considered accident in *Timbu Kolian* to regard the 'event' for the purposes of s. 23 and presumably s. 13 (1) as the inculpative consequence.[72] Fourthly, Windeyer J. is the only judge to recognise the fact that the defence of accident operates as a defence to all criminal charges and it is irrelevant that the 'event' arises from a lawful or an unlawful act.[73]

THE TASMANIAN POSITION

In Tasmania, only two cases in the early sixties, both decisions of Burbury C.J., have considered the accident defence in any detail. It is probably true to say that as a result of those decisions the accident defence has not been raised or discussed in any subsequent Tasmanian case. It is submitted that in both cases, *McDonald*[74] and *McCallum*,[75] Burbury C.J. misapplied and misunderstood the High Court decisions on accident.

In *McDonald*,[76] which was decided before *Timbu Kolian* but after *Mamote-Kulang*, the accused shot her husband from a distance of 10 ft., in the leg, with a shotgun. Her defence was that she did not realise the

71 Ibid, at p. 53.
72 Even Owen J., who supported and applied the 'supervening event' theory, appears to remain uncertain as to what is the 'event' referred to in s. 13 (1), (s. 23) because he said, at p. 71, '...whether the "event" of which the section speaks should be regarded as the death or as the actual impact of the blow which resulted in death, it would, in my opinion, have been one which occurred by accident...'
73 (1968) 119 C.L.R. 47 at p. 66.
74 [1966] Tas. S.R. 263.
75 [1969] Tas. S.R. 73.
76 [1966] Tas. S.R. 263.

gun was loaded. Her counsel raised the question of accident. Burbury C.J. dismissed accident on the basis of *Mamote-Kulang*. According to Burbury C.J. the High Court in that case,[77] 'explained and qualified what had been said in *Vallance's Case* about an event occurring by chance'. He said the High Court held by a majority that:[78]

> Where there is an intentional act by the accused, which by a chain of circumstances results in death, the accused can only exculpate herself on the grounds that death was caused by an event occurring by accident if in the chain of circumstances there has occurred some intervening event which by reason of the fact that it has occurred by accident, is something for which the accused ought not to be held responsible.

It should have been clear from *Vallance* and from an accurate reading of the judgments in *Mamote-Kulang* that this statement is inaccurate. If it was correct it would mean that in a factual situation, similar to *Timbu Kolian*, the defence of accident could not operate. As has already been pointed out, no question of causation arose in *Timbu Kolian*; the accused intentionally threw the stick which 'directly and immediately' caused the child's death. Nevertheless, accident was held to be a defence. What *Mamote-Kulang* decided or what *Timbu Kolian* said it decided was that a supervening occurrence would only be required where there was a direct application of force by the accused to the victim amounting to an assault in law. It is submitted that the facts of *McDonald* cannot be viewed in this light and the 'supervening event' theory should not have operated.

However, it would seem that even if accident had been left to the jury it would be most unlikely that the jury could say that the wounding of Mr. McDonald occurred by 'chance'. In his final direction to the jury Burbury C.J. told them that in order to convict Mrs. McDonald, they ought to be satisfied that she intended to discharge a loaded gun. It would seem obvious that if they were satisfied of that fact it would be impossible to say that the 'event (the wounding) occurred by chance'. After all, he was only standing 10 ft. from the position of the gun. Any reasonable jury, it is submitted, could not have been left in any doubt that if Mrs. McDonald intended to discharge a loaded firearm then she must have foreseen a wounding as a result of her actions.

In his judgment in *McDonald*, Burbury C.J. views accident as essentially a test of causation rather than foreseeability. While this is forgivable, taking *Mamote-Kulang* as a whole and remembering that *McDonald* was decided before *Timbu Kolian*, it is certainly unforgivable to describe Windeyer J.'s comments on causation in *Mamote-Kulang* as a,[79] 'very close analysis of the concept of an event occurring by accident'. As pointed out earlier, Windeyer J., in the passage cited by Burbury C.J.,[80] is in fact giving a correct and reasonably detailed account of the

77 Ibid, at p. 265.
78 Ibid, at p. 265.
79 Ibid, at p. 267.
80 *Supra* text at n. 46 *ff*.

principles of causation; he is not in this part of his judgment discussing the concept of an event occurring by accident.

However, the most important failing of Burbury C.J.'s decision in *McDonald* is not to realise the true nature of the decision in *Vallance*. As stated earlier the *ratio* of *Vallance* was that in relation to the crime of unlawful wounding it is necessary for the jury to be satisfied that the *accused foresaw the likelihood of wounding*.[81] The fact that the High Court disagreed with the Court of Criminal Appeal on the scope of the accident defence does not alter the fact that all the judges in the High Court regarded unlawful wounding as a crime that requires subjective recklessness. Burbury C.J. in *McDonald* failed to look at the section defining the crime to ascertain what it is that that section requires as far as the mental element for unlawful wounding is concerned and then to see whether the accident defence can have any independent operation. Clearly, in cases of unlawful wounding, if the test is subjective recklessness, the accident defence must be wholely irrelevant.

The only other case in which accident has been discussed was *McCallum*.[82] D had inserted a candle into his wife's vagina causing a rupture to the vagina wall. V died from infections caused by the wound and D was charged with manslaughter. There was evidence that V may have consented to the insertion of the candle. Burbury C.J. rejected the arguments, raised at the trial, that V's death occurred by chance. According to Burbury C.J. the internal injuries suffered by the deceased,[83] 'were caused directly and immediately by the act of the accused inserting the candle into his wife's vagina and those wounds caused her death'. Because it was a case of direct application of force a,[84] 'chance occurrence intervening between the accused's act and the death' was required. As there was no such supervening event the accident defence failed. This decision is open to the same objections put forward in relation to *McDonald*. *Timbu Kolian* clearly stated that before the 'supervening event' theory applies there has to be a direct application of force in the nature of the assault. It is difficult to view *McCallum* in this light. It is at least arguable that the act of inserting the candle was done with consent and could not have constituted an assault.[85] It was open to the jury to find that there was no intention on D's part to harm or

81 Author's emphasis.

82 [1969] Tas. S.R. 73.

83 Ibid, at p. 81.

84 Ibid, at p. 81.

85 However, the question of whether D's 'act' in inserting the candle was 'justified' or 'lawful' was not left to the jury. Burbury C.J. held that as a result of *Vallance* D becomes criminally responsible for unlawful wounding if his 'physical act' directly and immediately causes a wound; i.e. no mental element is prescribed for unlawful wounding. The fact that V may have consented to the insertion of the candle was irrelevant; D's 'act' became unlawful because of its consequences — the wounding, to which V did not consent. The wounding remained unlawful (assuming s. 53 (b) not be applicable) and the accused's act causing death remained unlawful. It has been argued in the article that the High Court in Vallance in fact required subjective recklessness for unlawful wounding. If this is correct Burbury C.J.'s reasons for deciding that D's act was unlawful was incorrect.

hurt his wife. The facts of *McCallum* cannot be considered in the same way as the facts in *Mamote-Kulang*, where the accused intended to harm his wife and death resulted because of an unforeseen circumstance.

It is certain, as a result of *Timbu Kolian*, that a supervening event is not required in every case. It is submitted that neither *McDonald* nor *McCallum* are cases where a discussion of the 'supervening event' theory is relevant. Of course there was no supervening event in either case. If there had been the accused would have been acquittd because it could not be said that he caused the wound or caused the death. Neither is it easy to see how the accident defence could have any independent operation in these two cases. In *McDonald*, the charge was unlawful wounding, where subjective recklessness is required. In *McCallum*, despite Burbury C.J.'s refusal to direct on accident, the direction subsequently given on 'unlawful act manslaughter'[86] supplies every advantage which the defence might have hoped to gain from the defence of accident. The jury in *McCallum* were instructed to convict if the insertion of the candle,

> was an act which was inherently dangerous in the sense that a reasonable man in the accused's situation, thrusting the candle into the vagina with the force he did, would have realised that he was exposing the woman to an appreciable danger of really serious injury.[87]

It is difficult to see how a jury could be satisfied of that in *McCallum*.

CONCLUSION

What then is the current Tasmania position? As a result of the decision in *Timbu-Kolian*[88] the 'supervening event' theory has all but disappeared. It may still be relevant in cases of manslaughter where the facts clearly show that D assaulted V intentionally and death resulted. In all other cases the test for accident is whether the 'event' was intended, foreseen, or reasonably foreseeable. However, as mentioned above, in most cases where the accident defence could realistically be raised the definition of the crime will operate to exclude the defence. The majority of crimes in the Tasmanian Code, either expressly[89] or by implication,[90] require the Crown to prove that D either intended the result of his conduct or foresaw it as likely, or that a reasonable man would have foreseen the result as likely. If that is the case and the test for accident is one of foreseeability then the defence could only have an independent operation in cases where the inculpative consequence does not require foreseeability. For example, in Tasmania, the Crown can establish man-

86 Section 156 (2) (c) of the Tasmanian Code provides that a homicide is culpable, and amounts to manslaughter, if it is caused, (c) 'by any unlawful act'.

87 [1969] Tas. S.R. 73 at p. 88.

88 (1968) 119 C.L.R. at p. 47.

89 *E.g.*, murder, under s. 157 (1) (a), is committed if there is 'an intention to cause the death of any person . . .'.

90 *E.g.*, unlawful wounding as a result of *Vallance* and manslaughter by 'any unlawful act'. See *supra* n. 86.

slaughter if they prove that D's act which caused death was 'commonly known to be likely to cause bodily harm';[91] there is no further *requirement* that V's death be foreseeable. In the appropriate factual situation, D may be excused from criminal responsibility if the jury is satisfied that the death, the relevant event, was 'unintended, unforeseen and unforeseeable'.

91 Section 156 (2) provides, 'Homicide is culpable when it is caused — (a) by an act intended to cause death or bodily harm or which is commonly known to be likely to cause death or bodily harm and which is not justified under the provisions of the Code.'