Council pointed out, (though the High Court somewhat more vigorously), affect the findings in some of the earlier cases:

> If some of the situations such as those in *Giles v. Walker* (Thistledown) and *Sparkes v. Osborne* (prickly pear) were to recur today, it is probable that they would not be decided without a balanced consideration of what could be expected of the particular occupier as compared with the consequences of inaction.[29]

CONCLUSION

Both Goodhart[30] and Noel[31] note and approve the general trend of courts from the traditional immunities of the landowners to a broader general duty of care in occupiers to prevent their land from becoming a source of danger to others. It is submitted that *Goldman v. Hargrave* is not breaking new ground in finding liability for the natural condition of land—though in basing the decision on negligence rather than the traditional forms of nuisance it may appear so. Rather, the decision gave the coup de grace to an ailing natural condition rule, in favour of that closer concern for one's neighbour who, in an increasingly complex and closely-populated society, is necessarily more than ever to be affected by one's acts or omissions.

M. E. STOCKWELL*

## R. v. SLEEP

*The Code defence of provocation is available in offences where assault is not necessarily an element of the offence charged.*

The decision of Hart J. in *Sleep*[1] to direct the jury that provocation could be a defence to manslaughter is illustrative of the difficulties which beset the interpretation of codes.

In ruling that the jury should consider that defences under sections 246 and 247 (provocation) and 248[2] were open to the accused, his Honour had to overcome an extremely imposing difficulty. Section 245 defines provocation for the purposes of section 246, and it pre-

29 Ibid.

30 Op. cit., n. 21, above.

31 Noel, *Nuisance from Land in its Natural Condition*, 56 HARV. L. REV. 772.

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1 [1966] Qd. R. 47.

2 The reference are not to the Queensland sections of the Code but to the Western Australian equivalents.

faces this definition with the words, 'the term "provocation" used with reference to offences of which assault is an element.' The question arises—is assault an element of manslaughter? If it is not, then the definition, and therefore section 246, would not apply to the offence of manslaughter at all.

The accused was charged with the unlawful killing of his wife. The evidence was that during an argument the deceased had brandished a bottle and a carving knife, and that he had hit her twice about the mouth and eyes. She did not die until sometime after this exchange, and there was evidence from which it can be inferred that the death was a result of accident. In the event, the jury acquitted.

Section 246 states that:

> A person is not criminally responsible for an assault committed upon a person who gives him provocation for the assault, if he is in fact deprived by the provocation of the power of self-control, and acts upon it on the sudden and before there is time for his passion to cool; provided that the force used is not disproportionate to the provocation, and is not intended, and is not such as is likely to cause death or grievous bodily harm.

His Honour was able to point to three early cases in which judges had directed juries that this section could be a defence to manslaughter: *Coupland*,[3] *Foxcroft*[4] *and Smeltzer*.[5] In more recent times Stanley J. has expressed a similar view: *Sabra Isa*,[6] *Herlihy*[7] and *Johnson*.[8] However, the weight of authority would appear to be against this view. In *Herlihy*,[9] Mansfield C.J. and Mack J. showed a reluctance to accept *Sabra Isa*, and there are several statements by Philp J. also to this effect.[10]

When section 245 refers to 'an offence of which an assault is an element,' in what sense does it use the term "element"? Is assault "an element" of the offence of manslaughter? There are two views of this matter.

The first approach concludes that assault is not an element of manslaughter. The definition of provocation in section 245 is applicable only to offences which, by definition, involve assault, i.e. offences of

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3 Brisbane Courier Reports, 28th May 1901.
4 Referred to in 5 Q.J.P. 129.
5 Ibid.
6 [1952] St. R. Qd. 269, 287.
7 [1956] St. R. Qd. 18, 49.
8 [1964] Qd. R. 1, 14.
9 [1956] St. R. Qd. 18, 66.
10 See Martyr, [1962] Qd. R. 398, 414; Johnson, [1964] Qd. R. 1, 5.

which one element that the prosecution must establish is assault. Assault is defined in section 222 in terms of lack of consent to the striking or threatened striking. There is no question of the prosecution having to establish lack of consent in a manslaughter case. In passing it may be remarked that two other consequences flow from this view: (a) provocation would not be open as a defence not only to manslaughter, but also to such offences as causing grievous bodily harm (s. 297) and unlawful wounding (s. 301), as assault is not an element of these offences; (b) the definition of provocation in section 245 could not apply to provocation reducing murder or wilful murder to manslaughter (s. 281). This would throw doubt on the West Australian view as stated in *Mehemet Ali*.[11]

The opposing view, which is at the basis of the reasoning of Hart J., was earlier proposed by Stanley J. in *Sabra Isa*.[12] 'The words "with reference to an offence of which assault is an element" relate to the actual circumstances of the particular matter being investigated by the tribunal.' The question is not whether assault is a necessary element of the charge, but whether in the particular case an assault is actually involved. His Honour advanced three reasons for adopting this interpretation: (i) the act of striking the blow is excused under section 246; this is the act which causes the death—so there is an excuse for an otherwise unlawful killing; (ii) the words in the proviso to section 246, viz., 'provided that the force used is not such as is likely to cause death or grievous bodily harm,' suggest that the mere fact that death ensues does not make the defence inapposite; (iii) the collocation of sections 246, 247 and 248.

The first line of argument involves the interlocking of various sections of the Code. Under section 270, killing is defined as 'causing the death.' Thus, section 268 can be read: 'It is unlawful to *cause the death* of any person unless such *causing of death* is authorized, justified or excused by law'. What caused the death is the striking of the blow, yet under section 246, the striking of the blow is excused. If the accused is not to be punished for the striking, then he is not to be punished for the causing of death.

This is in direct contrast to the opinion expressed by Philp A.C.J. in *Johnson*[13] where his Honour said:

> Certainly, so far as manslaughter is concerned, section 246 affords no exculpation since section 268 provides that 'all *killing* is un-

11 (1957) 59 W.A.L.R. 28.
12 [1952] St. R. Qd. 269.
13 [1964] Qd. R. 1, 5.

> lawful unless such killing is authorized justified or excused by law'. The fact that the assault which lead to the death was excused because it was provoked is immaterial.

From another aspect section 245 and the whole "element controversy" may not be relevant at all. Section 245 merely defines provocation. Section 246 does not refer to an "element of assault" or even an offence of assault, but to an *act* of assault. A great majority of manslaughter cases will involve an *act* of assault.

If this is not accepted, then the Philp J. approach is probably in better accord with ordinary principles of interpretation.

Hart J. dealt with the second and third points together. The first paragraphs of sections 246, 247 and the first paragraph of section 248 all have the same proviso: 'provided that the force is not intended and is not such as is likely to cause death or grievous bodily harm'. These words, he said, 'imply that if a defence is available, and the force used is not intended and is not such as is likely to cause death or grievous bodily harm, then the mere fact that death ensues does not make the defence irrelevant'.[14]

This result was reached by comparing the wording of section 248, paragraph two, ('may use any such force') with the wording of s. 248, paragraph one, ('may use such force'). His Honour held that there was insufficient difference in the wording to support the contention that in a situation where death does ensue, the defence is open under the second paragraph, yet not the first. It follows from the similarity in section 248 to that in sections 246 and 247 that those defences would be open too.

It is submitted that, where death results, if self-defence is a defence to manslaughter, then it logically follows that sections 246 and 247 are available in similar circumstances. But remembering that the prosecution conceded the relevance of section 248, the correctness of the premise is open to question.

An argument against this availability may be advanced viewing the Code in synthesis. The provisions dealing with the use of force may be classified into three groups:

(i) those authorizing use of reasonable force, but making no reference to the causing of death: e.g. section 231—executing process or making an arrest; (ii) those authorizing use of reasonable force, and specifically or by strong implication, authorizing causing of death: e.g. section 233—preventing escape from arrest where the fugitive is reasonably

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14 [1966] Qd. R. 47, 53.

suspected of having committed a crime punishable by death; (iii) those authorizing use of reasonable force, provided such force is not intended and is not such as is likely to cause death or grievous bodily harm. From this it could be argued that causing of death has been specifically authorized, but only in certain cases and in carefully defined circumstances (see sections 233, 235). The suggestion is that this is meant to be exhaustive of the situations in which causing of death is contemplated. The argument is very pertinent in the context of section 248 where, within the confines of the one section, causing of death is specifically authorized in one situation, but not in another.

Another conception of this aspect of the law is open. In all these sections, the use of reasonable force is authorized and it is arguable that, provided that the conditions upon the use of force are complied with, an unexpected and unintended result, the death, should not be visited upon the actor.

The writer finds difficulty in accepting that a man should be responsible for accidental results of a lawful act. But the difficulty here lies more with the *Mamote Kulang*[15] interpretation of section 23, which requires an "intervening event" which occurs by accident. Take the following hypothetical example: suppose *A,* in circumstances which would amount to provocation, strikes *B,* and *B* dies because the blow has accentuated a constitutional defect. *A* has no defence at all unless *Sleep* type reasoning is adopted.

It is further suggested that in view of the fact that provocation is relevant to wilful murder, to murder, and to assault, it is difficult to see why it should be excluded in matters such as manslaughter and unlawful wounding falling between assault and murder in the scale of offences.

The *Sleep* case highlights some of the defects in this area of the Griffith Code. It is submitted that, though Hart J.'s reasoning may not be the most appropriate, it is at very least sustainable. The writer suggests that the result is desirable and may contribute towards overcoming some of the difficulties caused by the interpretation of section 23. So far as Western Australian courts are concerned, should they adhere to the approach displayed in *Mehemet Ali,* they might well adopt the direction in *Sleep* as good law.

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15 (1964) 111 C.L.R. 63.

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