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Responsibility and Intervening Acts: What *"Maybin"* an Overbroad Approach to Causation

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Résumé de l'article

Souvent, une action criminelle entraînant la mort de la victime est clairement imputable à l'accusé. Dans de nombreux cas, il est facile de conclure que l'accusé a « causé » la mort de la victime. Toutefois, le lien de causalité devient particulièrement complexe lorsqu'un acte intermédiaire se produit entre la conduite initiale de l'accusé et la mort de la victime, ce qui crée des conjectures à savoir s'il est juste de blâmer moralement l'accusé pour le résultat qui a suivi. La Cour suprême du Canada, dans sa décision relativement récente dans l'affaire *R v Maybin*, tente de clarifier les notions liées à la causalité en droit pénal. Bien que la Cour ait refusé de modifier les principes classiques liés au lien de causalité, ou de créer un nouveau test afin de répertorier les situations dans lesquelles il peut être établi, la Cour a fourni deux outils analytiques qui peuvent être utilisés afin de déterminer quand il est juste de blâmer moralement l'accusé pour la mort de la victime, malgré l'occurrence d'un acte intermédiaire. Comme on le verra, même si ces outils d'analyse de la « prévisibilité raisonnable » et des « actes indépendants » servent à simplifier la théorie de la causalité, la manière dont ces outils ont été conçus pose de sérieux problèmes. Cet article met en lumière ces lacunes importantes, et ultimement, questionne dans quelle mesure ces développements de la théorie de la causalité ont une incidence sur les conceptions contemporaines de la *mens rea*.

Responsibility and Intervening Acts: What "*Maybin*" an Overbroad Approach to Causation

Terry Skolnik*

ABSTRACT

Oftentimes, a criminal action resulting in the victim's death is clearly attributable to the accused. In many cases, we can easily say that the accused "caused" the victim's death. Causation, however, becomes particularly complicated when some type of intervening act occurs between the accused's initial conduct and the victim's death, creating speculation about whether it is fair to morally blame the accused for the ensuing result. The Supreme Court of Canada's relatively recent decision R v Maybin *marks a significant attempt to clarify notions related to causation in the criminal law. Although the Court refused to alter conventional principles related to the law of causation, or create a new test to verify when it has been established, it provided two analytical tools which can be used in order to see when it is fair to morally blame the accused for the victim's death despite an intervening act's occurrence. As will be seen, although these analytical tools of "reasonable foreseeability" and "independent acts" serve to simplify the law of causation, there are important problems with how each tool has been conceptualized. This article highlights these important shortfalls, and ultimately, questions to what extent these developments in the law of causation affect current conceptions of* mens rea.

KEY-WORDS:

Causation, intervening act, novus actus interveniens.

RÉSUMÉ

Souvent, une action criminelle entraînant la mort de la victime est clairement imputable à l'accusé. Dans de nombreux cas, il est facile de conclure que l'accusé a « causé »

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la mort de la victime. Toutefois, le lien de causalité devient particulièrement complexe lorsqu'un acte intermédiaire se produit entre la conduite initiale de l'accusé et la mort de la victime, ce qui crée des conjectures à savoir s'il est juste de blâmer moralement l'accusé pour le résultat qui a suivi. La Cour suprême du Canada, dans sa décision relativement récente dans l'affaire R v Maybin*, tente de clarifier les notions liées à la causalité en droit pénal. Bien que la Cour ait refusé de modifier les principes classiques liés au lien de causalité, ou de créer un nouveau test afin de répertorier les situations dans lesquelles il peut être établi, la Cour a fourni deux outils analytiques qui peuvent être utilisés afin de déterminer quand il est juste de blâmer moralement l'accusé pour la mort de la victime, malgré l'occurrence d'un acte intermédiaire. Comme on le verra, même si ces outils d'analyse de la « prévisibilité raisonnable » et des « actes indépendants » servent à simplifier la théorie de la causalité, la manière dont ces outils ont été conçus pose de sérieux problèmes. Cet article met en lumière ces lacunes importantes, et ultimement, questionne dans quelle mesure ces développements de la théorie de la causalité ont une incidence sur les conceptions contemporaines de la* mens rea.

MOTS-CLÉS :

Causalité, acte intermédiaire, novus actus interveniens.

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INTRODUCTION

When can we fairly blame an accused for certain consequences despite the occurrence of an intervening act? The Supreme Court of Canada's relatively recent decision in *R v Maybin*[1] offers two analytical tools to assist courts in assessing when an accused can be fairly blamed for consequences: when the intervening act is reasonably foreseeable, *or*, when the intervening act is not truly independent. However, as will be discussed, there are several important problems related to both of these analytical tools.

Firstly, the facts giving rise to this decision in addition to the Supreme Court of Canada's judgment and reasoning will be canvassed. Afterwards, the principal problems related to the doctrine of reasonable foreseeability and independent acts will be examined. Ultimately, it will be shown that the concept of causation in Canadian criminal law has been expanded considerably.

I. FACTS

One night, at a crowded bar in Nanaimo, British Columbia, the victim affronted the accused by touching a pool ball situated on his table. In response, the accused (Timothy Maybin) grabbed the victim and punched him several times in the face and head. The co-accused (Timothy's brother: Matthew Maybin) then also punched the victim several times. The victim did not defend himself and then staggered

1. 2012 SCC 24, [2012] 2 SCR 30 [*Maybin*].

and fell unconscious onto a pool table. The bar's bouncer arrived, and asked who started the fight. When a patron pointed at the unconscious victim, the bouncer forcefully hit the victim in the back of the head. Both assaults took place within a minute and the victim died as a result of a brain haemorrhage.

The trial judge acquitted the Maybin brothers and the bouncer because he was not satisfied beyond a reasonable doubt that either of the assaults was the only cause or a sufficiently contributing cause of death, thus acquitting all three of manslaughter.

A majority judgment of the BC Court of Appeal reversed the decision. Although the quorum concluded that although factual causation had been proven, the majority and dissenting opinions disagreed as to the issue of legal causation. The majority concluded that an intervening act was reasonably foreseeable and thus, legal causation was established. The dissenting opinion, on the other hand, would have acquitted the brothers of manslaughter because it viewed the assault as an "intervening act," severing the causal chain. As a result, the Maybin brothers were ordered to stand a new trial and dismissed the appeal concerning the bouncer's acquittal.

At issue before the Supreme Court of Canada was whether the causal chain had indeed been severed by the intervening act of the bouncer's assault, and therefore, the Maybin brothers ought to be acquitted of manslaughter.

II. UNANIMOUS DECISION OF THE COURT (PER: KARAKASTANIS, LEBEL, FISH, ABELLA, ROTHSTEIN, CROMWELL AND MOLDAVER JJ CONCURRING)

The Supreme Court of Canada took the opportunity to clarify certain distinctions between issues of (A) *factual* and (B) *legal* causation when examining when it is appropriate to hold the accused criminally accountable for the victim's death by manslaughter.[2]

2. For issues of causation related to accusations of murder, see *R v Harbottle*, [1993] 3 SCR 306.

A. Factual Causation

The first inquiry concerns the issue of *factual* causation: whether the victim would have died were it not for the act of the accused?[3] The Supreme Court confirmed the previous decisions of *Smithers v R*[4] and *R v Nette*,[5] notably that factual causation is "an inquiry about how the victim came to his or her death, in a medical, mechanical, or physical sense, and with the contribution of the accused to that result."[6]

The issue of factual causation is an inclusive inquiry[7] which recognizes that there can be several contributing causes to the victim's death.[8] The accused actions are not required to be the sole cause of the victim's death. Nor must the accused's action have to be the immediate, direct, or most significant cause of the victim's death.[9] Rather, in order for factual causation to be established, it must be established that the victim would not have died "but for" the actions of the accused.[10] Because the victim would not have died "but for" the Maybin brothers' assault, the Court concluded that factual causation had indeed been established. Once factual causation is established, the court must then examine the secondary issue of legal causation.[11]

B. Legal Causation

The second inquiry concerns the issue of *legal causation*; even though the victim would not have died "but for" the accused's actions, is it still fair or appropriate to hold the accused legally accountable for the victim's death given the circumstances? In other words, is it fair to attribute the consequence of death to the accused's actions given the circumstances, or would it amount to punishing a person who is morally innocent of causing the consequences?[12]

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3. *Maybin*, *supra* note 1 at para 15.
4. [1978] 1 SCR 506 [*Smithers*].
5. 2001 SCC 78, [2001] 3 SCR 488 [*Nette*].
6. *Ibid* at para 44.
7. *Maybin*, *supra* note 1 at para 15.
8. *Ibid* at para 14.
9. *Ibid* at para 20.
10. *Ibid* at para 15.
11. *Nette*, *supra* note 5 at para 44. Conversely, where factual causation is not established, the accused ought to be acquitted of the resulting offence.
12. *Maybin*, *supra* note 1 at para 29.

In order for legal causation to be established, the accused's actions must have contributed significantly to the victim's death.[13] Where the cause of death is clearly the accused's action, legal causation is not an issue.[14] However, examining legal causation becomes paramount in situations where there is an intervening act between the accused's initial unlawful actions against the victim and the latter's death. In the case at hand, the inquiry assessed whether the bouncer's attack on the unconscious victim severed the causal chain.[15] Thus, as the Court explained, the impact of the intervening act on the accused's liability is assessed in the optic of legal causation, not factual causation. Whereas factual causation is an *inclusive* inquiry which examines what factually contributed to the victim's death, legal causation examines whether certain intervening acts ought to *exclude* the accused's criminal liability for manslaughter,[16] notably, because it would be unfair to hold him morally responsible for the death due to an intervening act which severs causation.

Despite the inherent difficulty of assessing whether legal causation has been met where an intervening act occurred, the Court refused to create a new or determinative legal test aimed at establishing causation. Rather, it held that two analytical tools could be used in assessing whether the accused significantly contributed to the victim's death in the presence of an intervening act, or rather, whether the chain of causation had been severed. The two tools are: (1) whether an intervening act was reasonably foreseeable, or (2) when the intervening act was independent.

1. Intervening acts which are not reasonably foreseeable

The Court held that intervening acts which are reasonably foreseeable will not usually break the chain of causation. It is fair to attribute the victim's death to the accused where it was reasonably foreseeable that another act may intervene, causing the victim's death. The precise consequences of the intervening act did not have to be reasonably foreseeable. Rather, the Court concluded that the general nature of the intervening act coupled with a risk of non-trivial and objectively foreseeable harm at the time of the initial act is sufficient

13. *Ibid* at para 5.
14. *Smithers*, *supra* note 4 at 518.
15. As well as in cases of omissions liability resulting in the death of the victim.
16. *Maybin*, *supra* note 1 at paras 15-16.

to maintain causation.[17] In other words, the specific intervening act (the bouncer punching the unconscious victim) did not have to be reasonably foreseeable.

The Court also explained that the reasonable foreseeability analytical tool used to establish legal causation is consistent with the constitutionally required *mens rea* for manslaughter. Although both require an objective foreseeability of the risk of bodily harm,[18] there is a significant difference between the two concepts. On one hand, the *mens rea* requirement for homicide established in *R v Creighton*[19] concerns the state of mind and the degree of moral fault of the accused. In manslaughter cases, the constitutional minimum standard is the objective foreseeability of a risk of non-trivial bodily harm.

On the other hand, legal causation involves "the connection (or independence) between the actions of the individuals and the effect of those actions,"[20] is "based on concepts of moral responsibility,"[21] and "with the question of whether the accused person should be held responsible in law for the death that occurred."[22] Because merely requiring the objectively foreseeable risk of non-trivial bodily harm would create a redundancy with the pre-existing *mens rea* requirement, the Court also stated that the general nature of the intervening act must also be reasonably foreseeable.[23]

Because the fight took place in a bar, it was reasonably foreseeable that the bar staff or a patron would intervene with an accompanying risk of non-trivial harm to the victim. The Court also noted that where the intervening act is a natural event (such as the victim being assaulted and left unconscious on a beach, the rising tide later drowning him[24]), the reasonable foreseeability test is more appropriate than the doctrine of independent intervening acts, which I turn to now.

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17. *Maybin*, *supra* note 1 at para 34.

18. *R v Creighton*, [1993] 3 SCR 3 at 44-45 [*Creighton*] and *Maybin*, *supra* note 1 at para 38 respectively.

19. *Creighton*, *supra* note 18.

20. *Maybin*, *supra* note 1 at para 55.

21. *Nette, supra* note 5 at para 83.

22. *Ibid* at para 45.

23. *Maybin, supra* note 1 at paras 36-38.

24. *R v Hallett*, [1969] SASR 141 (Supreme Court of South Australia) [*Hallett*].

2. Independent intervening acts

The second analytical tool that can be used to assess whether it would be unfair to hold the accused responsible for the victim's death concerns the independence of the intervening act. In some cases, even though the accused contributed to the victim's death, the consequence of death should not be attributed to him because of some overriding independent act which severs causation. This doctrine of independent acts involves looking backwards from the moment of death, and then examining the relative weight of the respective causes.[25]

The Court explained that the doctrine of independent acts is more suited to situations in which the intervening act is that of a third party exercising his or her free will. This is justified by the idea that the intervening party's action commences a new causal chain,[26] thus replacing the original actor, and breaking the moral chain between the initial actor and the consequences.[27] Exceptions to this rule are situations where causality is established by the *Criminal Code* provisions. For example, where the victim dies following improper treatment applied in good faith[28] or where death could have been prevented by resorting to proper means,[29] legal causation is still established, and the consequence of death deemed fairly attributable to the accused.

III. DISCUSSION

The Court's framework for intervening acts in *Maybin* provides two useful analytical tools which help assess the subsistence of legal causation, with the purpose of ensuring that the criminal law avoids blaming the morally innocent. There are, however, several confusing and illogical points related to how legal causation is currently examined. Problems with the analytical tool of "reasonable foreseeability" are canvassed, followed by an analysis of certain issues related to the doctrine of independent acts.

25. *Maybin*, *supra* note 1 at para 46.
26. *Ibid* at para 51.
27. Glanville Williams, "*Finis* for *Novus Actus*?" (1989) 48:3 Cambridge LJ 391 at 392.
28. *Criminal Code*, RSC 1985, c C-46, s 225.
29. *Ibid*, s 224.

A. Reasonable foreseeability: Only the general nature of the intervening act with non-trivial risk of bodily harm is required

With respect to the analytical tool of reasonable foreseeability, the accused is still culpable where the general nature of the intervening act, coupled with the non-trivial risk of bodily harm was foreseeable. The following key passage from *Maybin* illustrates this idea:

> Legal causation does not require that the accused must objectively foresee the precise future consequences of their conduct. Nor does it assist in addressing moral culpability to require merely that the risk of some non-trivial bodily harm is reasonably foreseeable. Rather, the intervening acts and the ensuing non-trivial harm must be reasonably foreseeable in the sense that the acts and the harm that actually transpired flowed reasonably from the conduct of the appellants.[30]

This means that it was not necessary for the Maybin brothers to foresee precisely how the bouncer would intervene, notably, by punching an unconscious and non-threatening victim in the back of the head. Rather, it is sufficient to hold them culpable for manslaughter if it was reasonably foreseeable that *somebody* would intervene, be it bar staff, patrons, or somebody else, and the violence would continue or escalate, in that such actions flow from the accused's initial assault. There are four issues surrounding this notion.

1. In some cases, the precise nature of the intervening act can be morally relevant

Firstly, in some circumstances, the precise act by the third party can be so outlandish and surprising that it would seem unfair to hold the accused morally blameworthy for the consequence. The facts in *Maybin* are illustrative, because the bouncer (who, presumably, is hired to ensure the safety of patrons) punched an unconscious victim in the back of the head. However, the current tool of reasonable foreseeability ignores the precise type of intervening act, so long as it does not "overwhelm the original actions."[31]

30. *Maybin*, *supra* note 1 at para 38.
31. *Ibid* at para 57.

As Professor Rankin points out, it is illogical that the type of harm inflicted by the third party against the victim is generally immaterial. After all, what if the bouncer took out a knife and stabbed the unconscious victim, or took out a gun and assassinated the unconscious victim by shooting him in the back of the head?[32] Surely, it is illogical to ignore this fact in assessing whether or not it is fair to hold the accused morally accountable for the consequence. Even if we can argue that a stabbing or shooting by the bouncer would overwhelm the initial assault by the Maybin brothers, how is it that a violent, closed fisted punch to the back of the head of an unconscious victim did not? It would seem that the bar for what constitutes an overwhelming act severing causation has been set remarkably high.

Or consider another hypothetical example which further illustrates this point. What if the paramedics arrived on scene prior to the bouncer's assault and took the victim away in the ambulance. Suppose that one of the paramedics, once in the ambulance, recognizing the victim as his sworn enemy, took advantage of the occasion to punch the unconscious victim in the back of the head. In such a case, are we truly to consider only the general nature of the intervening act (that the paramedic would intervene) with an accompanying risk of harm, while completely ignoring that the paramedic intervened by punching the victim rather than applying some type of treatment in good faith?

It seems difficult to support the proposition that the precise nature of the intervening act is irrelevant so long as it does not overwhelm the accused's original act.

2. In some cases, the identity of the intervening actor is morally relevant

The paramedic example highlights the second problem with the current notion of reasonable foreseeability, notably in that it ignores the identity of the intervening party. Once again, although it is arguably reasonably foreseeable that patrons could intervene in a bar fight (especially if they have some type of friendship with or tie to the brothers), it seems bizarre that we ought to ignore the fact that the bouncer was the intervening party. Suppose police officers had walked in prior to the bouncer's intervention, and had been the ones to punch

32. Micah B Rankin, "R. v. Maybin: A Sweeping Test of Accountability or a Standardless Sweep?" *The Court*, 6 June 2012.

the victim in the back of the head, or violently throw him on the floor, head first, while arresting him? Or what if the intervening party was a priest, referee, or some other type of individual whose role is to mediate conflict rather than engage in it? How is the fact that the intervening party's mandate is to ensure safety and prevent violence morally irrelevant, especially, until it meets the high threshold of "overwhelming the initial actions"? Once again, it seems curious to ignore the fact that the role of the intervening party is to prevent harm in the assessment of the accused's culpability in the presence of an intervening act.

3. The accused is not responsible for the consequences of new causal chains

The Maybin brothers have absolutely no control over the bouncer's conduct. The bouncer's determination of how to conduct himself is entirely within his own jurisdiction. In that respect, his conduct is largely a matter of moral luck, over which the accused have little to no control.

More importantly, intervening acts, such as the bouncer's assault, necessarily create new causal chains, the results of which the accused is not responsible for.[33] As Williams states:

> A person is primarily responsible for what he himself does. He is not responsible, not blameworthy, for what other people do. The fact that his own conduct, rightful or wrongful, provided the back-ground for a subsequent voluntary and wrong act by another does not make him responsible for it. What he does may be a but-for cause of the injurious act, but he did not do it. His conduct is not an imputable cause of it. Only the later actor, the doer of the act that intervenes between the first act and the result, the final wielder of human autonomy in the matter, bears responsibility (along with his accomplices) for the result that ensues.[34]

The Supreme Court, however, counters Williams' contention. In their view, though intervening acts create new causal chains, there are situations by which the *Criminal Code* fairly attributes the consequences of death to the accused in spite of this. The Court provides two examples.

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33. Although one can argue that he may be responsible in the sense that he provokes them.
34. Williams, *supra* note 27 at 391.

Firstly: in the case of treatment applied in good faith where the victim dies, the *Criminal Code* holds the accused fairly responsible for the consequence. In such a case, an act applied in good faith, which either fails to improve the victim's health or makes it worse. The moral importance of this section is that the act is applied in good faith, in a positive manner to improve the health of the victim.

Secondly, where recourse to proper medical treatment would have saved the victim's life even though the latter dies, the *Criminal Code* holds that the death of the victim can properly be ascribed to the accused. In this case, an act exercised through the autonomy of the victim, once again in good faith, or, where treatment was in some way unavailable, leads to the latter's death. In both cases, a means to positively improve the victim's situation becomes unavailable, and the latter dies. A positive action to improve the victim's health is either barred by circumstance, or the victim's autonomy.

The Court is correct to say that the legislator has provided for such situations, which fairly hold the accused responsible for consequences despite apparent intervening acts. Yet there are two problems in stating that the existence of these provisions opens the door to holding the accused responsible for the conduct of an independent third party.

Firstly, though the legislator has created situations in which consequences are fairly attributed to the accused it is less clear how or why this notion is then transposed into the common law to trump William's assertion.

Secondly, there is an obvious moral difference between these two *Criminal Code* provisions and the situation and the facts in *Maybin*, which the Court overlooks. The aforementioned *Criminal Code* provisions maintain causality where there is a failure to improve the victim's situation, or some type of act applied in good faith which fails to save the victim, or results in the victim's death. In either case, some type of positive action to improve the victim's situation was unavailable or failed, resulting in his death. Both situations exist under the backdrop of some type of good faith.

The bouncer's action, however, was not a failure to improve, nor was it an act applied in good faith. It was the complete opposite. It was an act undertaken with the goal to harm, to make the victim's situation worse. Though the bouncer stated that he punched the victim in order

to maintain control in the bar,[35] it was an act that either killed a victim that would have died anyways, or an act that killed a victim who would not have died. It was not an omission which resulted in the victim's death or some type of situation which rendered aid unavailable. There is a significant moral difference between the *Criminal Code* provisions which establish causality even where intermediate acts are present, and claiming that William's proposition about the creation of new causal chains fails. It is very difficult to justify that the Maybin brothers are in some way responsible for the bouncer's preposterous reaction to the fight especially when they had such little control over it, and when they in no way encouraged or sought his aid in further brutalizing the victim.

4. Reasonable foreseeability must be interpreted overly widely in order to coalesce with the doctrine of independent acts

These aforementioned concerns segue into the final problem with the reasonable foreseeability test as it is currently construed, notably, that the test is too wide in its application. In most cases, where there are intervening acts, both the reasonable foreseeability test and the independent act test ought to produce the same result. For example, in *R v Hallett*,[36] where an unconscious victim was left on a beach, and was later drowned by the tide, the rising of the tide was reasonably foreseeable and the act was not so independent as to rupture the causal chain (though the causal chain would have been broken had the accused been left in a safe position and an earthquake triggered a tidal wave, killing the victim[37]).

However, in cases where the precise nature of the intervening act is extremely unlikely (as it is in *Maybin*) the reasonable foreseeability test must be interpreted overly widely in order to maintain consistency with the "independent act" doctrine. This is especially true because there are only two analytical tools, and to be useful, they should not produce conflicting results. One tool should not determine that the intervening act was reasonably foreseeable while the other maintains that it was too weighty an independent act to justify morally attributing the consequences to the actor.

35. *Maybin*, *supra* note 1 at para 42.
36. *Hallett*, *supra* note 24.
37. *Ibid* at 150.

B. The doctrine of independent acts for voluntarily willed actions

1. Sweeping application of the doctrine of independent acts in certain contexts

Thus far, it has been demonstrated that the doctrine of reasonable foreseeability of intervening acts has been very widely construed. The same deficiency exists for the doctrine of independent acts. The following key passages concerning the Supreme Courts assessment of the accused's culpability illustrates this idea:

> What then, is the nature and degree of independence that may absolve the original actors of legal responsibility for the consequences of their actions? Turning to this case, was the act of the bouncer *so independent of the actions of the appellants that his act should be regarded in law as the sole cause of the victim's death to the exclusion of the acts of the appellants?*[38]

In order for the original actor to be absolved of liability of the victim's death, the Court requires the intervening act to be truly independent in the sense that it and it alone, *solely* caused the victim's death, thereby overwhelming the original actor's conduct. This casts a very wide net in the assessment of the original actor's culpability, who risks being morally blamed for the victim's death unless the intervening act is entirely responsible for its occurrence. Certain contexts come to mind which creates problems for this account of culpability.

Consider situations in which different actors forming a group have some type of informal mutual obligation to protect one another (for example: family members). In such situations, it is nearly always reasonably foreseeable that family members will intervene to protect the original actor in dangerous situations. Under the optic of reasonable foreseeability, the intervention of other family members is necessarily reasonably foreseeable due to the group's social structure, which essentially boils down manslaughter culpability to a status-type offence in such contexts.

Under the optic of the doctrine of independent acts, the accused can be convicted absent an "overwhelming" act of another person which must be solely responsible for the death (such as a third party shooting the victim after the original actor merely pushed the victim).

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38. *Maybin*, *supra* note 1 at para 53 [emphasis added].

The bizarre problem with such an assessment of culpability shifts all of the focus *away* from the accused's actions to factors beyond the accused's control, such as: (i) the time between the accused's action and the intervention of others; (ii) the setting; and (iii) the severity of the actions of other autonomous agents.

In such group contexts, both tools seem to warrant an inappropriate automatic determination of attributive responsibility for the original actor.

2. Independent acts which are not the products of free will

One innovation of the *Maybin* decision is that it guides trial judges as to the appropriate analytical tool to use in the presence of intervening acts, depending on the source of the intervening act:

> When the intervening acts are natural events, they are more closely tied to the theory of foreseeability, and the courts ask whether the event was "extraordinary", as in *Hallett*. When the intervening acts are those of a person, exercising his or her free will, the focus is often on the independence of the actions.[39]

Although this guidance is important and also offers a degree of predictability in the presence of intervening acts, there are several shortcomings of this bifurcated approach.

As we have seen, Williams argues that intervening acts create new causal chains in which only the subsequent actor is responsible for his conduct.[40] Yet the doctrine of independent acts is privileged where the intervening act is a person exercising his free will. Unless the intervening act overwhelms the accused's original conduct (and a punch delivered in the back of the head of an unconscious victim was deemed not to overwhelm the accused's actions) the consequence can fairly be attributed to him.

In *Maybin*, the factual context squares nicely with the concept of free will, especially for those who support choice theories of culpability. It can be successfully argued that the bouncer willed the punch delivered to the back of the victim's head in the sense that it was not an inadvertent careless accident by the bouncer. In circumstances as clear

39. *Ibid* at para 50.

40. Williams, *supra* note 27 at 392-93.

as the *Maybin* decision, though the precise act by the intervening actor may be extremely unorthodox given the circumstances, we can maintain at the very least that the act was chosen in the sense that it was a product of his will.

Yet there are a host of murky situations where it is unclear whether the intervening act is a "natural event" (in the sense of the tide rising in *Hallett*) or "a person exercising his free will" (in the sense of the bouncer's assault in *Maybin*). Negligence cases are a prime example.

In such cases, the culpability of the actor lies not in accepting an unreasonable risk, or purposely willing some action, but rather in having failed to advert to a risk. The actor is culpable for failing to appreciate and avoid a risk of which he ought to have been aware. In such cases, the actor cannot be said to make a "choice," and we have difficulty accounting for how negligence is in any sense chosen.[41] This is why choice theorists frequently consider negligence to be an exception to choice theory, or rather, look to notions of capacity to appreciate risk and opportunity to avoid its materialization.[42]

Consider the example of *R v Sinclair*,[43] in which the accused beat the victim and left him on the side of the road, only to be crushed by a passing motorist. How are we to qualify the conduct of the passing motorist? It seems awkward to classify the motorist's conduct as "willed" in the sense that the bouncer's assault on the victim was. It seems equally strange that the event ought to be classified as "natural" in the sense of a rising tide, or some other natural occurrence. In such a case, reasonable foreseeability seems to be more suitable than neither the doctrine of intervening acts, despite the intervening act being neither "natural" nor "the product of a willed action".

3. *Difficulty in determining whether the* Criminal Code *provisions or analytical tools should apply*

Some situations create confusion as to whether the *Criminal Code* provisions or rather the analytical tools in *Maybin* should apply. Suppose the paramedics had arrived prior to the bouncer's assault, yet while transporting the victim to the hospital, the paramedic suffered

41. Antony Duff, "Choice, Character, and Criminal Liability" (1993) 12:4 Law & Phil 345 at 349.
42. Michael S Moore, "Choice, Character, and Excuse" (1990) 7 Soc Phil & Pol'y 29 at 56-57.
43. 2009 MBCA 71, 240 Man R (2d) 135.

a stroke or heart attack. The ambulance then gets into a minor crash, killing the victim. Or, to offer another twist, suppose the ambulance driver negligently drove through a red light, getting into a *minor* crash, killing the victim.

In both cases, it seems quite a stretch to claim that transporting the victim to the hospital is some type of treatment applied in good faith, thus justifying causality in conformity with section 225 of the *Criminal Code*. After all, is ambulance transportation some type of good faith treatment in the same sense as a surgery or faulty CPR technique, resulting in the victim's death? It would seem that the section ought to apply to cases where the treatment causes the death, rather than death happens during transportation towards treatment, or death occurs as a side effect of transportation and treatment.

Or perhaps, we can claim that causality is maintained, as death could have been prevented by resorting to proper means in conformity with section 224 of the *Criminal Code*,[44] though those means never had the chance to obtain. Yet this would seem to stretch the meaning of this section, making it widely over-inclusive, by confusing the ends (treatment of the victim) with the means (bringing the victim to the hospital to be treated).

Or, was the intervening act reasonably foreseeable? After all, we do not need to prove the precise nature of the intervening act (the paramedic's heart attack or stroke, or the car accident), but rather than the paramedics intervention was reasonably foreseeable and came with an accompanying risk of non-trivial bodily harm. Yet once again, we are met with the issue of how overwhelming the heart attack or negligent driving was.

CONCLUSION

The Supreme Court's decision in *Maybin* is commendable in that it provides important principles related to intervening acts and causation. By giving guidance as to appropriate analytical tools, in addition to contexts in which such tools should apply, the doctrine of *novus actus interveniens* has been simplified. However, there remain

44. *Criminal Code*, *supra* note 28, s 224.

important deficiencies with respect to the analytical tools of reasonable foreseeability and independent acts which I have exposed and which result in a considerable expansion of the doctrine of causation.

This is apparent with the Court's description of the analytical tool of reasonable foreseeability; especially concerning how high the bar has been set with respect to which intervening acts will "overwhelm" the accused's actions. As for the analytical tool of independent acts, the bar has perhaps been set even higher, in that the actor will only be absolved if the intervening act can be considered the sole cause of the victim's death, thereby excluding the former's liability.

Finally, though *Maybin* has further demarcated the distinction between *mens rea* and causation in the context of manslaughter offences, little tempering of the strictness of the *Creighton* has occurred. Even by requiring that in the context of the reasonable foreseeability test, the supplemental element of the general nature of the intervening act be reasonably foreseeable, the distinction is largely illusory. The nature of the intervening act can be so very general in nature, the intervening act can be outlandish yet not deemed overwhelming, or the *novus actus* can be the significant yet not sole cause, thereby all acting as counter forces which will prevent the accused's liability from being absolved despite an intervening act. It would thus seem that despite an attempt to widen the gap between *mens rea* and causation since *Creighton*, the gulf between the two has in fact been narrowed, while the causality net has been cast more widely.