Causation, Fault and the Concurrence Principle

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There is a basic principle of criminal law which states that the fault element (or *mens rea*) must coincide in point of time with the conduct element (or *actus reus*) in order for a defendant to be guilty of an offence.[1] This principle will be called the concurrence principle following Lord Kenyon CJ's statement in *Fowler v Padget* that "the intent and the act must both concur to constitute a crime".[2] The principle is seldom a contentious issue in the vast majority of cases which come before our courts. However, a few instances have arisen in the case law where the principle has been strained or else circumvented in order to achieve what the courts considered to be the correct result. Since these instances have invariably been cases of culpable homicide, it is appropriate for the ensuing discussion to be placed in the context of murder and manslaughter although the propositions which emerge from the discussion may well be of wider application.

A typical example of an instance when the concurrence principle has not been strictly met is of the defendant (D) who mistakenly believes that he or she has done an act which has killed the victim (V) and disposes of the supposed corpse in a way which causes V's death. The difficulty with such a case is that culpable homicide may not have been committed in respect of the initial act because there was no death, nor might it have been committed in relation to the later act since D then lacked the requisite fault element as he or she believed V to be dead already.

The best known instance is the Privy Council case of *Thabo Meli v The Queen*[3] which was an appeal from the High Court of Basotholand. The appellants acted under a preconceived plan first to kill V and then make the death look like an accident. They invited V to a drinking party, got him partially intoxicated and struck him on the head with the intention to kill. Believing V to be dead, they rolled him over a low cliff and faked the scene to resemble an accident. The autopsy revealed that V did not die from the head injury but from exposure. The appellants argued that there was no murder because, first, the blows, though inflicted with intent to kill, did not kill and, secondly, the later act which did kill was done in the belief that it was done to a corpse and so was not accompanied by a murderous intent. In other words, they claimed that they should be acquitted

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1 A Simester and W Brookbanks, *Principles of Criminal Law* (Auckland: Brookers, 1998), 112-113; A Ashworth, *Principles of Criminal Law* (Oxford: OUP, 3rd ed 1999), 94, 163-165; G Sullivan, "Cause and the Contemporaneity of *Actus Reus* and *Mens Rea*" (1993) 52 *Cambridge Law Journal* 487; G Marston, "Contemporaneity of act and intention in crimes" (1970) 86 *Law Quarterly Review* 208; AR White, "The identity and time of the actus reus" (1977) *Criminal Law Review* 148.

2 1798 TR 509 at 514. See also *R v Jakeman* (1983) 76 Cr App R 223; *R v Scott* (1967) VR 276; *R v Meyers* (1997) 71 ALJR 1488.

3 [1954] 1 All ER 373; [1954] 1 WLR 228.

of murder because the concurrence principle had not been met. The Privy Council answered this argument in the following terms:

> It appears to their Lordships impossible to divide up what was really one transaction in this way. There is no doubt that the accused set out to do all these acts in order to achieve their plan and as parts of their plan; and it is much too refined a ground of judgment to say that, because they were under a misapprehension at one stage and thought that their guilty purpose had been achieved before in fact it was achieved, therefore they are to escape the penalties of the law.[4]

They accordingly upheld the appellants' convictions for murder.

This article critically evaluates the two approaches taken by the New Zealand courts which have dealt with cases akin to *Thabo Meli*. The first approach is what I have described as the causation based approach because it relies heavily on rules of causation, while the second is described as the fault based approach because its primary focus is on the fault of the accused. I shall contend that, although the causation based approach should be relied upon in the first instance, there may be cases where that approach is inapplicable or else inappropriate. The second approach based on fault is advocated as the better method of resolving these cases. To date, the New Zealand courts have not had occasion to apply this latter approach primarily on account of the very narrow limits in which it has been cast by the Court of Appeal in *R v Ramsay*.[5] I shall argue against these limitations and suggest that the fault based approach deserves to be more widely applied in cases where satisfying the concurrence principle is a problem.

The Causation based Approach

This approach seeks to resolve the issue posed by cases like *Thabo Meli* by regarding D's initial act as a cause (both factual and legal[6]) of V's death. As the initial act was performed with the requisite fault element, there is no further problem and D is guilty of murder or manslaughter as the case may be. A subsequent act may also have been a cause of death but this is not an obstacle to criminal liability since the law recognises that there may be more than one cause. Thus, under this approach, it is unnecessary to establish a causal linkage between the initial act and subsequent acts.

A case where this approach was applied in relation to a murder charge was the Court of Appeal decision in *R v McKinnon*.[7] D had struck V's head with a piece of fence paling rendering him unconscious, and had subsequently dragged him to a telephone box and left him there. The evidence of the pathologist was

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4 [1954] 1 All ER 373 at 374; [1954] 1 WLR 228 at 230 per Lord Reid, delivering the judgment of the court. The All England Reports uses the expression 'one series of acts' instead of 'one transaction'.

5 [1967] NZLR 1005.

6 See *Royall v The Queen* (1991) 172 CLR 378 at 440 referring to E Colvin, "Causation in Criminal Law" (1989) 1 *Bond Law Review* 253 at 254-258.

7 [1980] 2 NZLR 31.

that V had suffered a minor injury to the nose which resulted in bleeding. Because V was unconscious the blood which he inhaled caused his death by drowning. The court held that the concurrence principle had been met because the blow to the head was still an operating and a substantial cause of death at the time when V died in consequence of inhaling his own blood from the nose injury.[8] The court supported its finding by citing the following view expressed by Sir Francis Adams, an experienced judge and distinguished criminal law commentator, that the decision in *Thabo Meli* could have been resolved by this type of approach based on causation:

> In *Thabo Meli's* case, the real cause of death was not the mere act of leaving the victim where he lay. But for the injuries previously inflicted he could have walked away; and what really killed him was the fact that those injuries rendered him incapable of escaping from exposure to the cold.[9]

Another instance where the Court of Appeal has relied on this approach but in relation to a charge of manslaughter is *R v Manuel and Grant*.[10] The appellants had met V in an hotel and, on V's invitation, had gone to his house. They then drove to a deserted car park where Grant viciously assaulted V rendering him completely incapacitated and drifting in and out of consciousness. Some hours later, the appellants drove V to a river where they left him in the water. V died by drowning. At the trial, the appellants admitted the substance of the facts but did not unequivocally admit that they were aware that V was alive when they placed him in the water. The Court of Appeal upheld their manslaughter conviction upon finding that:

> There is no room for dispute that the beating administered at the car park which led to the victim becoming unconscious played a causative part in his death by drowning. Thus if the jury were satisfied that at the time of the car park incident Grant had the requisite intent then the assault being causatively linked with the victim's death nothing further was required.[11]

From these two case examples, it can be observed that the causation based approach satisfies the concurrence principle without straining the principle in any way. The approach finds D guilty of murder or manslaughter on the basis that her or his initial act was itself a substantial cause of V's death. The concurrence principle is satisfied so long as that act was done with the requisite fault element, and D is guilty of the offence charged even though some later act was also found to have been a substantial cause of death.

Simple as this approach might seem both in terms of its expression and application, there is every danger of misapplying it as the Court of Appeal appears to have done in *R v Chignell*.[12] V had attended a bondage and discipline

8 *Ibid.* at 36 per Richmond P, delivering the judgment of the court.

9 "Homicide and the supposed corpse" (1968) 1 *Otago Law Review* 278 at 287.

10 Court of Appeal; Cooke, Somers and Eichelbaum JJ, 10 December 1984, unreported. I have only the case note in (1986) 10 *Crim LJ* 110 to go on.

11 (1986) 10 *Criminal Law Journal* at 110.

12 [1991] 2 NZLR 257.

session at D's home in Auckland. D tied V's hands to chains suspended from above and also fastened a dog chain around his neck so that he had to stand on tiptoe to be comfortable. D left the room and, on returning some time later, found V's head slumped forward and hanging by his arms. On one version of the evidence, D, having concluded that V was dead, tied up his body and took it to Taupo where she threw it into the Huka Falls. The prosecution contended that D was guilty of murder on account either of having killed V in Auckland with the requisite intent or, if V was then still alive and known by D to be so, of having killed him in Taupo by throwing him into the falls with the requisite intent. D, having been convicted of murder, appealed. The Court of Appeal allowed her appeal and ordered a new trial partly on the ground that the trial judge had failed to direct the jury that, for conviction to lie, they had to decide unanimously that D had murdered V in one place only. According to the court:

> Any members of the jury who found that [V] was murdered at Taupo may have had little difficulty in deciding that the act of throwing him into Huka Falls, alive but bound, must have been accompanied by an intent to kill. Their conclusion involves a disagreement with any jurors who considered [V] was then dead, having been killed at Auckland. Murder there would require a finding that [D] killed [V] and a decision as to whether she meant to or was reckless whether death occurred through knowing that the injury she inflicted was likely to cause death.[13]

Consequently, the court held that it was imperative for the trial judge to direct the jury to decide unanimously on just one of the two places as being where the murder had occurred since "[t]he two cases put by the Crown, murder at Auckland or murder at Taupo, are essentially different" as they "were separated by place and in time, and involved wholly different acts and, it seems likely, different intents on the part of [the] accused".[14]

The Court of Appeal's handling of the concurrence principle in *Chignell* smacks of, but is not, the causation based approach. The source of confusion appears to lie in the court's use of the word "murder" which denotes both the conduct and fault elements of murder.[15] This had the effect of making the court insist that both elements of the offence needed to have occurred in the one place.

A proper application of the causation based approach would have presented the issues the jury had to consider much more clearly and avoided the need to decide whether both the fault and conduct elements of murder had occurred at the one place. Such an application could have been achieved by directing the jury to consider the following sequence of questions:[16]

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13 *Ibid.* at 265-266 per the whole court comprising Eichelbaum CJ, Richardson, Somers, Bisson and Hardie Boys JJ.

14 *Ibid.* at 265. I shall argue below that this ruling may have overlooked the application of the fault based approach.

15 To be fair, it was the prosecution which used the term "murder" when presenting its case. However, neither the trial judge nor appellate judges saw fit to rectify this source of misconception.

16 This suggested sequence of questions does not take into account the possible role played by the fault based approach which shall be considered below.

1. Was D's initial act of hanging V by means of chains at her home an operating and substantial cause of his death? If "no", go to question 3. If "yes", answer the next question.

2. Was such an act accompanied by the requisite fault for murder? If "no", go to question 3. If "yes", D is guilty of murder even though she may have mistakenly believed V to be dead when she threw him into the falls. This is because D's initial act of hanging and chaining V had rendered him unconscious which substantially contributed to his drowning.

3. Was D's later act of throwing V into the falls the sole cause of V's death? If "no" and V had died by some other cause not attributable at all to D's acts, D is not guilty of murder. If "yes", answer the next question.

4. Was such an act accompanied by the requisite fault for murder? If "no", D is not guilty of murder. In this regard, D's mistaken belief that she was handling a corpse supports this negative answer. If "yes", D is guilty of murder.

The causation based approach is an effective method of resolving what might otherwise amount to difficult problems created by the concurrence principle. However, the approach has its critics and certainly does not claim to be an exhaustive method of resolving all cases where satisfying the concurrence principle is a problem. One criticism is that the approach secures a conviction whenever D's initial act had rendered V unconscious. This would have occurred in every single case involving the killing of a supposed corpse. In this connection, the following example by Colin Turpin is apt:

> If a poisoner, wrongly thinking that the poison had done its work, proceeded to dismember the supposed corpse of his unconscious victim, and so killed him, it would seem somewhat artificial to argue that, if not unconscious, the victim would not have submitted to being cut up, and that the poison was therefore a substantial cause of the death.[17]

Another criticism of the causation based approach is that it would apply to unjustly convict D even though a third party, acting independently, had performed the fatal act.[18] Surely, the criticism goes, the involvement by a third party would cast doubt on a finding of murder or manslaughter against D. Professor John Smith seeks to avoid D's conviction by contending that the third party's intervention might break the causal connection between D's initial act and V's death.[19] However, his contention is questionable in cases where, had V been conscious, the third party would not have been able to carry out the fatal

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17 "The murdered corpse – *Thabo Meli* extended" (1969) 27 *Cambridge Law Journal* 20 at 21-22. Cf. Sullivan, op cit n 1, at 496.

18 See K Arenson, "Causation in the criminal law: a search for doctrinal consistency" (1996) 20 *Criminal Law Journal* 189 at 193-194; I Elliott, "An Australian letter" (1969) *Criminal Law Review* 511 at 514.

19 *Smith and Hogan's Criminal Law* (London: Butterworths, 9th ed, 1999), 80-81.

act successfully. For example, D1 renders V unconscious with a blow to the head and leaves V in a house. D2, operating independently of D1, sets the house alight and V dies in the fire. Had V regained consciousness before being engulfed by the fire, V might have escaped unhurt. The causation based approach would regard the effect of D1's blow on V as still an operating and substantial cause of V's death.

A third criticism of the approach is that reliance on rules of causation may sometimes lead to arbitrary results depending on whether there was a subsequent act or event which was so overwhelming as to amount to a *novus actus interveniens*. Since such an act or event inevitably constitutes the sole cause of the proscribed harm, D's earlier act can no longer remain a substantial cause. Consequently, the causation based approach cannot be relied upon to satisfy the concurrence principle. When this is applied to the facts in *Thabo Meli*, the concurrence principle would not have been satisfied and D would accordingly have escaped criminal liability if V had died instantly from the impact of being thrown over the cliff.[20] As it transpired, V died some time later from over-exposure to the elements which could not on any account be construed as a *novus actus interveniens*. The same may be said of the facts in *Chignell*. If D believed that she was handling a corpse when she threw V into the falls, she would not be guilty of murder if V died instantly when he hit the water but would be if he was washed ashore further downstream and died a little later from over-exposure. It is difficult to appreciate why D's criminal liability for murder should depend on the chance element of whether V survived the immediate impact of D's act of throwing in either of these cases.

In sum, these criticisms point to the need for an alternative approach to resolving cases where the concurrence principle is an issue and where the causation based approach is inapplicable or inappropriate. The causation based approach is inapplicable whenever D's initial act was found not to be a substantial cause of the proscribed harm. This may be due to such an act having a negligible causal effect, or because there was a later act or event comprising a *novus actus interveniens*. The approach is arguably inappropriate in cases where D's initial act had rendered V unconscious. Attributing criminal liability to D based on such an act seems a crude and simplistic basis for attributing criminal liability to D, especially for such serious offences as murder and manslaughter.

Just such an alternative to the causation based approach was devised by the Privy Council in *Thabo Meli* and accepted by the New Zealand courts albeit in narrowly confined terms. To this I now turn.

The Fault based Approach

This approach is encapsulated in the ruling of the Privy Council in *Thabo Meli* cited earlier.[21] It seeks to satisfy the concurrence principle by regarding murder or manslaughter as established when a person causes death through a series of acts forming a single transaction which was actuated throughout by the requisite fault element for one or the other of these crimes. This is not to say that the fault

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20 See Simester and Brookbanks, op cit n 1, 116 at note 180.

21 See the main text accompanying note 4 above.

required by the offence was present throughout the transaction for then there would be no issue of lack of concurrence between the conduct and the fault elements. Rather, the approach regards the fault accompanying the initial act, which was strictly no longer present when D later caused V's death, to have remained as the driving force or motivation behind D's subsequent actions including that which caused V's death. In this way, the fault element brings the initial act and subsequent acts together as "one transaction".

Causation is mentioned under this approach only because it is a necessary element for result crimes such as murder and manslaughter. Accordingly, it is a necessary feature but not a hallmark of the approach. The hallmarks are twofold. First and foremost is the fault element which must be present at some stage in the series of acts leading to V's death. The second is the series of acts itself which takes on the description of "one transaction" only because the acts comprising the series are all bound together by the fault element. This binding occurs when what motivated D to commit the subsequent acts was the fault accompanying the initial act. Frequently, the binding happens when the subsequent acts were done to further the accused's initial wrongdoing such as by trying to conceal the crime or to avoid detection. Taking the facts of *Thabo Meli*, while the intention to kill was no longer present when the appellants rolled V over the cliff and left him exposed to the elements, the appellants had performed those acts in order to conceal their intentional striking of V. The emphasis placed by the fault based approach on the fault element is borne out further by the appreciation that, under the approach, it is immaterial that a later act was the sole cause of death.[22]

The nature of the fault based approach is succinctly expressed in the statement that "the *actus reus* must be attributable to the *mens rea*."[23] The word "attributable" construes the conduct elements of the offence as "belonging or owing to" the fault element of the said offence. While the fault based approach takes this rather elastic view of the concurrence principle, it still purports to satisfy the principle so that it is incorrect to regard the approach as "a genuine exception"[24] to the principle.

A consequence of this approach, and one which differentiates it from the causation based approach,[25] is that the concurrence principle will not be established if a third party, acting independently, had done an act which caused V's death. This is because D's fault accompanying her or his initial act would not have extended into the act of the third party. Accordingly, D would not be held criminally liable for V's death, which seems to be the right and just result. Conversely, concurrence may be established even if the final act of D was the sole cause of death. As noted earlier, the causation based approach would be inapplicable in such a case.

While there are clear *dicta* to be found in New Zealand decisions which approve of the fault based approach, there does not appear to be any case which has actually applied the approach to satisfy the concurrence principle. The likely

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22 Smith and Hogan, op cit n 19, 81.

23 CMV Clarkson and HM Keating, *Criminal Law: Text and Materials* (London: Sweet and Maxwell, 4th ed, 1998), 245.

24 Simester and Brookbanks, op cit n 1, 115.

25 See the main text accompanying note 18.

reason for this is that our courts have confined the operation of the approach within narrow limits. The following *dicta* by the Court of Appeal in *Ramsay* specifies these limits:

> The Privy Council [in *Thabo Meli*] held that [the later act which caused V's death] should not be separated from the earlier acts, for all were performed to achieve the accused's plan. We do not doubt that in any such case it is permissible to view conduct comprehensively; see also *R v Church* ... , but here in the present case the Crown at no time suggested such a plan, or anything remotely approaching it ...[26]
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> ... And so it seems to us that while it may sometimes be useful to view conduct as a whole to ascertain whether there was a dominant intention running throughout a series of acts which can fairly be taken as the intention actuating the fatal act, nevertheless when it comes to ascertaining knowledge of the likely consequences of a particular act, one does not get the same help from looking at a course of conduct in that way ... To ascertain that knowledge one should look at the act as an individual act ...[27]

Hence, the limits are that the fault based approach is only applicable in cases where D had a preconceived plan to kill V and, following from this, that D must have intended to kill V.[28] Accordingly, the approach would be unavailable where the prosecution relied on the other form of fault for murder under s 167 of the *Crimes Act* comprising knowledge, as opposed to intention, of causing bodily injury which is likely to cause death.[29] Neither will the fault based approach apply to cases of constructive murder under s 168 since they do not involve an intention to kill. It also follows that the limits imposed by *Ramsay* prevent the use of the approach in cases of manslaughter since the fault elements for that offence are based, at least in part, on negligence or recklessness.[30] In the next section, I challenge the correctness of these limits and advocate removing them on the basis that they are contrary to justice, common sense and the true nature and operation of the fault based approach.

Before doing so, it would be helpful to briefly return to our discussion of the case of *Chignell*. Earlier on, I suggested that the jury could have been directed to answer a sequence of questions in accordance with the causation based approach.[31] Now that the fault based approach has been presented, the fourth question requires amending and a further question then posed to the jury. These might read as follows:

4. Was such an act accompanied by the requisite fault for murder? If "no", answer the next question. If "yes", D is guilty of murder.

5. Was D's initial act of hanging V by means of chains accompanied by the

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26 [1967] NZLR 1005 at 1014.

27 *Ibid.*, at 1015.

28 Pursuant to s 167(a) of the *Crimes Act*.

29 See ss 167(d) of the *Crimes Act*.

30 See s 160 read with ss 167 and 168 of the *Crimes Act*.

31 See the main text following note 16 above.

> requisite fault for murder and, if so, was D's later act of throwing V into the falls motivated by such fault? If "no", D is not guilty of murder. If "yes", D is guilty of murder even though she may have mistakenly believed that V was already dead when she threw him into the falls.

The addition of these questions after the first three questions devised earlier achieves the transition from the causation based approach to the fault based one. This may be explained by noting that, of the sequence of five questions, the first four are by-products of the causation based approach. The transition to the fault based approach occurs when the fourth question receives a negative answer. Absent the fault based approach, this answer brings the application of the causation based approach to an end with a finding that D is not guilty of murder.[32] However, on account of the fault based approach, the jury is required to take a final look at D's possible criminal liability for murder. This time, the inquiry is based, not on causal rules, but on whether D's fault accompanying her initial act could be said to extend into her later act so as to render both acts "one transaction". If so, D will be guilty of murder. More generally, it may be observed that this proposed sequence of questions complies with the proposition that the causation based approach should be initially applied, followed by the fault based approach only when the former approach is inapplicable or else inappropriate.

The Role of Fault in relation to the Concurrence Principle

In this section I shall examine the following matters concerning the fault based approach to the concurrence principle: whether it requires there to have been a preconceived plan; whether it should be confined to cases involving an intention to kill; and whether it requires a court to take a particular line of inquiry in relation to the concurrence principle.[33]

(i) no need for a preconceived plan

A reading of *Thabo Meli* may suggest that the murder convictions were affirmed by the Privy Council only because the appellants had a preconceived plan to kill their victim and to dispose of the body in a certain way.[34] Certainly, the Court of Appeal in *Ramsay* interpreted *Thabo Meli* in this way.[35]

There are several reasons against imposing a requirement of a preconceived plan. To begin with, the reading of *Thabo Meli* as imposing this restriction may itself be questioned. While the Privy Council did speak of the faking of the

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32 As embodied in the original fourth question appearing in the main text following note 16 above.

33 This section comprises a revised version of part of my article entitled "Killing a supposed corpse: in search of principle" (1998) 31 *Comparative and International Law Journal of Southern Africa* 350, with greater attention given to New Zealand law plus a reappraisal of some of my arguments in that article.

34 See especially the passage accompanying note 4 above.

35 See also the South Rhodesian Federal Court in *R v Chiswibo* 1961 2 SA 714 and referred to in *Russell on Crime* JWC Turner (ed) (London: Stevens, 12th ed, 1964) 59-60; Adams, op cit n 9 at 282; and the *dicta* remark by Mason CJ in the High Court of Australia case of *Royall* (1990) 172 CLR 378 at 393.

accident as part of the plan, it did not say that the plan included the faking in the precise way that was adopted. Nor did it say that a preconceived plan was essential to its decision. It is one thing to say that a particular rule will apply if there was a plan and quite another to say that the rule cannot otherwise apply. As regards *Ramsay*, the ruling there was only *dicta* since the evidence before the court showed that the accused believed the victim to be still alive.[36] Accordingly, the case fell into a different category from those involving the killing of a supposed corpse.

The ruling in *Ramsay* may also be questioned on the ground that the Court of Appeal referred with approval[37] to *R v Church*,[38] a decision of the English Court of Appeal. Yet in *Church*, the court was prepared to invoke the fault based approach to the concurrence principle to convict D even though he did not have a preconceived plan to cause his victim's death. The facts were that D had an altercation with a woman which led him intentionally to cause her grievous injury. Thinking that he had killed her, he panicked and threw her body into a river where she drowned. While claiming to apply *Thabo Meli*, the English Court of Appeal replaced the need for a preconceived plan with the less demanding requirement that the series of acts performed by D were all "designed"[39] to cause death or grievous injury. This is the same as saying that D was guilty of murder provided the *actus reus* was "attributable" to the *mens rea*.[40]

The insistence on a preconceived plan can also be criticised on the ground that it is difficult to imagine D being acquitted of murder when D had performed an act with an intention to kill and then, on the spur of the moment, improvised the disposal of the supposed corpse. In these circumstances, a defence by D that he or she lacked the fault for murder is lacking in moral merit.[41] A further criticism is the difficulty of proving that D had a preconceived plan. In most cases it will not be possible to know whether or not D had a preconceived plan to dispose of the body in a certain way, an observation which has led Sir Francis Adams to say that:

> [a] rule of law which, on the overt acts done in *Thabo Meli v R* would convict the accused of murder if there were proof of a 'preconceived plan', and acquit them of that charge if there were none, would not only work in an arbitrary way, but would have no possible foundation in principle.[42]

Furthermore, where the prosecution cannot prove the existence of the plan, it must establish the precise point in time at which death occurred in order to secure a conviction and this is often an impossible task.[43]

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36 Apart from the accused's statement that the victim was then still breathing, his very act of gagging her presupposed that she was still alive: see Adams, op cit n 9, 288.

37 [1967] NZLR 1005 at 1014 and cited in the main text accompanying note 26 above.

38 (1966) QB 59.

39 (1966) QB 59 at 67 per Edmund Davies J delivering the judgment of the court.

40 See the main text accompanying note 23 above.

41 See G Williams, *Textbook of Criminal Law* (London: Stevens, 2nd ed, 1983), 256.

42 Adams, op cit n 9, 283.

43 Williams, op cit n 40, 256; Adams, id, 285.

These criticisms lend strong support to decisions in other jurisdictions which have applied the fault based approach to cases where no preconceived plan was proven. Besides the English Court of Appeal case of *Church* discussed earlier, notable decisions where this was done include the more recent English Court of Appeal decision in *R v Le Brun*[44] and the South African Supreme Court case of *State v Masilela*.[45] All told, when taken together, these criticisms against the need for a preconceived plan more than overcome the claim by some that insisting on a preconceived plan fosters certainty.[46]

(ii) no need for an intention to kill

As noted earlier, the Court of Appeal in *Ramsay* confined the fault based approach to the concurrence principle to cases where the prosecution contends that the accused intended to kill. Anything short of this most culpable of fault elements for murder will not suffice. The judgment in *Ramsay* needs to be considered in some detail in order to comprehend the court's reasoning for imposing this limitation. The facts were that D had given a lift to V, a girl. What followed afterwards was uncertain. V's corpse was found in a pit on D's farm. She had been subjected to considerable violence including a blow which fractured her skull. A gag was also found in her throat which completely obstructed the air passage. The medical evidence was that death was due to asphyxia which could have been caused by the gag or, on the other hand, by the deep unconsciousness resulting from the head injury. At the trial, the prosecution alleged that D had committed murder by act or acts performed, meaning to cause death (under s 167(a) of the *Crimes Act*), or meaning to cause injury known to be likely to cause death and with recklessness as to death (s 167(b)) , or for an unlawful object doing an act which was known to be likely to cause death (under s 167(d)). The trial judge in summing-up relied heavily on the *Thabo Meli* ruling with the result that D was convicted of murder. The Court of Appeal quashed the conviction on the ground that the said ruling was only applicable to cases involving an intention to kill under s 167(a). The court viewed the issue before the Privy Council to be one of intention and not of knowledge and consequently regarded the ruling to be inapplicable where knowledge was an issue as was the case under s 167(b) and (d).[47] It went on to hold that where these sub-clauses were relied upon, the jury should have been directed to identify the particular act causing death and then to determine whether that act was accompanied by either of these forms of knowledge.[48] On this reasoning, the mental state in which the earlier act was done would have no direct relevance and the question of liability would not be made to depend on whether D had performed a series of acts forming one transaction.

It is difficult to appreciate why the fault based approach represented by the *Thabo Meli* ruling should be limited to cases involving an intention to kill. A

44 (1991) 2 WLR 653 at 658-659.

45 1968 2 SA 558(A) at 572.

46 Simester and Brookbanks, op cit n 1, 115.

47 (1967) NZLR 1005 at 1015.

48 This part of the ruling has since been reaffirmed by the Court of Appeal in *McKinnon* (1980) 2 NZLR 31 at 34-35 and by the High Court in *R v Nathan* (1981) 2 NZLR 473 at 477.

proper understanding of the nature and operation of the approach would reject such a limitation. That approach emphasises the fault element for murder as the driving force or motivation behind all the acts performed by the accused including the final act which actually caused death. The approach does not depend on a particularly high degree of fault for this to happen. It should be allowed to operate so long as the law recognises the particular form of fault for murder which the prosecution has relied on and there are no legal impediments to its operation. This has been the stance taken by the English Court of Appeal as instanced by its decision in *Church*. The court there applied the approach to cases of murder where the accused intended to kill or intended to do grievous bodily harm. These are the two forms of fault elements for murder presently recognised by English law.

When the above critique is applied to the judgment of the Court of Appeal in *Ramsay*, it is seen that the court was wrong to have denied the approach to cases involving the fault element under s 167(b) but correct to have denied it to cases involving the fault element under s 167(d). Section 167(b) stipulates that:

> Culpable homicide is murder ... if the offender means to cause to the person killed any bodily injury that is known to the offender to be likely to cause death, and is reckless whether death ensues or not.

The wording of this provision clearly relates the offender's intention to *any* bodily injury which is known to the offender to be likely to cause death; it does not relate such intention to the particular injury which actually caused death.[49] Thus, if applied to the facts in *Ramsay*, s 167(b) might support the application of the fault based approach if the prosecution's case was that when D struck the blow which fractured V's skull he meant to cause her bodily injury which he knew to be likely to cause death. Contrary to the ruling in *Ramsay*, the plain wording of s 167(b) does not require D to have known additionally that his later act of gagging V was likely to cause her death. The approach could be applied to satisfy the concurrence principle even though the actual cause of death was D's later act of gagging V, provided that the gagging was motivated by the fault element accompanying the initial act of striking.

Turning now to the fault element for murder specified in s 167(d), that subclause states that:

> Culpable homicide is murder ... if the offender for any unlawful object does an act that he knows to be likely to cause death, and thereby kills any person, though he may have desired that his object should be effected without hurting any one.

Unlike s 167(b), the wording of s 167(d) relates D's knowledge to the particular act which actually caused death. This is evident from the use of the word "thereby" found in the provision. Accordingly, *Ramsay* was correct to require, in

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49 The High Court in *Nathan* [1981] 2 NZLR 473 at 477 was well aware of this form of wording of s 167(b). However, it felt bound by the decisions of the Court of Appeal in *Ramsay* and *McKinnon* which held that the knowledge in s 167(b) was to the fatal injury itself.

respect of s 167(d) cases, that D must know that her or his act is likely to cause death and which act actually causes death. Since such a requirement does not permit consideration of a series of acts forming one transaction, the fault based approach is inapplicable. Whatever might be said for allowing the application of the approach to certain types of fault for murder but not to others, our current statutory definition of murder clearly requires such distinctions to be made.

With regard to cases of manslaughter, the fault based approach should likewise apply if D had the fault element required for that offence when he or she performed the first of a series of acts forming one transaction. This was the stance taken by the English Court of Appeal in *Church* when it held that the trial judge was remiss in failing to give a direction in respect of the alternative manslaughter charge along similar lines to that which the court said should have been given for murder.[50]

(iii) the need to identify the fault element accompanying the initial act

It seems obvious that the fault based approach requires the starting point of any inquiry into concurrence to be at the time when the initial act was performed. Should the requisite fault for murder or manslaughter then be present, the approach regards the acts which follow as part and parcel of the initial act since they were motivated into being by the fault element accompanying the initial act. Accordingly, the approach does not inquire specifically into whether the requisite fault was present when the later fatal act was performed nor does it require this to have been the case. This inquiry into fault accompanying the later fatal act is performed *only when* it cannot be proven that the accused had performed the initial act with the requisite fault.

Adhering to these simple rules would have prevented the courts from taking the wrong path as occurred in *Ramsay*. As noted above, the Court of Appeal was misled into requiring the fault element to be attributed specifically to the fatal act. The source of the error may have been in the argument of the prosecution that it was immaterial whether the blow which fractured V's skull or the gagging caused her death since one or more of the requisite types of fault was present in reference to each.[51] When answering this argument, the court became embroiled in determining whether the requisite fault was present during the gagging. The proper course that the court should have taken was to consider whether one of the fault elements for murder provided by s 167[52] was present when the initial attack was committed. Only if the prosecution failed to prove this should the court have proceeded to inquire into whether any of the fault elements for murder was present when D subsequently gagged V.

A similar error appears to have been made by the English Court of Appeal in the manslaughter case of *Attorney-General's Reference (No 4 of 1980)*.[53] D had an

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50 (1966) 1 QB 59 at 71. For a summary of the direction which the court held should have been given in respect of the murder charge, see the main text accompanying note 39 above.

51 (1967) NZLR 1005 at 1014.

52 The argument has been made above that ss 167(a) and (b) could comprise the fault element, but not (d).

53 (1981) 2 All ER 617.

argument with V at the top of a flight of stairs. He pushed her away and she fell down the stairs. Believing her to be dead, he dragged her body up the stairs with a rope around her neck and cut up her body in his flat. The court held that it was immaterial which act caused death so long as D had the fault element for manslaughter when he pushed V and also when he dragged and cut up her body.[54] It is submitted that this stance is too favourable towards D. A proper application of the fault based approach would require proof that the fault element was present during the initial act of pushing. The prosecution would not need to prove additionally that D's treatment of V's body had been grossly negligent.

Incidentally, the problem of concurrence in *Attorney-General's Reference* could have been resolved by applying the causation based approach. Should the prosecution prove that D had the fault for manslaughter when he pushed V down the stairs and this act was regarded as a substantial cause of her death, the concurrence principle would be satisfied. However, as previously argued, the troubling feature of this approach is that it treats any act of D's which renders her or his victim unconscious as a substantial cause of death. Furthermore, on the facts, there is a strong case for regarding D's later act of dragging V's body and cutting it up as the sole cause of death so as to render inapplicable the causation based approach. Consequently, resort can only be had to the fault based approach.

Conclusion

Certain propositions can be extracted from the preceding discussion which, if adopted by our courts, would do much to clarify this confusing area of the criminal law. These propositions would also greatly help the courts to reach outcomes of cases which are based on justice, common sense and a proper understanding of the causation and fault based approaches to the concurrence principle:

- Where the facts of a case unequivocally permit the causation based approach to apply, that approach should be invoked in preference to the fault based approach.

- The causation based approach requires the jury to determine whether the accused's initial act was a substantial cause of the proscribed harm and, if so, whether that act was accompanied by the requisite fault element of the offence charged.

- The causation based approach may be inapplicable on account of the legal rules governing causation such as the requirement that the accused's act constitute a substantial cause of the proscribed harm, and the effect of a *novus actus interveniens* rendering the accused's initial act no longer a substantial cause.

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54 The court found that the prosecution had established that the act of pushing had been an intentional act which was unlawful and dangerous and what D did to the body amounted to gross criminal negligence. Under English law, the fault element for manslaughter may be an unlawful and dangerous act or gross negligence. Closely similar types of fault for manslaughter are recognised under s 160 of our *Crimes Act*.

- The causation based approach may be inappropriate in cases where the accused's initial act had rendered the victim unconscious.

- Where the facts of a case render the causation based approach inapplicable or else inappropriate, the courts should rely on the fault based approach.

- The fault based approach requires the jury to determine whether the fault element accompanying the accused's initial act motivated the accused to commit a later act or acts such that the series of acts performed by the accused constituted "one transaction".

- The fault based approach should not be confined to cases where the accused had a preconceived plan. It should apply so long as it can be said that the accused had performed a series of acts forming "one transaction" which was motivated throughout by the fault element accompanying the initial act.

- The fault based approach should not be confined to cases where the accused had an intention to kill. It should apply so long as the fault element relied upon by the prosecution accompanied the initial act of the accused and there were no legal impediments, such as statutory wording, preventing the particular type of fault element from being invoked to support the approach.

- The courts should always commence their consideration of the concurrence principle by inquiring into whether the requisite fault element for the offence charged accompanied the accused's commission of the initial act. If so, the principle is satisfied and no further inquiry needs to be undertaken to determine whether the fault element also accompanied any later act or acts of the accused. The courts should undertake this further inquiry only when the requisite fault element was found not to have accompanied the initial act of the accused.