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TEACHING CAUSATION IN CRIMINAL LAW: LEARNING TO THINK LIKE POLICY ANALYSTS

BRENDA MIDSON*

I INTRODUCTION

One of the most persistent ideals in the context of legal education is that of teaching students to ‘think like lawyers’.¹ While the precise range of cognitive skills that enable one to think like a lawyer may be subject to much debate,² one of these skills is undoubtedly the ability to extract legal principles from cases and statutes and apply them to the facts of a legal problem.³

It has become apparent through teaching causation in criminal law that, while extracting and applying the law from cases is easy enough when the principles are clear, students often struggle when relying on cases in which judges employ unexpressed policy-based reasoning. In the context of causation, James Gobert argues that:

[T]he struggle that courts and commentators have had with causation issues may indicate either that causation is a much more complex

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¹ The phrase is of uncertain origin but was given particular prominence by the movie *The Paper Chase*. A literature search for the purposes of this article revealed a large number of articles using this phrase in the context of legal education. See, eg, Kate E Bloch, ‘Cognition and Star Trek™: Learning and Legal Education’ (2009) 42 *John Marshall Law Review* 959; Neil P Cohen, ‘Teaching Criminal Law: Curing the Disconnect’ (2004) 48 *Saint Louis University Law Journal* 1195; Larry O Natt Gantt II, ‘Deconstructing Thinking Like a Lawyer: Analyzing the Cognitive Components of the Analytical Mind’ (2007) 29 *Campbell Law Review* 413; Jane K Gionfriddo, ‘Thinking Like a Lawyer: The Heuristics of Case Synthesis’ (2007) 40 *Texas Tech Law Review* 1; Cynthia G Hawkins-León, ‘The Socratic Method–Problem Method Dichotomy: The Debate over Teaching Method Continues’ (1998) *Brigham Young University Education and Law Journal* 1; Keith H Hirokawa, ‘Critical Enculturation: Using Problems to Teach Law’ (2009) 2 *Drexel Law Review* 1; Myron Moskowitz, ‘From Case Method to Problem Method: The Evolution of a Teacher’ (2004) *Saint Louis University Law Journal* 1205; Nancy B Rapoport, ‘Is “Thinking Like a Lawyer” Really What We Want to Teach?’ (2002) 1 *Journal of the Association of Legal Writing Directors* 91; Kurt M Saunders and Linda Levine, ‘Learning to Think Like a Lawyer’ (1994) 29 *University of San Francisco Law Review* 121.

² Rapoport, above n 1, 93.

³ Bloch, above n 1, 963.

phenomenon than the questions might suggest or that the questions are the wrong ones to be asking. Obtuse and strained analyses often appear in cases involving intervening causes in order to allow the courts to impose sanctions on a defendant thought to be deserving of punishment or to avoid imposing liability on a defendant not thought to be so deserving.⁴

Law students must be able to extrapolate outcomes from legal principles and given facts. When policy grounds for decision-making are not clearly articulated, students struggle to find the ‘law’ to apply. As Gobert identified, these difficulties are not often resolved by a reading of the case law, which illustrates that cases with almost identical factual matrices can result in different outcomes. This is particularly apparent in homicide cases, where medical treatment is asserted as breaking the chain of causation. Using some of these cases as examples, this paper proposes that, in complex cases, the question of causation cannot be answered simply by applying the legal principles without reference to a range of policy considerations. To students, these are ‘invisible factors’ in judicial decision-making. They account for the variation of outcomes that occur in the application of causation principles but, because they are not explicitly referred to in case law, it is almost impossible for students to employ them in problem-solving. The challenge for legal education is to teach legal reasoning so that students are better able to identify and apply unarticulated policy reasons.

The question of causation in criminal law provides an instructive example of judges’ use of unexpressed policy reasoning and the challenges that this poses for the teaching and learning of legal reasoning and problem-solving. In demonstrating how the doctrine of causation can be used to teach reasoning skills to students more effectively, this paper begins with an analysis of the causation principles that purport to apply in Commonwealth jurisdictions, followed by an analysis of case law in which the application of these principles has resulted in disparate outcomes. In turn, this gives rise to a discussion of the way in which unexpressed policy-based reasoning thwarts the attempts of students to distil the law from cases. Because the principles that are held to apply are often expressed in imprecise terms, there is little guidance for students on what is actually required to break the chain of causation. The role of legal education is to bridge this gap in legal reasoning and, thus, Part IV below offers suggestions as to how law curricula could incorporate methods by which students can improve their identification and use of policy-based arguments. This includes helping students to look beyond explicit ideas and consider underlying values and policy concerns that impact upon courts’ reasoning. It is proposed that effectively teaching legal reasoning involves teaching enhanced

⁴ James J Gobert, ‘The Fortuity of Consequence’ (1993) 4 *Criminal Law Forum* 1, 12.

case analysis skills which students can apply within a problem-based learning method.

II CAUSATION

While there are numerous limitations and exceptions to the principle, it remains fundamental to Anglo-Saxon criminal law that liability arises out of the proof, beyond reasonable doubt, of the accused's commission of the *actus reus* of an offence, while concurrently possessing the requisite *mens rea*.⁵ But proof of the *actus reus* and *mens rea* is not always sufficient to establish liability. In a number of offences, the prosecution must also prove that the accused's act *caused* a particular result. A clear example is in homicide cases, where the act of the accused must have caused the death of the victim. In the majority of homicide cases, establishing causation is uncomplicated because it is not disputed that, for example, the infliction of grievous bodily injury by the accused caused the death of the victim. Other cases prove to be more difficult, particularly where there is an intervening event — a *novus actus interveniens* — or where there are multiple causes of death. In such cases, it may be that the act of the accused is not legally causative of death, even though a simple application of the but-for test would suggest otherwise.

Whether the death of a victim was caused by an act of the accused is a question of fact for the jury, but the jury can make this decision only in accordance with the legal principles explained to them by the judge.⁶ In Commonwealth jurisdictions, there have been a number of approaches taken to determining issues of causation where there is more than one proximate, or immediate, cause of death. Two of these approaches have been particularly dominant: the reasonable foreseeability test and the substantial cause test.

The reasonable foreseeability test, which asks whether any intervening event was a reasonably foreseeable consequence of the accused's actions,⁷ was applied by Brennan and McHugh JJ in *Royall v R*.⁸ Brennan J, relying on the English case of *R v Roberts*,⁹ said:

Foresight or reasonable foreseeability marks the limit of the consequences of conduct for which an accused may be held criminally responsible.¹⁰

In *Roberts*, the victim jumped from a moving car to escape an assault from the accused. The accused was charged with assault

⁵ *Woolmington v DPP* [1935] AC 46.

⁶ *R v Cheshire* [1991] 3 All ER 670, 674 ('*Cheshire*').

⁷ Dennis Klimchuk, 'Causation, Thin Skulls and Equality' (1998) 11 *Canadian Journal of Law and Jurisprudence* 115, 117.

⁸ (1991) 172 CLR 378 ('*Royall*').

⁹ (1971) 56 Cr App R 95 ('*Roberts*').

¹⁰ *Royall* (1991) 172 CLR 378, 399.

occasioning actual bodily harm. Stephenson LJ set out the test for establishing whether the actions of the accused had caused the victim's injuries in the following terms:

Was it a natural result of what the alleged assailant said and did, in the sense that it was something that could reasonably have been foreseen as the consequence of what he was saying or doing?¹¹

In applying that test, the English Court of Appeal found that the accused could reasonably have foreseen that the victim would have jumped from the car, and he had therefore caused her injuries.

The substantial cause test for causation asks whether the act of the accused is a substantial and operating cause of death. The primary authority for the substantial cause test is *R v Smith*.¹² Smith was convicted of murder. One of the grounds upon which he appealed his conviction was that the jury had been misdirected on causation. Smith had stabbed a fellow soldier, Creed, with a bayonet, causing one wound in the arm and one in the back. In respect of the latter wound, the bayonet had pierced the lung and caused a haemorrhage. Following the stabbing, another soldier attempted to carry Creed to the medical station, but on the way dropped him twice. At the medical station, staff were trying to deal with a number of other cases, including two other serious stabbings. They did not appreciate the seriousness of Creed's injuries. He received some treatment, including oxygen and artificial respiration, which in the light of the piercing to the lung, turned out to be 'thoroughly bad' treatment.¹³ He died approximately two hours after the original stabbing. There was evidence that had Creed received immediate and different treatment he might not have died, and indeed that his chances of surviving were as high as 75 per cent.¹⁴ The case was decided on the principle that

if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating. Only if it can be said that the original wounding is merely the setting in which another cause operates can it be said that the death does not result from the wound. Putting it another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.¹⁵

The Queen's Bench Division held that the direction to the jury had been correct, and that no reasonable jury, properly directed, could come to any conclusion other than that death resulted from the original wound.

¹¹ *Roberts* (1971) 56 Cr App R 95, 102.

¹² [1959] 2 QB 35 (*Smith*).

¹³ *Ibid* 42.

¹⁴ *Ibid*.

¹⁵ *Ibid* 42-3.

*Royall*¹⁶ is the seminal Australian case on causation. Royall was charged with murder after his girlfriend, Kelly Healey, fell from the window of a sixth-floor flat. He admitted assaulting Healey during the course of a violent argument but said she then locked herself in the bathroom and that she jumped out of the bathroom window when he broke the door down to check on her. The prosecution relied upon three scenarios in arguing Royall was guilty of murder: that he pushed Healey; that she fell in the course of avoiding his attack; or that she jumped because of a fear of life-threatening violence from him. The case was left to the jury to decide whether Royall had caused Healey's death by any of the three means alleged by the prosecution. One of the grounds upon which Royall's appeal was based was that the judge had given erroneous directions on the issue of causation.

In the High Court, both the substantial cause and reasonable foreseeability tests were discussed in some detail, along with the 'natural consequence' test. It is interesting to note that Mason CJ cited *Roberts*¹⁷ as authority for this latter test.¹⁸ He set out the test in the following terms:

where the conduct of the accused induces in the victim a well-founded apprehension of physical harm such as to make it a natural consequence (or reasonable) that the victim would seek to escape and the victim is injured in the course of escaping, the injury is caused by the accused's conduct.¹⁹

The majority of the judges determining the appeal in *Royall*²⁰ favoured the natural consequences test. New Zealand courts have adopted and applied *Smith*'s²¹ substantial cause test,²² as have courts in Australia and Canada.²³ The utility of the *Smith*²⁴ approach is that it applies both to establish a causal link *and* to establish that the link was maintained in cases where there are multiple causes or

¹⁶ (1991) 172 CLR 378.

¹⁷ (1971) 56 Cr App R 95.

¹⁸ *Royall* (1991) 172 CLR 378, 389.

¹⁹ *Ibid.*

²⁰ (1991) 172 CLR 378.

²¹ [1959] 2 QB 35.

²² See, eg, *R v McKinnon* [1980] 2 NZLR 31. It is also important to note that, in New Zealand, s 166 of the *Crimes Act 1961* (NZ) also applies in cases where treatment is the immediate cause of death. It states that '[e]very one who causes to another person any bodily injury, in itself of a dangerous nature, from which death results, kills that person, although the immediate cause of death be treatment, proper or improper, applied in good faith.' The Court in *R v Kirikiri* [1982] 2 NZLR 648, 651 held that s 166 was declaratory of the common law, and thus *Smith* was relevant to the interpretation of the section.

²³ Stanley Yeo, 'Blamable Causation' (2000) 24 *Criminal Law Journal* 144.

²⁴ [1959] 2 QB 35.

intervening causes.²⁵ Under this test, the chain of causation is not broken unless the act of the accused is no longer a substantial and operating cause of death. That is, it is only if the subsequent event is so overwhelming as to make the initial wound ‘merely part of the history’ that the chain of causation will be held to be broken.²⁶

At first glance, the legal principles which determine causation might seem clear. For the student, the problem usually arises in attempting to employ the principles in problem-solving. Indeed, in *Royall*, McHugh J noted:

Judicial and academic efforts to achieve a coherent theory of common law causation have not met with significant success. Perhaps the nature of the subject matter when combined with the lawyer’s need to couple issues of factual causation with culpability make achievement of a coherent theory virtually impossible.²⁷

That academic and judicial attempts to achieve a coherent theory of causation have not been wholly successful foreshadows the difficulties that students face in attempting to identify the relevant principles to apply. This point is apposite to the need for changes to legal education approaches, which is discussed in detail in Part IV. To set the scene for that discussion, the following section canvasses cases in which medical treatment is asserted as breaking the chain of causation between the accused’s infliction of injury and the death of the victim. As will be shown, the resulting decisions cannot be explained simply by reference to the application of the legal principles.

*A R v Jordan*²⁸

The appellant stabbed the victim, Beaumont, in the abdomen. Beaumont died eight days later. The stab wound had penetrated

²⁵ Yeo, above n 23, 150. Yeo argues that, where there is more than one substantial cause of death, a test of foreseeability is the most appropriate measure for determining whether a defendant should still be liable. In other words, did the defendant foresee, or ought he or she to have reasonably foreseen, the intervening event?

²⁶ For an accused’s act to be legally causative of death, it must also be a dangerous act. In New Zealand, this is expressly required by s 166 of the *Crimes Act 1961*. Outside of s 166, some cases and commentators use the term ‘mortal wound’ to express the requirement that the original injury must be more than trifling. See, eg, Paul K Ryu, ‘Causation in Criminal Law’ (1958) 106 *University of Pennsylvania Law Review* 773. H L A Hart and Tony Honoré, *Causation in the Law* (Oxford University Press, 2nd ed, 1985) 241–2 identify three senses of ‘mortal wound’ as (i) one sufficient to cause the death of a person of average constitution under normal circumstances; (ii) one highly likely to cause the death of a particular victim, given the victim’s constitution and likelihood of medical assistance; and (iii) one that in fact causes death even though it was not mortal in either of the two preceding senses (for example, a scratch that the victim neglected).

²⁷ *Royall* (1991) 172 CLR 378, 448.

²⁸ *R v Jordan* [1956] 40 Cr App Rep 152 (‘*Jordan*’).

the intestine in two places but, by the time of death, both injuries had mainly healed. In the meantime, the medical staff administered an antibiotic, Terramycin, to Beaumont with a view to preventing infection. Beaumont's intolerance to the drug was discovered after the initial doses, at which time administration of the drug was stopped; however, another doctor ordered its resumption the following day. Evidence of two doctors called by the appellant was to the effect that the treatment of the patient in this way was 'palpably wrong',²⁹ as was the 'intravenous introduction of wholly abnormal quantities of liquid',³⁰ which led to pulmonary oedema then broncho-pneumonia, from which Beaumont died.

The Court of Criminal Appeal drew a distinction between normal treatment and 'palpably wrong' treatment, and accepted as correct the position that normal treatment causing death will not negate causation on the part of the person inflicting the original injury. From a doctrine of precedent perspective, it should be noted that this case was decided before *Smith*,³¹ and the Court in this instance was not prepared to formulate a test for establishing causation. Hallett J said:

It is sufficient to point out here that this was not normal treatment. Not only one feature, but two separate and independent features, of treatment were, in the opinion of the doctors, palpably wrong and these produced the symptoms discovered at the post-mortem examination which were the direct and immediate cause of death, namely, the pneumonia resulting from the condition of oedema which was found.³²

On that basis, the Court was of the opinion that, if such evidence had been before the jury, the jury would have felt unable to be satisfied that the death was caused by the stab wound. In other words, Jordan's act did not cause Beaumont's death.

*B R v Evans and Gardiner (No 2)*³³

In this Australian case, the two accused stabbed a fellow prisoner, Hamilton, in the stomach. The injury was inflicted in April 1974 and, after a bowel resection operation, Hamilton resumed normal activities, participating in sports activities at Christmas that year. On 15 March 1975 Hamilton became unwell, and he died on 23 March. The cause of death was a stricture in the bowel at the site of the resection operation, which is not uncommon. It was open to the jury at trial to find that the doctors should have diagnosed the condition and treated it.

²⁹ Ibid 157.

³⁰ Ibid.

³¹ [1959] 2 QB 35.

³² *Jordan* [1956] 40 Cr App Rep 152, 157–8.

³³ *R v Evans and Gardiner (No 2)* [1976] VR 523 ('*Evans and Gardiner*').

The Full Court of the Supreme Court of Victoria applied *Smith*,³⁴ and held that the real issue for the jury was whether the blockage of the bowel was due to the stabbing. The Court was of the view that there was sufficient medical evidence for the jury to support such a finding. It noted that there were features of the case that made it unusual — namely, that the stab wound was initially treated immediately and in a skilful way, and that the wound had ‘healed’³⁵ and the victim had ‘recovered’.³⁶ However, it is apparent that these features of the case were not seen by the Court as being sufficiently ‘unusual’, in the *Jordan*³⁷ sense of that word. Both Evans and Gardiner were convicted of manslaughter.

*C Cheshire*³⁸

In early December 1987, the appellant shot the victim in the leg and stomach, causing serious injuries. The victim was operated on and placed in intensive care. While being treated in hospital, he developed respiratory problems and a tracheotomy tube was placed in his windpipe. The victim then developed several infections and it was not until early February 1988 that his condition began to improve. However, by 8 February, he was again having difficulty breathing and his condition thereafter deteriorated. He died early on 15 February. A post-mortem examination revealed that the victim had suffered from a rare complication of the tracheotomy — namely, a narrowing of the windpipe to the extent that it caused asphyxiation. The pathologist who conducted the post-mortem gave evidence that the immediate cause of death was cardio-respiratory arrest

due to a condition which was produced as a result of treatment to provide an artificial airway in the treatment of gunshot wounds of the abdomen and leg.³⁹

The defence called its own medical witness to give evidence that, by 8 February, the wounds of the thigh and abdomen no longer threatened the life of the deceased and his chances of survival were good, which would seem consistent with the fact that the victim had shown some improvement. But, according to the Court, precedent established that the chain of causation will be broken by medical treatment only in ‘the most extraordinary and unusual case’.⁴⁰ Ultimately, the Court concluded that, even if more experienced doctors had detected the complication in sufficient time to prevent

³⁴ [1959] 2 QB 35.

³⁵ *Evans and Gardiner* [1976] VR 523, 534.

³⁶ *Ibid.*

³⁷ [1956] 40 Cr App Rep 152.

³⁸ [1991] 3 All ER 670.

³⁹ *Ibid* 672.

⁴⁰ *Ibid* 677.

death, the complication was a direct consequence of the appellant's acts, which remained a significant cause of his death:

Even though negligence in the treatment of the victim was the immediate cause of his death, the jury should not regard it as excluding the responsibility of the accused unless the negligent treatment was so independent of his acts, and in itself so potent in causing death, that they regard the contribution made by his acts as insignificant.⁴¹

Arguably, Lord Beldam's test — that an intervening cause will break the chain of causation only if it is independent of the acts of the accused and 'so potent in causing death' — is no different from the approach taken in *Smith*.⁴² In other words, if the act is not independent of the accused then he or she is responsible for it, and if it is not potent in causing death then it will not be 'so overwhelming as to make the original wound merely part of the history' as *Smith*⁴³ requires.

D *Application of Authorities*

Having canvassed the relevant authorities, it is useful to attempt to apply them to a hypothetical situation to demonstrate the difficulties that students might encounter. Imagine a scenario in which A inflicts a relatively minor wound to B's head. A does not know that B suffers from haemophilia, a congenital bleeding disorder in which blood does not clot normally. The blow to the head causes bleeding inside B's brain, such that he will eventually die if not treated. A drives B to the hospital. As B steps from A's car, B is struck by another car and is killed instantly.

Imagine the same scenario, in which another person, C, inflicts the same relatively minor wound to B's head. But, in this scenario, B is not struck by a car and makes it into the hospital. He is examined by a doctor who takes B's full medical history and arranges for a CT scan which detects the presence of an intracranial haemorrhage. Surgeons successfully treat B via replacement therapy in which clotting factor is dripped into his vein. However, several weeks following surgery, an infection develops at the intravenous site.⁴⁴ The drug administered to clear the infection is ineffective, but this fact is not diagnosed by medical staff, who continue to administer it. B's condition deteriorates and he dies two months after the day on which the initial wound is inflicted. Evidence shows that, had alternative treatment been administered, B would likely not have succumbed to the infection.

⁴¹ *Ibid.*

⁴² [1959] 2 QB 35.

⁴³ *Ibid.*

⁴⁴ I am grateful to the anonymous referee who pointed out a flaw in the original hypothetical fact situation and suggested an amendment.

It is arguable that, in the first scenario, upon an application of the substantial cause test, students would find that being struck by a car was so overwhelming as to make A's act of striking B merely part of the historical context. Thus, A would not be held liable for B's death, since she did not legally cause it. The question is, would students decide upon the same result in the second scenario, notwithstanding that C's act is precisely the same as A's?

The facts of the second scenario are not markedly different from those in *Jordan*⁴⁵ or, indeed, *Smith*,⁴⁶ *Evans and Gardiner*⁴⁷ and *Cheshire*.⁴⁸ But all of the cases since *Jordan* assert that the rule in that case is restricted to its own particular facts. As Hallett J observed in *Jordan*, the case was 'exceedingly unusual'.⁴⁹ In *R v Blaue*,⁵⁰ the English Court of Appeal held that, while *Jordan*⁵¹ was rightly decided on its facts, it 'should be regarded as a case decided on its own special facts and not as an authority relaxing the common law approach to causation',⁵² a view endorsed in *Evans and Gardiner*.⁵³ *Cheshire*⁵⁴ approved of the comments in *Smith*⁵⁵ to the effect that *Jordan*⁵⁶ was 'a very particular case depending upon its exact facts'.⁵⁷ Perhaps the furthest the courts have been prepared to go in ignoring the decision in *Jordan*⁵⁸ entirely is in *R v Malcherek*, *R v Steel*,⁵⁹ where Lord Lane CJ said:

In the view of this court, if a choice has to be made between the decision in *R v Jordan* and that in *R v Smith*, which we do not believe it does (*R v Jordan* being a very exceptional case), then the decision in *R v Smith* is to be preferred.⁶⁰

With respect, analysis of the decision in *Jordan*⁶¹ does not bear out its special treatment. Following the *Smith*⁶² approach, it is arguable that the circumstances of *Jordan*⁶³ are simply ones in which the second cause of death was so 'overwhelming as to make the original wound merely part of the history'.⁶⁴ But the same argument

⁴⁵ [1956] 40 Cr App Rep 152.

⁴⁶ [1959] 2 QB 35.

⁴⁷ [1976] VR 523.

⁴⁸ [1991] 3 All ER 670.

⁴⁹ *Jordan* [1956] 40 Cr App Rep 152, 153.

⁵⁰ *R v Blaue* [1975] 3 All ER 446 ('*Blaue*').

⁵¹ [1956] 40 Cr App Rep 152.

⁵² *Blaue* [1975] 3 All ER 446, 449.

⁵³ [1976] VR 523.

⁵⁴ [1991] 3 All ER 670.

⁵⁵ [1959] 2 QB 35.

⁵⁶ [1956] 40 Cr App Rep 152.

⁵⁷ *R v Smith* [1959] 2 QB 35, 43.

⁵⁸ [1956] 40 Cr App Rep 152.

⁵⁹ [1981] 1 WLR 690.

⁶⁰ *Ibid* 696.

⁶¹ [1956] 40 Cr App Rep 152.

⁶² [1959] 2 QB 35.

⁶³ [1956] 40 Cr App Rep 152.

⁶⁴ *R v Smith* [1959] 2 QB 35, 43.

could be made in respect of *Evans and Gardiner*,⁶⁵ in that a time delay of almost a year between infliction of injury and death, and a failure to diagnose and treat a condition that was eminently treatable, renders the initial wound merely a historical setting for the ultimate cause of death.

As foreshadowed by the scenarios described above, an interesting question for students to consider is whether, if the intervening cause had been not medical treatment but an act of another third party, the outcome would have been the same? Or what of the case where an injury is inflicted by an accused, and that injury causes the death of the victim who was already susceptible as a result of an initial injury (inflicted by a third party) which had substantially healed? The accused would not escape liability because of the operation of the eggshell skull rule.⁶⁶ But would the inflictor of the original injury also be liable for the death? Arguably, outside of medical treatment cases, the answer would be no, on the basis that the original injury had ceased to be a substantial and operating cause, and rather is merely the historical setting in which the proximate cause of death took place.

On the face of it, the distinguishing feature of *Jordan* is that the treatment given in that case was characterised as ‘palpably wrong’.⁶⁷ In interpreting the meaning of this phrase in its context, assistance can be gained from HLA Hart and Tony Honoré in their seminal work, *Causation in the Law*.⁶⁸ The authors note that *Stephen’s Digest of the Criminal Law* requires

something more than ordinary negligence in order that one who inflicts a wound may be relieved of liability for homicide.⁶⁹

Dicta from the cases discussed thus far provide support for this approach; namely, that for the chain of causation to be broken in medical treatment cases gross negligence is required. Lord Beldam in *Cheshire* stated that

[a]cts or omissions of a doctor treating the victim for injuries he has received at the hands of an accused may conceivably be so extraordinary as to be capable of being regarded as acts independent of the conduct of the accused but it is most unlikely that they will be.⁷⁰

⁶⁵ [1976] VR 523.

⁶⁶ The ‘eggshell skull’ or ‘thin skull’ rule asserts that ‘those who use violence on other people must take their victims as they find them’: *Blaue* [1975] 3 All ER 446, 450. In other words, a person who inflicts violence on another is responsible for the consequences, notwithstanding that the victim may have been particularly susceptible because of his or her ‘thin skull’. This principle applies regardless of whether the person who inflicted the violence was aware of the susceptibility or not.

⁶⁷ *Jordan* [1956] 40 Cr App Rep 152, 157.

⁶⁸ Hart and Honoré, above n 26.

⁶⁹ Hart and Honoré, above n 26, 355.

⁷⁰ *Cheshire* [1991] 3 All ER 670, 675.

Again, it is difficult to conceive of a case more ‘extraordinary’ in this context than *Evans and Gardiner*.⁷¹ The original bowel resection may not have been ‘independent of the conduct of the accused’⁷² and, even if the resection surgery or other treatment immediately surrounding the surgery had been improper, acts of the accused would still have been substantial and operating causes, had the victim died at that time. But, at the time that he *did* die, the original wounds had healed. The resection had healed. As noted by the Full Court itself, ‘the wound “healed” after treatment and the victim “recovered”’.⁷³ In other words, the acts of the accused were spent. While the failure to diagnose and therefore treat may not have constituted gross negligence, the treatment was at that point independent of the conduct of the accused and thus the chain of causation had been broken.

Interestingly, in that case the victim, Hamilton, died not long before the expiry of the ‘year and a day rule’ which provides that, for liability for homicide to ensue, the death must occur within a year and a day from the date when the injury causing death was inflicted. In New Zealand, this rule is codified in s 162 of the *Crimes Act 1961* (NZ). After a year and a day, there is an irrebuttable presumption that the death was attributable to some other cause.⁷⁴ Had the victim ‘held on’ for another three weeks, the accused would not have been liable for his death. In the writer’s opinion, that outcome would not have been any more arbitrary than that which actually arose.

Ian Brudner notes the difficulties inherent in the common law approach to causation.⁷⁵ He argues that the applicable principles are ‘couched in language notorious for ... imprecision’.⁷⁶ While the cases are quite clear on the principle that the intervening act must be ‘overwhelming’ to make the accused’s act pale into insignificance, there is no guidance for students on what is actually required to do this. The question that needs to be answered, Brudner says, is precisely what it takes to cancel out the responsibility of someone whose act otherwise qualifies as a proximate cause of death.⁷⁷ The only example of what might be required is contained in *Jordan*⁷⁸ but, as noted, this case is routinely restricted to its own particular facts.

The medical treatment cases can be compared with the applicable rules in cases where the conduct of the victim is asserted as breaking the chain of causation. In *Blaue*,⁷⁹ the appellant stabbed the victim,

⁷¹ [1976] VR 523.

⁷² The words used by Lord Beldam in *Cheshire* [1991] 3 All ER 670, 677.

⁷³ *Evans and Gardiner* [1976] VR 523, 534.

⁷⁴ *Ibid* 523.

⁷⁵ Ian Brudner, ‘Owning Outcomes: On Intervening Causes, Thin Skulls, and Fault-Undifferentiated Crimes’ (1998) 11 *Canadian Journal of Law and Jurisprudence* 89.

⁷⁶ *Ibid* 92.

⁷⁷ *Ibid*.

⁷⁸ [1956] 40 Cr App Rep 152.

⁷⁹ [1975] 3 All ER 446.

Woodhead, piercing her lung. By the time she arrived at the hospital she had lost a great deal of blood and was told that a blood transfusion was necessary. She refused the transfusion on ground that it was contrary to her belief as a Jehovah's Witness, and she persisted in this refusal despite being advised that she would die if she did not receive the transfusion. She died the following day. The Crown admitted at trial that, had the transfusion been administered, Woodhead would not have died. The defence submitted that Woodhead's refusal to have a blood transfusion was unreasonable, and had broken the chain of causation between the stabbing and her death. The Court pointed out that

[i]t has long been the policy of the law that those who use violence on other people must take their victims as they find them. This in our judgment means the whole man, not just the physical man. It does not lie in the mouth of the assailant to say that his victim's religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable. The question for decision is what caused her death. The answer is the stab wound. The fact that the victim refused to stop this end coming about did not break the causal connection between the act and death.⁸⁰

It is implicit, in the decision in *Blaue*,⁸¹ that 'unreasonable conduct' on the part of the victim is necessary to break the chain of causation in that category of case, and this proposition is supported by *Roberts*⁸² — the 'reasonable foreseeability' case referred to above.⁸³ Hart and Honoré also suggest that unreasonable refusal of treatment may negate causation (while noting that such a proposition is 'despite *Blaue*').⁸⁴ In this regard, cases in which the conduct of the victim is asserted as breaking the chain of causation are analogous to medical treatment cases in the degree necessary to break the chain of causation. That is, *gross negligence* seems to be necessary to break the causal connection in medical treatment cases; *unreasonable conduct* on the part of the victim in the other category of cases. But, apart from *Jordan*,⁸⁵ the outcomes in the cases do not actually seem to support these principles.⁸⁶

⁸⁰ Ibid 450.

⁸¹ [1975] 3 All ER 446.

⁸² (1971) 56 Cr App R 95.

⁸³ See *Roberts* (1971) 56 Cr App R 95, 102 (Stephenson LJ).

⁸⁴ Hart and Honoré, above n 26, 361.

⁸⁵ [1956] 40 Cr App Rep 152.

⁸⁶ The law often distinguishes between acts and omissions and places a higher degree of accountability on those who act, compared with those who omit to do something. This is another factor that may affect outcomes in causation cases, but it is premature to conclude that this distinction was critical to the differing outcomes in *Jordan* [1956] 40 Cr App Rep 152 as compared to *Evans and Gardiner* [1976] VR 523 and *Cheshire* [1991] 3 All ER 670. In *Smith* [1959] 2 QB 35, the positive acts of administering oxygen and artificial respiration did not break the chain of causation either.

III POLICY-BASED REASONING

Based upon the foregoing, it seems reasonable to suggest that the decisions in the cases discussed have nothing to do with law and everything to do with policy.⁸⁷ If we use *Jordan*⁸⁸ to illustrate, it is not the application of the legal principles of *causation* that give rise to the decision, because in a case in which medical treatment is grossly negligent or palpably bad, the act of the accused is exactly the same as the act of an accused in a case where medical treatment is merely unskilful, or even proper. In both cases, the act of the accused either causes the death or it does not: subsequent gross negligence does not alter the nature of the original wound. But the line of authorities beginning with *Smith*⁸⁹ would hold one accused liable for the death but not the other. As Hart and Honoré point out, the decision in *Blaue*⁹⁰ may be correct but the reasoning is unsatisfactory.⁹¹ Further, in my view, the reasoning underpinning the decision-making in medical treatment cases is also unsatisfactory because it is not transparent. The cases use the language of causation to explain why the accused is still liable, rather than the language of policy. In reference to the reasoning in *Blaue*,⁹² Gardner commented:

In itself such a display of respect for the victim is doubtless commendable, but should it really dictate the fate of the assailant? The same goes for a detectable striving in the other decisions not to regard medical mistreatment as a *novus actus interveniens*.⁹³

Similarly, in *Evans and Gardiner*⁹⁴ and *Cheshire*,⁹⁵ the reasoning seems to be that, as a matter of policy, an accused will still be liable for the death of the victim where medical treatment is the proximate cause of death, whether such treatment is proper or improper, or even ‘thoroughly bad’.⁹⁶

The extent to which this kind of reasoning is problematic, for students and practitioners, has been noted by John Farrar, who identifies interests, legal values and ‘other relevant factors’ that operate in the context of judicial decision-making:

⁸⁷ Padfield also suggests that cases like these have nothing to do with causation and everything to do with policy: Nicola Padfield, ‘Clean Water and Muddy Causation: Is Causation a Question of Law or Fact, or Just a Way of Allocating Blame?’ [1995] *Criminal Law Review* 683, 685.

⁸⁸ [1956] 40 Cr App Rep 152.

⁸⁹ [1959] 2 QB 35.

⁹⁰ [1975] 3 All ER 446.

⁹¹ Hart and Honoré, above n 26, 361.

⁹² [1975] 3 All ER 446.

⁹³ Simon Gardner, ‘Causation in Homicide’ (1992) 108 *Law Quarterly Review* 24, 26.

⁹⁴ [1976] VR 523.

⁹⁵ [1991] 3 All ER 670.

⁹⁶ As was the case in *Smith* [1959] 2 QB 35.

The main limitations here are that we do not know what influence the various variables have on the ultimate decision of a court. All that you can learn in our present state of knowledge is that they do operate and that how they will operate in a particular case is to a degree a matter of intuition.⁹⁷

Farrar argues that, while legal policy is a fluid concept that is difficult to tie down, it seems to be relevant in determining the scope of the ratio decidendi of cases and whether their facts are sufficiently analogous to justify following them.⁹⁸

Christian Witting, writing about policy in duty of care cases, relies on a definition of policy-based reasoning as normative. In other words, it is reasoning based upon what the rights and obligations of individuals *ought* to be.⁹⁹ Ellie Margolis notes that policy-based reasoning involves an assessment of whether a proposed legal rule will advance a particular social goal.¹⁰⁰

There is nothing wrong with policy-based reasoning, per se. Paul Wangerin notes that good lawyers use it all the time.¹⁰¹ Furthermore, students are not unused to policy arguments — most curricula expect considerations of policy, or social purpose, within doctrinal courses.¹⁰² But one of the difficulties with policy-based reasoning is the uncertainty to which it gives rise. Witting argues that, while policy-based reasoning involves a wider focus, and is more forward-looking, it cannot offer definite guidance for decision-making since there is opportunity for predictive error.¹⁰³

W Jonathan Cardi, also in the context of tort law, argues that courts deciding negligence cases use the language of public policy only reluctantly, instead ‘cloak[ing] policy-based reasoning in doctrinal-sounding language’.¹⁰⁴ The concept of foreseeability is an example. Cardi argues that judges’ use of indeterminate terms such as ‘foreseeability’ in deciding whether a duty of care exists has a harmful effect on the law.¹⁰⁵ Because the term is so vague, it leads judges to treat like cases differently and different cases alike.¹⁰⁶ The same point can be made in respect of the judicial use of the term

⁹⁷ John H Farrar, *Introduction to Legal Method* (Sweet & Maxwell, 1977) 157, 158.

⁹⁸ *Ibid.*

⁹⁹ Christian Witting, ‘Tort Law, Policy and the High Court of Australia’ (2007) 31 *Melbourne University Law Review* 569, 573.

¹⁰⁰ Ellie Margolis, ‘Beyond Brandeis: Exploring the Uses of Non-Legal Materials in Appellate Briefs’ (2000) 34 *University of San Francisco Law Review* 197, 211.

¹⁰¹ Paul T Wangerin, ‘A Multidisciplinary Analysis of the Structure of Persuasive Arguments’ (1993) 16 *Harvard Journal of Law and Public Policy* 195, 218.

¹⁰² Marin Roger Scordato, ‘Reflections on the Nature of Legal Scholarship in the Post-Realist Era’ (2008) 48 *Santa Clara Law Review* 353, 365.

¹⁰³ Witting, above n 99, 577.

¹⁰⁴ W Jonathan Cardi, ‘Purging Foreseeability’ (2005) 58 *Vanderbilt Law Review* 739, 762.

¹⁰⁵ *Ibid.* 740.

¹⁰⁶ *Ibid.*

causation. In the medical treatment cases, with the exception of *Jordan*,¹⁰⁷ the use of the language of causation masks the real reason why liability is said to remain in the hands of the accused. The real reason is a moral claim that it is repugnant to justice that an accused should be held not liable for their actions if the intervening cause of death is an attempt to save the victim's life. Indeed, this would seem to be the policy behind s 166 of the *Crimes Act 1961* (NZ). That is, if the treatment is applied in good faith, then a person who inflicts dangerous injury to another person should not benefit in the sense that their liability might be mitigated by the fact that some other cause contributed to the harm. This policy is at least enshrined in statute and students can point to it as the basis for holding that an accused has legally caused a victim's death. The difficulty with the case law is that it is silent as to this kind of reasoning. Hart and Honoré note that there are theorists who

insist that the decisions of courts on the extent of a wrongdoer's liability are not and should not be reached by the application of any general principles but by the exercise of the sense of judgment, unhampered by legal rules, on the facts of each case ... Instead it should be recognized that the judge, though he may weigh an indefinite number of considerations each with some bearing on the question, decides more or less intuitively what the extent of a wrongdoer's responsibility is to be.¹⁰⁸

The case law discussed above suggests that at the heart of decisions about causation are judgements based on moral or policy considerations. This is acknowledged by Dressler, who notes:

Proximate causation analysis is less a matter of applying hard and fast rules than it is an effort by the factfinder to determine, for reasons of social policy or out of a conception of justice, on whom to impose criminal penalties. Consequently, although courts sometimes act as if there is a foolproof way of identifying the proximate cause of social harm, it is more accurate to think in terms of factors relating to causal responsibility that help lawyers predict and effect outcomes.¹⁰⁹

But, as Chan Wing Cheong notes, uncertainty results when decisions about liability are based upon unarticulated policy choices.¹¹⁰ Justice is not served by decision-making that could yield a different result for essentially the same criminal act — not for any lack of causation or *mens rea*, but because of the moral value attached to the proximate cause of death. When this kind of decision-making is employed, it is impossible to predict outcomes with any certainty, and this does not assist students in solving problems. It is our responsibility as legal educators to bridge this gap and ensure

¹⁰⁷ [1956] 40 Cr App Rep 152.

¹⁰⁸ Hart and Honoré, above n 26, 291.

¹⁰⁹ Joshua Dressler, *Cases and Materials on Criminal Law* (West Group, 1994) 181.

¹¹⁰ Chan Wing Cheong, 'The Requirement of Concurrence of *Actus Reus* and *Mens Rea* in Homicide' (2000) *Singapore Journal of Legal Studies* 75, 88.

that teaching and learning approaches support the development of enhanced legal reasoning skills in our students. As David Nadvorney observes:

We want our students to learn the legal reasoning skills necessary to develop sound legal argument, yet the message we send them, at least on paper, is that today we're studying homicide, tomorrow theft crimes, next week and for the rest of the semester, doctrine of some other name. Of course, reasoning skills are taught in law classes. Professors highlight it as they analyze cases and other materials, develop it when they use hypotheticals, and refine it during Socratic dialogue ... But it seems as if they hardly ever, except in legal methods or legal process courses, explicitly teach it.¹¹¹

Thus the challenge for legal education is how to explicitly teach legal reasoning when the legal reasoning in the case law is implicit. David Nadvorney suggests that integrating the teaching of reasoning skills into substantive courses can be done, and that doing so will enrich both the teaching and learning of law.¹¹² David Samuelson also believes that legal reasoning ought to be taught 'purposely and forthrightly'.¹¹³ He says:

How courts solve law problems is not best left to the intuition of beginning students, or to their memory, or to osmosis. Understanding legal decision-making results from learning how logic and rhetoric operate in the specialized area of legal thinking and problem-solving. Chiefly, it results from learning that the law possesses both external and internal logic and then from learning the dynamics of these breeds of logic. Finally, it results from learning how judges justify legal outcomes on non-legal grounds.¹¹⁴

IV TEACHING AND LEARNING FROM POLICY-BASED REASONING

It is of little help to students (and lawyers), in a system based very much on the doctrine of precedent and its reliance on material facts, that courts make decisions on the basis of moral culpability without reference to the legal principles that have been expressly held to apply. It is difficult for students to reconcile the outcome that a strict application of the *rationes decidendi* yield with the decisions in fact made by judges which are dictated by broader considerations of justice.¹¹⁵

¹¹¹ David Nadvorney, 'Teaching Legal Reasoning Skills in Substantive Courses: A Practical View' (2002) 5 *New York City Law Review* 109, 110.

¹¹² *Ibid* 113.

¹¹³ David R Samuelson, 'Introducing Legal Reasoning' (1997) 47 *Journal of Legal Education* 571, 572.

¹¹⁴ *Ibid*.

¹¹⁵ Lloyd L Weinreb, 'Teaching Criminal Law' (2009) 7 *Ohio State Journal of Criminal Law* 279, 289.

Therefore, it is essential firstly to draw students' attention to the fact that 'invisible factors' do operate in decision-making; and secondly to encourage students to look beyond the legal principles or rules in a case, to identify what those invisible factors are, and how to utilise them in problem-solving.

How is this to be achieved? A number of reasons, outlined below, support the view that combining a problem-based learning method with enhancing students' case analysis skills is an effective approach and easily achieved within current pedagogies. Case law — judicial application of the law to the facts of real problems — is real world problem-solving. The utility of cases as a teaching tool (aside from the fact that they contain the law) is that they demonstrate just how judges go about the process of applying the law (and policy) to the facts before them. The ability to utilise facts in problem-solving is a fundamental skill that must be acquired before students can begin to explore the nuances of policy-based reasoning. Cohen notes that, in the context of criminal cases, this mastery

includes understanding how critical facts are in criminal cases and how ambiguous they may well be. It also includes a basic understanding of the processes used in criminal cases to present facts and to resolve the facts to be applied to the law.¹¹⁶

At the core of the approaches to teaching and learning discussed in this article is the idea of students as active learners. As Torrey points out, it is widely acknowledged that participatory student learning is the most effective pedagogy.¹¹⁷

A Problem-Based Learning

The use of problem-solving (as distinct from problem-based learning) as a method of teaching and assessment is common in law schools.¹¹⁸ This method invites students to apply knowledge already gained (through lectures, readings and tutorials) to hypothetical fact situations.¹¹⁹ But problem-based learning is quite different to problem-solving. It uses real-world problems to focus learning, and supports the development of abstract thinking and critical thinking.¹²⁰ While there are a range of methods that fall within the category of problem-based learning, the common feature is learning by doing — students learn by being active problem-solvers.¹²¹ Problem-based learning enables students to consider issues in a 'real-world' context

¹¹⁶ Cohen, above n 1, 1201.

¹¹⁷ Morrison Torrey, 'You Call That Education' (2004) 19 *Wisconsin Women's Law Journal* 93, 103.

¹¹⁸ Jacquelin Mackinnon, 'Problem Based Learning and New Zealand Legal Education' (2006) 3 *Web Journal of Current Legal Issues* <<http://webjcli.ncl.ac.uk/2006/issue3/mackinnon3.html>>.

¹¹⁹ Ibid.

¹²⁰ Ibid.

¹²¹ Hirokawa, above n 1, 2.

rather than single legal category problems, which encourage the collation and synthesis of information by students and the ability to apply knowledge gained thereby to the facts of the problem.¹²² It is important to note that the use of hypothetical problems in teaching students is not necessarily the same thing as problem-based learning. A hypothetical problem usually contains only one or two issues, whereas problems in problem-based learning approaches raise several. These issues must be marshalled by the students before each can be analysed and ‘solved’.¹²³ As Mryon Moskovitz notes, clients present lawyers with problems, not hypotheticals.¹²⁴ So, for the purposes of problem-based learning, problems are integrated stories with elements that must be identified, extracted and organised into a coherent structure.¹²⁵ The more that these stories resemble real life, the more motivated students are to engage with the material.¹²⁶

B Case Synthesis

Nevertheless students still require case analysis skills. In common law systems, cases play a significant role in legal problem-solving. As McMunigal points out, in the context of teaching criminal law,

[c]ases are wonderful teaching tools, allowing students to see the criminal law applied to concrete and often compelling factual scenarios and to gain insight into the policies behind the law from the rationales provided for deciding cases. Analyzing cases is a crucial skill for students to master.¹²⁷

The case method, as employed in law schools, asks students to examine appellate decisions to discover legal reasoning and discern the over-arching legal principles.¹²⁸ There have been numerous criticisms of the case method, including that it does not allow for students to think critically about the law,¹²⁹ and that it relies overly on a positivistic view of the nature of law. Lloyd Weinreb notes:

No one would assert anymore that the only question of interest to aspiring lawyers is what the law is, which question is to be answered exclusively by an examination of cases. The legislative function is recognized

¹²² Mackinnon, above n 118.

¹²³ Mryon Moskovitz, ‘Beyond the Case Method: It’s Time to Teach with Problems’ (1992) 42 *Journal of Legal Education* 241, 246.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.* 256.

¹²⁶ Stephen Nathanson, ‘Developing Legal Problem-Solving Skills’ (1994) 44 *Journal of Legal Education* 215, 224.

¹²⁷ Kevin C McMunigal, ‘A Statutory Approach to Criminal Law’ (2004) 48 *Saint Louis University Law Journal* 1285, 1286.

¹²⁸ Michael J Greenlee, ‘Theory, Practice, Specialization, and Interdisciplinary Perspectives: Pulling It All Together at the College of Law’ (2009) 52 *Advocate (Idaho)* 25, 25.

¹²⁹ Anders Walker, ‘The Anti-Case Method: Herbert Wechsler and the Political History of the Criminal Law Course’ (2009) 7 *Ohio State Journal of Criminal Law* 217, 217–20.

unstintingly. And the relevance of empirical disciplines like psychology and sociology, as well as historical, philosophic, and economic insights, is not doubted.¹³⁰

Notwithstanding, the case method still has a crucial role within legal education.¹³¹ As Aaronson points out,

the case method provides students with simulated practice in how appellate courts formally reason, and predicting what courts will do is a core skill central to a lawyer's claim to professional expertise.¹³²

Compared to the United States, the history of legal education in Commonwealth jurisdictions is relatively short. In part, this is due to the late development of law as an autonomous discipline in the English university system.¹³³ Sugarman notes that the common law formed the nucleus of English legal education and scholarship.¹³⁴ According to Sugarman, the 'common law frame of mind' involves an assumption that:

although law may appear to be irrational, chaotic and particularistic, if one digs deep enough and knows what one is looking for, then it will soon become evident that the law is an internally coherent and unified body of rules.¹³⁵

However, of course, this assumption is not borne out in reality. As Sugarman observes, principles are inseparable from interpretation and theory, which are shaped by values. He notes that this is what gives rise to the

schizophrenia of the first-year law student: when is it that s/he is supposed to talk about 'law'; and when is it that s/he can talk about 'policy'?¹³⁶

It is necessary to bear this in mind. However, in avoiding an overly positivistic view of the law, we must also be mindful of the centrality that case law plays in our legal system. While in New Zealand, as in many other jurisdictions, the criminal law has been codified, case law plays a fundamentally important role in interpreting and applying the statute. Furthermore, in the context of causation, the statute is silent as to when an accused's act is held to be legally causative of death (apart from s 166 of the *Crimes Act 1961* (NZ) which applies only where the immediate cause of death is medical treatment). While s 158 of the *Crimes Act 1961* (NZ) defines homicide as the killing of

¹³⁰ Weinreb, above n 115, 280.

¹³¹ Saunders and Levine, above n 1, 129.

¹³² Mark Neal Aaronson, 'Thinking Like a Fox: Four Overlapping Domains of Good Lawyering' (2002) 9 *Clinical Law Review* 1, 6.

¹³³ Geoff McLay, 'Toward a History of New Zealand Legal Education' (1999) 30 *Victoria University of Wellington Law Review* 333.

¹³⁴ David Sugarman, 'Legal Theory, the Common Law Mind and the Making of the Textbook Tradition' in William Twining (ed), *Legal Theory and Common Law* (Blackwell, 1986) 26.

¹³⁵ Ibid.

¹³⁶ Ibid 27.

a human being, the cases of *R v Storey*¹³⁷ and *R v Grant*¹³⁸ imply that ‘to kill’ means to ‘cause the death of’. Any argument that studying appellate decisions is not essential for an understanding of the law clearly cannot be sustained. But learning the case law is not simply a matter of learning the rules from a case and applying that rule to the facts of a problem. Instead, students must be able to synthesise ideas from groups of cases in order to determine the law to be applied to any given set of facts.¹³⁹ In doing so, students must be able to look beyond the explicit ideas and consider any unarticulated ideas, such as underlying policy concerns, that may dictate the courts’ reasoning.¹⁴⁰ Larry Teply and Ralph Whitten suggest that reading and analysing cases is still the most important method for learning legal reasoning.¹⁴¹ They add that cases are useful in demonstrating to students how courts in some substantive areas articulate rules that do not fully express the policies that the courts are enforcing:

[T]he cases in these situations allow the students to look beyond the articulation of the rules and identify the ‘real’ reasons for the decisions in the area.¹⁴²

Teply and Whitten add that these types of cases are instrumental in teaching students that they cannot simply ‘swallow what the courts say’ but instead must read critically and widely in order to predict what an outcome should be on a particular issue.¹⁴³ Jane Gionfriddo argues that the ability to synthesise cases is a complex skill, and students need to understand what a group of cases explicitly says and what inferences can reasonably be drawn, in order to come to grips with all important ideas and nuances.¹⁴⁴ However, it should also be acknowledged that there is not necessarily one coherent set of principles to be applied and students are often forced to pick and choose between competing interpretations from the cases.

The process of adopting problem-based learning and the teaching of enhanced case analysis skills is ongoing at Te Piringa Faculty of Law. My own teaching in criminal law involves a mixture of methods,¹⁴⁵ which build on research and case analysis skills students learn in a first-year ‘Legal Method’ course. Within criminal law,

¹³⁷ [1931] NZLR 417.

¹³⁸ [1966] NZLR 968.

¹³⁹ Gionfriddo, above n 1, 3.

¹⁴⁰ Ibid 13.

¹⁴¹ Larry L Teply and Ralph U Whitten, ‘Teaching Civil Procedure Using an Integrated Case-Text-and-Problem Method’ (2003) 47 *Saint Louis University Law Journal* 91, 99.

¹⁴² Ibid.

¹⁴³ Ibid 102–3.

¹⁴⁴ Gionfriddo, above n 1, 36.

¹⁴⁵ As Mueller notes, teaching methods are linked with a number of variables beyond the teacher’s control, such as class size: Gerhard O W Mueller, ‘Teaching International Criminal Law — Teaching Techniques’ (1988) 1 *Touro Journal of Transnational Law* 177, 180–3.

content is primarily delivered via a weekly two-hour lecture to a class of approximately 70–150 students in the third year of their undergraduate degree. Despite the large size of the class, questions are frequently raised by students during lectures. I also direct questions to the class as a whole, particularly when recapping particular subject areas or when discussing various policy approaches to criminal law. In addition to the weekly lecture, students attend six smaller group tutorials spread evenly across the teaching year. Tutorials are based around hypothetical fact situations requiring students to apply the relevant law and suggest potential outcomes. Assessment is also largely based around problem-solving (both in a test on criminal procedure and in the provision of a legal opinion on an area of the substantive law), although there is the opportunity to write an essay in the final exam. The opinion must rely on both statute and case law as authorities. In terms of reading material, students purchase a course materials book, containing mostly cases, and are advised to read a number of texts for supplementary reading.

Causation is taught in two different contexts. First, it is covered within the general principles of *mens rea* and *actus reus*, as one of the means by which concurrence of *actus reus* and *mens rea* can be established. But it is also taught within the context of homicide. There is support for the teaching of general principles within the context of specific crimes,¹⁴⁶ as it is often difficult to consider these concepts as abstractions. There is usually a homicide question in the final exam.

Currently, students participate in one tutorial (of a total of six per year) in which causation is in issue. This tutorial topic is on homicide and asks students to consider causation in the context of (i) an assault victim drowning in his own blood; and (ii) an assault victim receiving improper treatment causing death. Class and tutorial discussion focuses on extracting ‘the important ideas’ from the cases. As Gionfriddo suggests, we should begin by evaluating what courts have explicitly articulated before proceeding to work with the ideas inferentially supported by other cases.¹⁴⁷ As mentioned above, students begin learning case analysis in a first year Legal Method course. This is achieved by tracking the development of the law of negligence or the postal rule through the line of precedent cases. Samuelson describes a similar process, by which he uses the development of the law of negligence to teach legal reasoning. Once students have considered relevant cases at length and attempted to resolve issues in a hypothetical case, Samuelson says that students begin to realise that the validity of their answers turns upon their skill in drawing appropriate analogies and distinctions, and ‘on their

¹⁴⁶ Weinreb, above n 115.

¹⁴⁷ Gionfriddo, above n 1, 10.

sensitivity to the logical employment of legal principles'.¹⁴⁸ Similarly, by the time Te Piringa Faculty of Law students study 'Crimes' in the third year of their degree, they should have sufficient case analysis skills to begin synthesising the relevant authorities. In the context of causation, this entails beginning with the principle enunciated in *Smith*¹⁴⁹ that a wound is deemed to have caused death if, at the time of death, the wound is an operating and substantial cause.¹⁵⁰ The cases of *Evans and Gardiner*¹⁵¹ and *Cheshire*¹⁵² supplement the approach taken in *Smith*¹⁵³ by noting that it is only in the most unusual case that the chain of causation will be taken to be broken. The case synthesis is then enhanced by drawing an analogy between the explicit policy in *Blaue*¹⁵⁴ that those who use violence on others take their victims as they find them and the implied policy in *Smith*,¹⁵⁵ *Evans and Gardiner*¹⁵⁶ and *Cheshire*,¹⁵⁷ to conclude that medical treatment will almost never break the chain of causation. This is akin to acknowledging the existence of the eggshell skull rule. Finally, rather than restricting *Jordan*¹⁵⁸ to its own particular facts, students are encouraged to find that *Jordan*¹⁵⁹ has been overruled by *Smith*¹⁶⁰ and subsequent cases, despite the reluctance of courts in those cases to hold so expressly. To encourage students to reason in this way, 10 questions (identified later in this article)¹⁶¹ are postulated and discussed in class.

Assessment on causation normally takes the form of an opinion on homicide which includes hypothetical facts such as those outlined in Part II of this article. In 2010, the fact scenario concerned a victim who was stabbed in the course of a fight. The causation issue centred on the medical mismanagement of an outbreak of Methicillin-Resistant Staphylococcus Aureus (MRSA) which was contracted when the stab wound had almost healed. To this extent, the facts were analogous to the material facts in *Jordan*.¹⁶² Students were expected to extract and apply the relevant legal principles, and identify both the relevant facts and which facts were absent from the hypothetical (for example, the hypothetical did not state that the infection arose at the site of the wound but left this intentionally vague). Extra credit

¹⁴⁸ Samuelson, above n 113, 594.

¹⁴⁹ [1959] 2 QB 35.

¹⁵⁰ [1959] 2 QB 35, 42–3.

¹⁵¹ [1976] VR 523.

¹⁵² [1991] 3 All ER 670.

¹⁵³ [1959] 2 QB 35.

¹⁵⁴ [1975] 3 All ER 446.

¹⁵⁵ [1959] 2 QB 35.

¹⁵⁶ [1976] VR 523.

¹⁵⁷ [1991] 3 All ER 670.

¹⁵⁸ [1956] 40 Cr App Rep 152.

¹⁵⁹ *Ibid.*

¹⁶⁰ [1959] 2 QB 35.

¹⁶¹ See below n 179 and accompanying text.

¹⁶² [1956] 40 Cr App Rep 152.

was awarded to students who identified the unarticulated policy from *Smith*¹⁶³ and the line of cases that adopted it. This was assessed by determining the extent to which students had considered and given reasoned responses to the questions postulated in this paper¹⁶⁴ (bearing in mind that not all questions were necessarily relevant to the issue).

The 2010 problem is now being developed for wider use in 2011. The factual matrix is being expanded to give rise to a number of criminal law issues and jurisprudential issues so that it can form the centrepiece of a problem-based learning approach that applies outside of the 'Crimes' course.

Obviously, resource issues play a large part in determining the particular approach taken, but problem-based learning can be used within one course or topic or it can inform a whole curriculum.¹⁶⁵ With regard to the latter approach, Peter Davis's question as to why we have law schools and not justice schools is an interesting one.¹⁶⁶ He argues that justice needs to become central to law school curricula and consideration of fairness and justice issues needs to be explicit.¹⁶⁷ Davis uses John Rawls' construct of the veil of ignorance to encourage students to consider what a more just and fair society might look like.¹⁶⁸ As a teacher of both 'Jurisprudence' and 'Crimes', and assuming some degree of stability in workload allocation, it is entirely possible to produce problems for use in both courses. Issues around distributive and corrective justice, including Rawls' theory of justice (currently taught in 'Jurisprudence' in the second-year program at my institution) are relevant to questions about culpability (including causation) in 'Crimes' at third year. In 'Jurisprudence', students are encouraged to think about how the benefits and burdens of a society should be distributed and how such a distribution should be maintained. This involves conversations about how citizens inflict harm on others (by taking away benefits) and ways in which citizens become liable for those harms. In the 'Crimes' course, students need to again consider the nature of harm (what harms are criminal rather than civil) and the basis and extent of liability for criminal harms. Causation, as a basis for imposing liability on people for harm, is thus an important concept in both 'Jurisprudence' and 'Crimes', as well as 'Torts'. The use of a complex factual matrix in all three courses would assist students in understanding how the principle works within the particular substantive area of law (crimes or torts)

¹⁶³ [1959] 2 QB 35.

¹⁶⁴ See below n 179 and accompanying text.

¹⁶⁵ Mackinnon, above n 118.

¹⁶⁶ Peter L Davis, 'Why Not a Justice School? On the Role of Justice in Legal Education and the Construction of a Pedagogy of Justice' (2007) 30 *Hamline Law Review* 513.

¹⁶⁷ *Ibid* 534.

¹⁶⁸ *Ibid* 538.

as well as enabling them to appreciate the policy underlying those principles. Margolis argues that policy is usually learned in doctrinal law courses, often identified as particular dichotomies such as security versus freedom of action,¹⁶⁹ and says that as a result:

We get the message that policy is an amorphous concept, more useful for understanding a decision after the fact than for predicting or advocating a particular outcome.¹⁷⁰

Combining a doctrinal approach with jurisprudential analysis will encourage students to identify the policy issues that arise and, where relevant, how they may lead to injustice in some cases. Janet Weinstein and Linda Morton, who teach interdisciplinary problem-solving courses at California Western University, note that ‘justice’ is a goal of many law students.¹⁷¹ Their aim is therefore to enhance students’ vision of a just society.¹⁷² They say:

Legal education generally confines itself to a narrow, analytic approach to specific legal issues — an approach certainly essential to the practice of law. On the other hand, with our world becoming more global and more interdisciplinary, students must also learn methods for, and gain confidence in, tackling larger societal issues.¹⁷³

In many of the causation cases, the actions of the accused can be seen as warranting punishment regardless of whether or not there was another, more proximate, cause of death. As Gobert points out in relation to the medical treatment cases, irrespective of the doctors’ conduct, the conduct of the defendant was sufficiently blameworthy.¹⁷⁴ Regardless of whether the doctors’ acts or omissions were grossly negligent or simply negligent, the accused’s act was morally wrong. Also, one of the factors taken into account in sentencing is the degree to which an offender poses a risk to society. If we return to the hypothetical fact situations mentioned earlier, the accused A is equally as dangerous as the accused C, but will not be liable for B’s death because of the fortuitous (from A’s perspective) circumstance of B being struck by the car. Sanford Kadish argues that reducing punishment for an offender, simply because luckily no harm results, does not make sense in the context of the purposes of punishment.¹⁷⁵ If one of the aims of the criminal justice system is to

¹⁶⁹ Ellie Margolis, ‘Closing the Floodgates: Making Persuasive Policy Arguments in Appellate Briefs’ (2001) 62 *Montana Law Review* 59, 62–3.

¹⁷⁰ *Ibid.*

¹⁷¹ Janet Weinstein and Linda Morton, ‘Interdisciplinary Problem Solving Courses as a Context for Nurturing Intrinsic Values’ (2007) 13 *Clinical Law Review* 839, 850.

¹⁷² *Ibid.*

¹⁷³ *Ibid.*

¹⁷⁴ Gobert, above n 4, 17.

¹⁷⁵ Sanford H Kadish, ‘The Criminal Law and the Luck of the Draw’ (1994) 84 *Journal of Criminal Law and Criminology* 679.

protect society from those who pose a risk, regardless of what harm actually occurs, why employ a results-based approach?¹⁷⁶ Gobert makes the point that conduct that causes harm may not always be morally blameworthy, and morally blameworthy conduct may not necessarily cause harm. He argues that crimes should be defined in terms of acts and mental state, rather than results. Otherwise, the moral component of culpability is lost.¹⁷⁷ Gobert suggests that

it may well be that the most practical approach to questions of causation lies in a frank recognition that the true issue is not causation at all but attribution — whether, under all the circumstances, it is fair and just to attribute the harmful result to the defendant.¹⁷⁸

Considerations of justice are not the only relevant factors in teaching problem-solving from policy-based reasoning. In light of all the foregoing arguments, in seeking to employ policy-based reasoning in solving problems about causation, students are encouraged to consider the following, non-exhaustive, list of questions:¹⁷⁹

- i. Should the degree of the doctor's negligence affect the accused's culpability?
- ii. Should the dangerousness of the accused's conduct play a greater role in determining liability?
- iii. Were the defendants Smith,¹⁸⁰ Cheshire¹⁸¹ and Evans and Gardiner¹⁸² more dangerous than the defendant Jordan?¹⁸³
- iv. Were they more morally culpable?
- v. Should the victim's chance of recovery be a material factor?
- vi. Should the length of time between the accused's act and the victim's death be a material factor (the year and a day rule notwithstanding)?
- vii. Should the fact that a wound might have almost healed at the time the proximate cause arose be a material factor?
- viii. What are the facts upon which *Jordan*¹⁸⁴ is distinguishable?
- ix. What would the outcomes in *Smith*,¹⁸⁵ *Cheshire*¹⁸⁶ and *Evans and Gardiner*¹⁸⁷ be if the proximate cause of death was something *other* than medical treatment; for example, the act of a third party?

¹⁷⁶ Gobert, above n 4, 8.

¹⁷⁷ *Ibid* 19.

¹⁷⁸ *Ibid* 29.

¹⁷⁹ See above n 161 and 164 and accompanying text.

¹⁸⁰ [1959] 2 QB 35.

¹⁸¹ [1991] 3 All ER 670.

¹⁸² [1976] VR 523.

¹⁸³ [1956] 40 Cr App Rep 152.

¹⁸⁴ *Ibid*.

¹⁸⁵ [1959] 2 QB 35.

¹⁸⁶ [1991] 3 All ER 670.

¹⁸⁷ [1976] VR 523.

- x. What are the policy considerations that underpin apportioning blame for harm?

The hypothetical fact situations outlined in Part II of this article provide useful starting points for students to consider these questions, but require expansion to encourage students to think broadly about different bases for liability. In other words, while they are asked to consider whether the accused's act was causative of death, they might also consider any liability arising on the part of medical staff (in tort, for example). In light of the aims of a problem-based learning approach, the facts of the problem should allow students to identify where there may be gaps where the law does not expressly provide for such an answer. Further, students should be encouraged to consider whether any express legal answer is in fact a *just* one. Presenting the students with problems that ask them to think about a number of issues 'outside the square' of the doctrinal subject will enable them come to grips with the 'complexity of real-life situations',¹⁸⁸ and the fact that the law as expressed does not always provide neat answers.

It must be noted that the ideas raised in this paper are a work in progress. While some of the approaches have been adopted at Te Piringa Faculty of Law, there is scope for further development of legal method, jurisprudence, torts and criminal law courses to further accommodate the need for students to learn how to identify and apply the underlying policy from case law.

V CONCLUSION

An over-arching, pedagogical goal of law school should be facilitating the cognitive and emotional development of students in ways that provide them with a sufficient foundation to become lawyers who, in pursuing their profession, are able to analyse problems in their full context. This includes recognising both patterns and uniqueness in different fact situations and knowing how to synthesise, prioritise and apply appropriate breadth and depth of knowledge.¹⁸⁹

The homicide cases canvassed in this article demonstrate that, where questions of causation arise, outcomes depend upon the operation of factors that are usually invisible to the student. While students are required to extract the rules from cases and to apply them to hypothetical fact situations in order to predict outcomes, this approach is problematic where students must rely on cases in which it is difficult to separate out policy reasons from those based on the application of express legal rules. Such policy considerations can be found in the line of authorities beginning with *Smith*,¹⁹⁰ to the effect

¹⁸⁸ Aaronson, above n 132, 8.

¹⁸⁹ *Ibid* 18.

¹⁹⁰ [1959] 2 QB 35.

that medical treatment, regardless of how improper, will not break the chain of causation.

Students must therefore be encouraged to consider the invisible factors that judges employ in legal reasoning, by developing the skills necessary to synthesise the law and policy from cases, and by actively solving problems in which these issues arise. This can occur at all stages of the teaching and learning process, but tutorials in particular are a useful means by which students can engage in discussions about broader policy considerations without the fear that they may be getting the answer wrong, which is a risk in formal assessments. As Tracey Meares, Neal Katyal and Dan Kahan argue, a failure to engage students in the kinds of questions that are being asked in contemporary scholarship can result in students being unable to deal with criminal justice policy in practice.¹⁹¹ This means that students must be taught not only how to extract the law from cases, but also the policy, based on moral considerations, that underpins the decisions. In other words, one of the essential skills that falls within the rubric of ‘thinking like a lawyer’ is perhaps the ability to think like a policy analyst.

¹⁹¹ Tracey L Meares, Neal Katyal and Dan M Kahan, ‘Updating the Study of Punishment’ (2004) 56 *Stanford Law Review* 1171, 1172.