

**SUPREME COURT OF CANADA**

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| **Citation:** R. *v.* Maybin, 2012 SCC 24, [2012] 2 S.C.R. 30 | **Date:** 20120518  **Docket:** 34011 |

**Between:**

**Matthew Leslie Maybin and Timothy Andrew Maybin**

Appellants

and

**Her Majesty The Queen**

Respondent

- and -

**Attorney General of Ontario**

Intervener

**Coram:** LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

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| **Reasons for Judgment:**  (paras. 1 to 62): | Karakatsanis J. (LeBel, Fish, Abella, Rothstein, Cromwell and Moldaver JJ. concurring) |

R. *v.* Maybin, 2012 SCC 24, [2012] 2 S.C.R. 30

Matthew Leslie Maybin and

Timothy Andrew Maybin *Appellants*

v.

Her Majesty The Queen *Respondent*

and

Attorney General of Ontario *Intervener*

**Indexed as: R. *v.* Maybin**

2012 SCC 24

File No.: 34011.

2011:  December 15; 2012:  May 18.

Present: LeBel, Fish, Abella, Rothstein, Cromwell, Moldaver and Karakatsanis JJ.

on appeal from the court of appeal for british columbia

*Criminal law — Offences — Manslaughter — Causation — Accused punching victim in head during barroom altercation rendering him unconscious — Third party intervening and punching victim in head — Victim dying from injuries — When does an intervening act by another person sever causal connection between accused’s act and victim’s death, thereby absolving accused of legal responsibility? — Whether it was open to trial judge to find that accused’s assaults remained a significant contributing cause of death despite intervening act.*

Late at night, in a busy bar, the accused brothers, T and M, repeatedly punched the victim in the face and head. T eventually struck a blow that rendered the victim unconscious. Arriving on the scene within seconds, a bar bouncer then struck the victim in the head. The medical evidence was inconclusive about which blows caused death. As a result, the trial judge acquitted the accused brothers and the bouncer. The Court of Appeal was unanimous that the accused’s assaults were factually a contributing cause of death — “but for” their actions, the victim would not have died. Furthermore, the majority of the Court of Appeal concluded that the risk of harm caused by the intervening actor could have been reasonably foreseeable to the accused. The dissenting judge did not agree that the accused could have reasonably foreseen the conduct of the intervening actor, and also concluded that the intentional act of a third party (bouncer) acting independently severed legal causation. The appeal was allowed, the acquittals were set aside and a new trial was ordered.

*Held*: The appeal should be dismissed.

Courts have used a number of analytical approaches to determine when an intervening act absolves the accused of legal responsibility for manslaughter. For example, both the “reasonable foreseeability” and the “intentional, independent act” approach may be useful in assessing legal causation depending on the specific factual matrix. These approaches grapple with the issue of the moral connection between the accused’s acts and the death; they acknowledge that an intervening act that is reasonably foreseeable to the accused may well not break the chain of causation, and that an independent and intentional act by a third party may in some cases make it unfair to hold the accused responsible. These approaches may be useful tools depending upon the factual context. However, the analysis must focus on first principles and recognize that these tools are analytical aids and do not alter the standard of legal causation or substitute new tests. Even in cases where it is alleged that an intervening act has interrupted the chain of legal causation, the causation test remains whether the dangerous and unlawful acts of the accused are a significant contributing cause of the victim’s death.

The reasonable foreseeability approach questions whether it is fair to attribute the resulting death to the initial actor and posits that an accused who undertakes a dangerous act, and in so doing contributes to a death, should bear the risk that other foreseeable acts may intervene and contribute to that death. The time to assess reasonable foreseeability is at the time of the initial unlawful act, rather than at the time of the intervening act as it is too restrictive to require that the precise details of the event be objectively foreseeable. It is the general nature of the intervening acts and the accompanying risk of harm that needs to be reasonably foreseeable. The intervening acts and the ensuing non‑trivial harm must be reasonably foreseeable in the sense that the acts and the harm that actually transpired flowed reasonably from the conduct of the accused. If so, then the accused’s actions may remain a significant contributing cause of death.

Whether an intervening act is independent is sometimes framed as a question of whether the intervening act is a response to the acts of the accused. In other words, did the act of the accused merely set the scene, allowing other circumstances to (coincidentally) intervene, or did the act of the accused trigger or provoke the action of the intervening party? If the intervening act is a direct response or is directly linked to the accused’s actions, and does not by its nature overwhelm the original actions, then the accused cannot be said to be morally innocent of the death.

In this case, it was open to the trial judge to conclude that it was reasonably foreseeable that the fight would escalate and other patrons would join or seek to end the fight or that the bouncers would use force to seek to gain control of the situation. Further, it was open to the trial judge to find that the bouncer’s act was closely connected in time, place, circumstance, nature and effect with the accused’s acts and the effects of the accused’s actions were still subsisting and not spent at the time the bouncer acted. Therefore, based upon the trial judge’s findings of fact, it was open to him to conclude that the general nature of the intervening act and the accompanying risk of harm were reasonably foreseeable; and that the act was in direct response to the accused’s unlawful actions. The judge could have concluded that the bouncer’s assault did not necessarily constitute an intervening act that severed the link between the accused’s conduct and the victim’s death, such that it would absolve them of moral and legal responsibility. The trial judge could have found that the accused’s actions remained a significant contributing cause of the death.

**Cases Cited**

**Applied:** *Smithers v. The Queen*, [1978] 1 S.C.R. 506; *R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488; **referred to:** *R. v. Tower*, 2008 NSCA 3, 261 N.S.R. (2d) 135; *R. v. Shilon* (2006), 240 C.C.C. (3d) 401; *R. v. Pagett* (1983), 76 Cr. App. R. 279; *R. v. Smith*, [1959] 2 Q.B. 35; *R. v. Sinclair*, 2009 MBCA 71, 240 Man. R. (2d) 135; *R. v. Hallett*, [1969] S.A.S.R. 141; *R. v. Hughes*, 2011 BCCA 220, 305 B.C.A.C. 112; *R. v. Cribbin* (1994), 89 C.C.C. (3d) 67; *R. v. Creighton*, [1993] 3 S.C.R. 3.

**Statutes and Regulations Cited**

*Criminal Code*, R.S.C. 1985, c. C‑46, ss. 21, 222, 224, 225.

**Authors Cited**

Williams, Glanville. “*Finis* for *Novus Actus*?” (1989), 48 *Cambridge L.J.* 391.

Williams, Glanville. *Textbook of Criminal Law*, 2nd ed. London: Stevens & Sons, 1983.

Yeo, Stanley. “Blamable Causation” (2000), 24 *Crim. L.J.* 144.

APPEAL from a judgment of the British Columbia Court of Appeal (Finch C.J.B.C. and Ryan and Huddart JJ.A.), 2010 BCCA 527, 295 B.C.A.C. 298, 501 W.A.C. 298, 263 C.C.C. (3d) 485, 81 C.R. (6th) 48, [2010] B.C.J. No. 2311 (QL), 2010 CarswellBC 3168, setting aside the acquittals entered by Halfyard J., 2008 BCSC 1277, [2008] B.C.J. No. 2037 (QL), 2008 CarswellBC 2284, and ordering a new trial. Appeal dismissed.

*J. M. Peter Firestone* and *Catherine Tyhurst*, for the appellants.

*John M. Gordon*, *Q.C.*, and *Elizabeth A. Campbell*, for the respondent.

*Lucy Cecchetto*, for the intervener.

The judgment of the Court was delivered by

1. Karakatsanis J. — The causal link between an accused’s actions and the victim’s death is not always obvious in homicide cases. In cases involving multiple causes of death or intervening causes between an accused’s action and the victim’s death, determining causation is more challenging. An accused’s unlawful actions need not be the only cause of death, or even the direct cause of death; the court must determine if the accused’s actions are a significant contributing cause of death.
2. This appeal raises the question of when an intervening act by another person severs the causal connection between the accused’s act and the victim’s death, thereby absolving the accused of legal responsibility for manslaughter.
3. Late at night, in a busy bar, the appellants Timothy and Matthew Maybin, repeatedly punched the victim in the face and head. Timothy Maybin eventually struck a blow that rendered the victim unconscious. Arriving on the scene within seconds, a bar bouncer then struck the victim in the head. While the trial judge was not satisfied that Matthew Maybin’s assault caused bodily harm, he found that he was a party to his brother’s more serious assault. The medical evidence was inconclusive about which blows caused death. As a result, the trial judge acquitted the appellants and the bouncer. At issue is whether the trial judge could have concluded that the appellants caused the death in fact; and if so, whether the subsequent assault by another person constituted an intervening act that nonetheless broke the chain of legal causation.
4. The British Columbia Court of Appeal (2010 BCCA 527, 295 B.C.A.C. 298) concluded that factual causation had been established: “but for” the actions of the appellants the victim would not have died. However, the judges used two different analytical approaches in addressing legal causation. Ryan J.A. writing for the majority (Huddart J.A. concurring) asked whether the risk of the harm caused by the intervening actor could have been reasonably foreseeable to the appellants. She concluded that it could have been. Ryan J.A. allowed the appeal, set aside the appellants’ acquittals and ordered a new trial. Finch C.J.B.C., in dissent, did not agree that the appellants could have reasonably foreseen the conduct of the intervening actor, and concluded that the intentional act of a third party acting independently severed legal causation.
5. In my view, both the “reasonable foreseeability” and the “intentional, independent act” approach may be useful in assessing legal causation depending on the specific factual matrix. However, neither is determinative of whether an intervening act severs the chain of causation so that an accused’s act is not a significant contributing cause of death. They are tools to assist in addressing the test for legal causation set out by this Court in *Smithers v. The Queen*, [1978] 1 S.C.R. 506, and confirmed in *R. v. Nette*, 2001 SCC 78, [2001] 3 S.C.R. 488: Were the unlawful acts of the appellants a significant contributing cause of death?
6. The issues raised in this appeal are:

(1) Did the trial judge err in failing to address whether the appellants’ assaults were in fact a cause of death?

(2) Was it open to the trial judge to find that the appellants’ assaults remained a significant contributing cause of death despite the intervening act of the bouncer because (a) the intervening act was reasonably foreseeable; or (b) the intervening act was not an intentional, independent act?

1. For the reasons that follow, I would conclude that it was open to the trial judge to find that the appellants’ assaults remained a significant contributing cause of death. Accordingly, I would dismiss the appeal.

1. Background

1. Late one night in a crowded bar, the victim apparently affronted the appellant Timothy Maybin by touching a pool ball on the appellant’s table. Timothy Maybin then grabbed the victim and violently punched his face and head in quick succession. Timothy’s brother, the appellant Matthew Maybin, helped his brother but was pulled away by bar staff. The victim did not defend himself, and after being hit a number of times, he staggered a few steps and fell face forward, unconscious, on the pool table. The commotion attracted the attention of a bar bouncer, who arrived within seconds on the scene. The bouncer asked who started the fight and after a patron pointed in the direction of the pool table, the bouncer immediately struck the unconscious victim in the back of the head with considerable force. The two assaults took place within less than a minute. The victim subsequently died as a result of bleeding in the brain.
2. The trial judge (2008 BCSC 1277 (CanLII)) concluded that all three accused had assaulted the victim and had either directly or indirectly caused bodily harm;[[1]](#footnote-1) but that the appellants on the one hand, and the bouncer on the other, acted independently of each other (para. 325). The trial judge found that there were three possible causes of death: the punches delivered by Timothy Maybin; the single blow struck by the bouncer; or a combination of the two. Because he was not satisfied beyond a reasonable doubt that either Timothy Maybin’s punches or the bouncer’s blow was the sole or a significant contributing cause of the fatal injury, he acquitted all three accused of manslaughter.[[2]](#footnote-2)
3. On appeal, all three judges concluded that the trial judge erred in focussing narrowly upon the medical cause of death and failing to address the broader issues of factual and legal causation. The court was unanimous that the appellants’ assaults were factually a contributing cause of death: “but for” their actions, the victim would not have died.
4. In assessing legal causation, the majority and dissenting decisions accepted the standard set out by this Court in *Smithers* and confirmed in *Nette*. The court divided, however, in its analytical approach. The majority concluded that the risk of harm ― from the intervention of bar staff in an escalating bar fight ― was reasonably foreseeable. The dissenting decision concluded that the assault of the bouncer was not reasonably foreseeable and that the intentional act of an independent person severed legal causation.
5. The court allowed the Crown appeals and ordered a new trial for the Maybin brothers; it dismissed the appeal from the acquittal of the bouncer. The Maybin brothers appeal to this Court as of right.

2. General Principles of Causation for Manslaughter

1. Section 222(1) of the *Criminal Code*,R.S.C. 1985, c. C-46, provides that “[a] person commits homicide when, directly or indirectly, by any means, he causes the death of a human being.” Subsection (5) provides that “[a] person commits culpable homicide when he causes the death of a human being, (*a*) by means of an unlawful act”. The *Criminal Code* also identifies some circumstances in which the chain of causation will not be broken: a person causes the death of a human being notwithstanding (a) that death might have been prevented by resorting to proper means (s. 224) or (b) that the immediate cause of death is proper or improper treatment applied in good faith (s. 225).
2. In *Smithers*, this Court pronounced the test for causation in manslaughter as “a contributing cause of death, outside the *de minimis* range” (p. 519). In that case, the accused punched the victim in the head and delivered a hard, fast kick to the victim’s stomach. The medical cause of the victim’s death was the aspiration of foreign materials present from vomiting; doctors testified that such aspiration rarely happens when the epiglottis functions properly. Dickson J. stated that it was “immaterial that the death was in part caused by a malfunctioning epiglottis to which malfunction the [accused] may, or may not, have contributed” (p. 519). An unlawful act may remain a legal cause of a person’s death even if the unlawful act, by itself, would not have caused that person’s death, provided it contributed beyond *de minimis* to that death (p. 522). The Court thus recognized that there may be a number of contributing causes of death.
3. In *Nette*, this Court affirmed the validity of the *de minimis* causation standard expressed in *Smithers* for culpable homicide. Writing for the majority, Arbour J. noted that causation in homicide cases involves two aspects: factual and legal causation. Factual causation is “an inquiry about how the victim came to his or her death, in a medical, mechanical, or physical sense, and with the contribution of the accused to that result” (*Nette*, at para. 44). The trier of fact usually asks: “But for” the action(s) of the accused, would the death have occurred? Factual causation is therefore inclusive in scope.
4. Legal causation, however, is a narrowing concept which funnels a wider range of factual causes into those which are sufficiently connected to a harm to warrant legal responsibility. Arbour J. noted that legal causation is “based on concepts of moral responsibility and is not a mechanical or mathematical exercise” (*Nette*, at para. 83). She stated, at para. 45:

Legal causation, which is also referred to as imputable causation, is concerned with the question of whether the accused person should be held responsible in law for the death that occurred. It is informed by legal considerations such as the wording of the section creating the offence and principles of interpretation. These legal considerations, in turn, reflect fundamental principles of criminal justice such as the principle that the morally innocent should not be punished . . . .

1. Further, this Court emphasized that causation issues are case-specific and fact-driven. The choice of terminology to put to a jury is discretionary in the context of the circumstances of the case (*Nette*, at para. 72). Implicit in *Nette* then, is the recognition that different approaches may be helpful in assessing legal causation, depending upon the specific factual context.

3. Factual Causation

1. In this case all three judges of the Court of Appeal were satisfied that the appellants had factually caused the victim’s death. As a result, the issue of factual causation was not strictly within the scope of this appeal. In oral submissions before this Court however, counsel for the appellants argued that factual causation was not established because the trial judge had a reasonable doubt as to who delivered the lethal blow. Counsel suggested that in such circumstances, it would be anomalous if the bouncer was acquitted and the appellants were convicted.
2. As noted by the majority of the Court of Appeal, the bouncer was not in the same position as the Maybin brothers: the bouncer’s assault was at the end of the chain of events leading to the victim’s death (para. 46). Given the uncertainty of the medical evidence, the trial judge had a reasonable doubt about whether the bouncer’s blow contributed to the death. As a result, he could not find that the actions of the bouncer were a factual cause of death (para. 51 of the Court of Appeal reasons). The court therefore dismissed the appeal from the acquittal of the bouncer for manslaughter.
3. On the other hand, the appellants’ unlawful acts not only seriously injured the victim, but also rendered him unconscious on the pool table where he was subsequently assaulted by the bouncer. Given these facts, the Court of Appeal concluded that even if the appellants’ actions were not the direct and immediate cause of the victim’s death, “but for” their actions, the victim would not have died. I agree. As *Smithers* and *Nette* made clear, factual causation is not limited to the direct and immediate cause, nor is it limited to the most significant cause. The Maybin brothers’ assault was either the direct medical cause of death or it rendered the victim vulnerable to the bouncer’s assault.
4. For these reasons, I agree with the Court of Appeal that the trial judge erred in the factual causation inquiry in this case. He stopped with his assessment of the medical cause of death and did not consider the contribution of the appellants to that result by asking whether the deceased would have died “but for” the actions of the appellants. As Arbour J. noted in *Nette* (para. 77):

The difficulty in establishing a single, conclusive medical cause of death does not lead to the legal conclusion that there were multiple operative causes of death. In a homicide trial, the question is not what caused the death or who caused the death of the victim but rather did the accused cause the victim’s death. The fact that other persons or factors may have contributed to the result may or may not be legally significant in the trial of the one accused charged with the offence.

1. The fact that the bouncer’s act may have been a *novus actus interveniens*, or an intervening act, is part of the analysis of whether *legal* causation has been established and whether the appellants should be held legally accountable for the death.

4. Legal Causation ― Intervening Act

1. The doctrine of intervening acts is used, when relevant, for the purpose of reducing the scope of acts which generate criminal liability. As Cromwell J.A. stated in *R. v. Tower*, 2008 NSCA 3, 261 N.S.R. (2d) 135,“the law recognizes that other causes may intervene to ‘break the chain of causation’ between the accused’s acts and the death. This is the concept of an ‘intervening cause’, that some new event or events result in the accused’s actions not being a significant contributing cause of death” (para. 25).
2. Jurisprudence in Canada and in other common law jurisdictions and academic scholarship have given rise to efforts to formulate a principle to deal with intervening acts. Professor Stanley Yeo describes many of them:

Several efforts . . . may be gleaned from the case authorities. They include statements to the effect that a defendant is relieved of causal blame if the intervening event was “abnormal”, “an unreasonable act”, a “coincidence”, “not a natural consequence”, comprised the “voluntary conduct of the intervener” or “was not reasonably foreseeable”.

(“Blamable Causation” (2000), 24 *Crim. L.J.* 144, at p. 151)

1. The difficulty in formulating one test to determine when an intervening cause interrupts the chain of causation lies in the vast range of circumstances in which this issue arises. As mentioned, the majority and the dissent in the court below focussed on two different approaches to explain when an intervening act breaks the chain of causation.
2. The first approach, applied by the majority, looks to whether the intervening act was objectively or reasonably foreseeable (see *R. v. Shilon* (2006), 240 C.C.C. (3d) 401 (Ont. C.A.)). The majority asked whether the risk of harm caused by the intervening actor was reasonably foreseeable to the appellants at the time they were committing the unlawful acts. It concluded that a trier of fact could find that it was reasonably foreseeable to the appellants that their assault on the victim, which occurred in a crowded bar, late at night, would provoke the intervention of others, perhaps the bar staff, with resulting non-trivial harm.
3. The second approach, applied by the dissent, considers whether the intervening act is an independent factor that severs the impact of the accused’s actions, making the intervening act, in law, the sole cause of the victim’s death (see *R. v. Pagett* (1983), 76 Cr. App. R. 279 (C.A.); *R. v. Smith*, [1959] 2 Q.B. 35 (C.M.A.C.)). The dissent held that the bouncer’s assault was just such an independent factor.
4. In my view, both these approaches are analytical aids ― not new standards of legal causation. I agree with the intervener, the Attorney General of Ontario, that while such approaches may be helpful, they do not create new tests that are dispositive. Neither an unforeseeable intervening act nor an independent intervening act is necessarily a sufficient condition to *break* the chain of legal causation. Similarly, the fact that the intervening act was reasonably foreseeable, or was not an independent act, is not necessarily a sufficient condition to *establish* legal causation. Even in cases where it is alleged that an intervening act has interrupted the chain of legal causation, the causation test articulated in *Smithers* and confirmed in *Nette* remains the same: Were the dangerous, unlawful acts of the accused a significant contributing cause of the victim’s death?
5. Depending on the circumstances, assessments of foreseeability or independence may be more or less helpful in determining whether an accused’s unlawful acts were still a *significant* *contributing* cause at the time of death. Any assessment of legal causation should maintain focus on whether the accused should be held legally responsible for the consequences of his actions, or whether holding the accused responsible for the death would amount to punishing a moral innocent.

5. Reasonable Foreseeability

1. An intervening act that is reasonably foreseeable will usually not break or rupture the chain of causation so as to relieve the offender of legal responsibility for the unintended result. This approach posits that an accused who undertakes a dangerous act, and in so doing contributes to a death, should bear the risk that other foreseeable acts may intervene and contribute to that death. Because the issue is whether the actions and consequences were reasonably foreseeable prospectively, at the time of the accused’s objectively dangerous and unlawful act, it accords with our notions of moral accountability. This approach addresses the question: Is it fair to attribute the resulting death to the initial actor?
2. Courts have sometimes couched the principle of foreseeability in different terms, asking whether the intervening act is so “extraordinary” or “unusual” that the accused should not be held responsible for the consequences of that act. In *R.* *v. Sinclair*, 2009 MBCA 71, 240 Man. R. (2d) 135, the accused beat the deceased and left him motionless in the roadway where he was struck by a passing motorist. The Manitoba Court of Appeal held that, in order for *novus actus interveniens* to apply to sever legal causation, the intervening act had to be, in some way, extraordinary or unusual. In *R. v. Hallett*, [1969] S.A.S.R. 141 (S.C. *in banco*), the victim was left unconscious on a beach; the Supreme Court of South Australia held that a natural event may break the chain of causation if it is “extraordinary” (a tidal wave), but not if it is the ordinary operation of natural forces (the tides).
3. Objective foreseeability has thus been a useful tool in determining whether an intervening act severs the chain of legal causation. The more difficult question in applying such an approach is the scope of what has to be reasonably foreseeable. In this case, the parties disagree about whether the intervening act ― the blow delivered by the bouncer ― was reasonably foreseeable. While both the majority and dissent opinions apply a reasonable foreseeability framework, they arrive at different conclusions. This result is driven by their different views regarding what precisely must be reasonably foreseeable. Is it the specific assault by the intervening actor? Is it simply the risk of further bodily harm? Or is it the general nature of intervening acts and the accompanying risk of harm?
4. The dissent took the narrow view that the specific scenario ― the unprovoked assault by a bouncer of an unconscious patron ― had to be reasonably foreseeable. The majority cast the net more broadly by concluding “that it was reasonably foreseeable that the [appellants’] assault would provoke the intervention of others, perhaps the bar staff, with resulting non-trivial harm” (para. 43).
5. In my view, the chain of causation should not be broken only because the specific subsequent attack by the bouncer was not reasonably foreseeable. Because the time to assess reasonable foreseeability is at the time of the initial assault, rather than at the time of the intervening act, it is too restrictive to require that the precise details of the event be objectively foreseeable. In some cases, while the general nature of the ensuing acts and the risk of further harm may be reasonably likely, the specific manner in which it could occur may be entirely unpredictable. From the perspective of moral responsibility, it is sufficient if the general nature of the intervening act and the risk of non-trivial harm are objectively foreseeable at the time of the dangerous and unlawful acts.
6. Jurisprudence supports the proposition that the specific act need not be reasonably foreseeable. In *Shilon*, it was alleged that the accused and his associate stole another man’s motorcycle, giving way to a high-speed car chase between the accused and the owner of the motorcycle. The chase only ended when the owner of the motorcycle crashed into a police car, killing a police officer. The Ontario Court of Appeal asked whether the death of the police officer was within theambit of risk created by the dangerous, unlawful actions of the accused and whether the accused ought reasonably to have foreseen such harm (para. 40). In *R. v. Hughes*, 2011 BCCA 220, 305 B.C.A.C. 112, the British Columbia Court of Appeal accepted the trial judge’s wording that an accident was “well within the scope of the risk created by the accused” (para. 72). Under this approach, an accused may be held responsible for “[a]n event [that is] reasonably foreseeable as part of a generic risk, even though it is improbable in its details” (G. Williams, *Textbook of Criminal Law* (2nd ed. 1983), at p. 389).
7. In framing the answer to the question of “*what exactly* needs to have been reasonably foreseeable?” broadly ― by asking, for instance, “was the risk of further bodily harm reasonably foreseeable?” ― the result will more closely align with the *mens rea* for manslaughter.[[3]](#footnote-3) Since manslaughter requires only that the risk of non-trivial bodily harm is foreseeable at the time of the dangerous and unlawful acts (*R. v. Creighton*,[1993] 3 S.C.R. 3), it is arguably consistent at the level of moral responsibility to hold the accused accountable for the foreseeable risk of further non-trivial bodily harm.
8. That said, if it is only the risk of further bodily harm that is to be reasonably foreseeable, then the reasonable foreseeability test adds little concrete assistance in determining whether the intervening cause should legally sever the chain of causation. Such a broad formulation of reasonable foreseeability diminishes its effectiveness as any limitation of the scope of criminal liability. It does little to assist in answering the question of whether the nature of the intervening act is such that the accused should not be held legally responsible for the death. Some degree of specificity about the nature of the intervening act must be foreseeable in order to invoke a moral response.
9. For these reasons, I conclude that it is the general nature of the intervening acts and the accompanying risk of harm that needs to be reasonably foreseeable. Legal causation does not require that the accused must objectively foresee the precise future consequences of their conduct. Nor does it assist in addressing moral culpability to require merely that the risk of some non-trivial bodily harm is reasonably foreseeable. Rather, the intervening acts and the ensuing non-trivial harm must be reasonably foreseeable in the sense that the acts and the harm that actually transpired flowed reasonably from the conduct of the appellants. If so, then the accused’s actions may remain a significant contributing cause of death.
10. In this case, the appellants submit that the bouncer’s assault of the unconscious victim was not reasonably foreseeable at all, unlike further injury to the victim by another patron joining in the fight or by bar staff attempting to impose order.
11. I do not agree. If the physical intervention of the bar staff, with its risk of non-trivial harm was objectively foreseeable, then the specific details of that intervention did not themselves need to be foreseen. Focussing on the fact that the subsequent act was committed by a bouncer, as opposed to another patron, misplaces the focus on the actor, as opposed to the nature of the intervening act.
12. While the majority of the Court of Appeal framed their approach broadly as the risk of harm, the judges ultimately based their conclusion on the foreseeability of the general nature of the intervening acts and the potential for non-trivial harm. They concluded that the trial judge could have found that, in the context of an escalating bar fight, it was reasonably foreseeable that further non-trivial harm would be caused by the interventions of other patrons and bar staff. This conclusion was supported by the trial judge’s findings of fact. The appellants initiated an assault in a crowded bar, late at night, with drinking patrons and bar security staff nearby. It was open to the trial judge to conclude that it was reasonably foreseeable that the fight would escalate and other patrons would join or seek to end the fight or that the bouncers would use force to seek to gain control of the situation. It was further open to the trial judge to conclude that Matthew Maybin himself was aware of the risk of the escalation of the fight when he enlisted the support of another patron in advance because “there might be a fight . . . so I figured I’d grab another guy just in case” (para. 33 of the trial judge’s decision).
13. In this case, the fight did escalate, with other patrons joining in, others calling for a bouncer, and bar staff hurrying to the area. Moreover, the bouncer in this case testified that he thought he *was* trying to impose order (“When asked to explain why he had punched [the victim], [the bouncer] said that the man had been identified to him as being the instigator of the fight and so he hit him to shock and disorient him, so as to gain control of the situation” (para. 131 of the trial judge’s decision)). It was open to the trial judge to conclude that the risk of intervention by patrons and the bouncer was objectively foreseeable when the appellants commenced a one-sided fight in a crowded bar. Accordingly, I agree with the majority of the Court of Appeal that it was open to the judge to find that the intervening act was reasonably foreseeable in the circumstances of this case.
14. One final point on this issue. The majority of the Court of Appeal stated that the reasonable foreseeability test is determinative on the issue of legal causation (para. 35):

. . . the law will not hold someone legally responsible if the ordinarily circumspect person would not have seen the outcome as likely to result from his or her act. In my view, this principle explains the purpose of the novus actus interveniens rule. The application of the rule provides a way of ensuring that a person will not be held responsible for objectively unforeseeable consequences.

1. The Court of Appeal in effect elevated this analytical approach to a new causation rule. I do not agree. The reasonable foreseeability approach is a useful tool and directly incorporates the notion of blameworthiness. However, as noted above, there may be other helpful analytical tools to assess whether legal responsibility should be imputed to the accused and whether the accused’s acts were a significant contributing cause of death as required in *Smithers* and *Nette*.

6. Independent Acts

1. In dissent, Finch C.J.B.C. agreed that “a person should not be held responsible for objectively unforeseeable consequences” and concluded that the actions of the bouncer were not reasonably foreseeable. He continued:

However, persons should similarly not be held responsible for intentional actions of a third party acting independently. This was articulated by the Ontario Court of Appeal in *R. v. J.S.R.* (2008), 239 O.A.C. 42; 237 C.C.C. (3d) 305; 2008 ONCA 544, at para. 31:

[D]espite the existence of factual causation, it is said to be unfair to impute legal liability for the death to a person whose actions have been effectively overtaken by the more immediate causal action of another party acting independently . . .

. . .

[The bouncer’s] intentional conduct in striking the unconscious [victim] constitutes an intervening act in this case. He is an independent third party and the Maybin brothers should not be held morally or legally responsible for his acts, in the absence of a conclusion that the blows of Timothy Maybin and [the bouncer] in conjunction were the cause of death. [Emphasis in original; paras. 72-73.]

1. Whether the effects of an accused’s actions are “effectively overtaken by the more immediate causal action of another party acting independently” involves an assessment of the relative weight of the causes, looking retrospectively from the death.
2. Courts have sought to articulate when the first cause ought to be overlooked because of the nature and effect of the subsequent causes, quite apart from whether or not the subsequent causes may have been foreseeable. In *Smith*, the victim died in hospital after being stabbed by the accused. It was later discovered that the victim had been improperly treated. When deciding whether the actions of medical staff constituted an intervening cause, the English Courts Martial Appeal Court declared that an intervening cause shields the accused from responsibility only if the accused’s act is “merely the setting in which another cause operates” (p. 43). Or, put another way, only if the intervening cause “is so overwhelming as to make the original wound merely part of the history” leading to the victim’s death (p. 43). Ultimately, the court articulated the standard as: “. . . 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” (pp. 42-43). In *Hallett* when faced with the death of a man left unconscious on a beach who drowned as a result of “the ordinary operations of the tides” (p. 150), the court asked whether the original unlawful act was “so connected with the event that it . . . must be regarded as having a sufficiently substantial causal effect which subsisted up to the happening of the event” (p. 149).
3. In *Shilon*,the Ontario Court of Appeal accepted that “independent voluntary human intervention in events started by an accused may break the chain of causation” but concluded that it was the accused who “created and continued the highly charged situation” and “provoked” the third party’s dangerous driving, which was therefore “directly linked” to the accused’s actions (para. 43).
4. Whether an intervening act is independent is thus sometimes framed as a question of whether the intervening act is a response to the acts of the accused. In other words, did the act of the accused merely set the scene, allowing other circumstances to (coincidentally) intervene, or did the act of the accused trigger or provoke the action of the intervening party?
5. When the intervening acts are natural events, they are more closely tied to the theory of foreseeability, and the courts ask whether the event was “extraordinary”, as in *Hallett*. When the intervening acts are those of a person, exercising his or her free will, the focus is often on the independence of the actions.
6. The academic community has also sought to explain when the actions of another person will interrupt the chain of causation. Glanville Williams argues that while people are subject to the “causes” of nature, they have control over their actions and a voluntary act starts a new chain of causation, regardless of what has happened before. He explains how this accords with our ideas of moral responsibility and just punishment:

The first actor who starts on a dangerous or criminal plan will often be responsible for what happens if no one else intervenes; but a subsequent actor who has reached responsible years, is of sound mind, has full knowledge of what he is doing, and is not acting under intimidation or other pressure or stress resulting from the defendant’s conduct, replaces him as the responsible actor. Such an intervening act is thought to break the moral connection that would otherwise have been perceived between the defendant’s acts and the forbidden consequence.

(“*Finis* for *Novus Actus*?” (1989), 48 *Cambridge L.J.* 391, at p. 392)

1. An intervening act by another person does not always sever the causal connection between the accused’s act and the result: as mentioned, ss. 224 and 225 of the *Criminal Code* provide that the chain of causation is not broken if death could otherwise have been prevented by resorting to proper means (s. 224), or if the immediate cause of death is proper or improper treatment that is applied in good faith (s. 225). In addition, in this case, I need not consider the actions of a third party who acts in good faith, or under mistake, intimidation or similar pressure, or whose actions are not voluntary. Here, the bouncer criminally assaulted the unconscious victim causing bodily harm.
2. What then, is the nature and degree of independence that may absolve the original actors of legal responsibility for the consequences of their actions? Turning to this case, was the act of the bouncer so independent of the actions of the appellants that his act should be regarded in law as the sole cause of the victim’s death to the exclusion of the acts of the appellants?
3. The appellants submit that it should because (1) the appellants were not aiders of the bouncer’s assault; (2) they were not involved in a joint activity; and (3) the appellants could only be said to have contributed to the victim’s death by leaving him in the position the bouncer found him when he took it upon himself to assault the unconscious man.
4. I agree with the respondent that the inquiry as to whether an intervening act is independent is distinct from the inquiry of whether the accused and the intervening actor are parties acting in concert or with common purpose pursuant to s. 21 of the *Criminal Code*. If they are parties, each is responsible for the acts of the other. In the legal causation analysis, their respective acts remain separate. Legal causation focusses on the connection (or independence) between the actions of the individuals and the effect of those actions, not on the connection between the actors.
5. Thus, the finding by the trial judge of independence for the purposes of accessorial liability under s. 21 would not affect a finding that the actions of the appellants triggered or provoked the actions of the intervening actor. Similarly, the fact that the bouncer was an independent third party does not, as suggested in the dissent, end the legal causation analysis. Their respective *actions* must be sufficiently independent for legal causation purposes.
6. Was the bouncer’s intentional assault an independent act? The answer depends upon whether the intervening act was so connected to the appellants’ actions that it cannot be said to be independent. If the intervening act is a direct response or is directly linked to the appellants’ actions, and does not by its nature overwhelm the original actions, then the appellants cannot be said to be morally innocent of the death.
7. While the trial judge found the actions of the Maybin brothers and the actions of the bouncer to be separate and independent assaults, he also found these actions to be “an interrelated series of events” (para. 209). He found that the assaults took place in the same location and in the same manner, and from Timothy Maybin’s first punch to the bouncer’s blow, the elapsed time was less than a minute (see paras. 295-96 of the trial judge’s reasons).
8. In this case, then, the trial judge could have found that the bouncer acted in direct and virtually immediate reaction to what the appellants did; that the bouncer acted after asking who had started the fight; and that his act was responsive and not coincidental conduct. It was open to the trial judge to find that the bouncer’s act was closely connected in time, place, circumstance, nature and effect with the appellants’ acts and that the effects of the appellants’ actions were still “subsisting” and not “spent” at the time the bouncer acted (*Tower*,atpara. 26). The evidence could support the conclusion that the blow delivered by the bouncer was not so “overwhelming” as to make the effect of the original assaults merely part of the history so that it can be said that the original assaults were not “operative” at the time of death (*Smith*). I conclude that it was open to the trial judge to find that the assault of the bouncer was not independent of the appellants’ unlawful acts and that the appellants’ actions remained a significant contributing cause of the victim’s death. Arguably, the dangerous and unlawful acts of the appellants were not so remote to suggest that they were morally innocent of the death.

7. Conclusion

1. Courts have used a number of analytical approaches to determine when an intervening act absolves the accused of legal responsibility for manslaughter. These approaches grapple with the issue of the moral connection between the accused’s acts and the death; they acknowledge that an intervening act that is reasonably foreseeable to the accused may well not break the chain of causation, and that an independent and intentional act by a third party may in some cases make it unfair to hold the accused responsible. In my view, these approaches may be useful tools depending upon the factual context. However, the analysis must focus on first principles and recognize that these tools do not alter the standard of causation or substitute new tests. The dangerous and unlawful acts of the accused must be a significant contributing cause of the victim’s death.
2. I agree with the majority of the Court of Appeal that based upon the trial judge’s findings of fact, it was open to him to conclude that the general nature of the intervening act and the accompanying risk of harm were reasonably foreseeable; and that the act was in direct response to the appellants’ unlawful actions. The judge could have concluded that the bouncer’s assault did not necessarily constitute an intervening act that severed the link between Timothy and Matthew Maybin’s conduct and the victim’s death, such that it would absolve them of moral and legal responsibility. The trial judge could have found that the appellants’ actions remained a significant contributing cause of the death.
3. For these reasons, I agree with the majority of the Court of Appeal that in the circumstances of this case, it was open to the trial judge to find that the appellants caused the death. I would dismiss the appeal.

*Appeal dismissed.*

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1. The trial judge found Matthew Maybin joined in the assaults committed by his brother, and was thus a co-perpetrator (para. 210). [↑](#footnote-ref-1)
2. At trial, the Crown conceded that no included offence was available in this case because the charge in the indictment did not particularize the manner in which manslaughter was allegedly committed. The trial judge stated that had assault causing bodily harm been included in the offence of manslaughter, he would have found all three accused guilty of that included offence (para. 283). [↑](#footnote-ref-2)
3. As noted by Arbour J. in *Nette* (para. 47) and in *R. v. Cribbin* (1994), 89 C.C.C. (3d) 67 (Ont. C.A.), at p. 83, because principles of legal causation are about attributing blame to an accused, there is some inevitable overlap between *mens rea* and the legal causation inquiry. [↑](#footnote-ref-3)