SUPREME COURT OF QUEENSLAND

CITATION:	*R v Morant* [2018] QSC 222
PARTIES:	**R** **v** **GRAHAM ROBERT MORANT** (accused)
FILE NO:	Indictment No 1424 of 2018
DIVISION:	Trial Division
PROCEEDING:	Trial
DELIVERED ON:	5 October 2018
DELIVERED AT:	Brisbane
HEARING DATE:	17 to 21 September 2018; 24 to 28 September 2018; 2 October 2018
JUDGE:	Davis J
ORDER:	**On count 1, counselling suicide, the jury be directed:**

The Crown must prove beyond reasonable doubt that:

(i) **The accused intended, when he counselled the deceased, that the counselling would persuade her to kill herself.**

(ii) **But for the counselling, the deceased would not have killed herself, by using the generator to cause her death by carbon monoxide poisoning on 30 November 2014.**

On count 2, aiding suicide, the jury be directed:

The Crown must prove beyond reasonable doubt that:

(i) **When the acts of aiding were done, the accused knew that the deceased would or may kill herself by using the generator to cause her death by carbon monoxide poisoning; and**

(ii) **The accused intended that the acts of aiding would assist or help the deceased to kill herself by carbon monoxide poisoning.**

CATCHWORDS: CRIMINAL LAW – PARTICULAR OFFENCES – OFFENCES AGAINST THE PERSON – MISCELLANEOUS OFFENCES – OTHER MISCELLANEOUS OFFENCES AND MATTERS – where the accused was charged with two counts of aiding suicide – where one count encompasses counselling and one count encompasses aiding – whether the accused needed to know of the deceased's state of mind to be criminally responsible

Criminal Code (Qld) s 7, s 8, s 9, s 311
Crimes Act 1900 (NSW) s 351

Burns v The Queen (2012) 246 CLR 334, cited
Carter v Attorney-General for the State of Queensland [2014] 1 Qd R 111, cited
Giorgianni v The Queen (1985) 156 CLR 473, applied
IL v The Queen (2017) 91 ALJR 764, cited
R v B & P [1999] 1 Qd R 296, considered
R v Beck [1990] 1 Qd R 30, considered
R v Jeffrey [2003] 2 Qd R 306, cited
R v Licciardello [2017] QCA 286, considered
R v Lowrie & Ross [2000] 2 Qd R 529, cited
R v Nielsen [2012] QSC 29, considered
R v Sherrington and Kuchler [2001] QCA 105, considered
R v Stott and Van Embden [2002] 2 Qd R 313, followed
Royall v The Queen (1991) 172 CLR 378, cited

COUNSEL: M Lehane for the Crown
M Thomas and D Wells for the accused

SOLICITORS: Director of Public Prosecutions (Qld) for the Crown
Team Lawyers for the accused

[1] The accused, Mr Morant, was charged on indictment with two counts against s 311 of the *Criminal Code*: Aiding Suicide. Issues arose during the trial as to the appropriate directions to the jury on the state of mind of the accused and the deceased (Mrs Morant) necessary for the charges to be proved.

[2] During the trial I ruled on these issues and indicated that I would deliver reasons at some later time. I do so now.

Background

[3] Mr and Mrs Morant were married in about the year 2000. They lived together until the day Mrs Morant died, 30 November 2014.

[4] Mrs Morant died of carbon monoxide poisoning suffered by her in her car.[1] A petrol engine powered generator was positioned in the boot of the car. Part of the back seat was folded down so there was a passage between the boot and the cabin. Mrs Morant was found deceased in the car. There was some evidence that a third party may have been at the suicide scene and perhaps started the generator, although the evidence about that was scant. It was never alleged that Mr Morant was present. There was no suggestion that Mrs Morant was restrained in any way while in the car.

[5] From the finding of death by carbon monoxide poisoning and the position of the generator in the car, the inference is open, and almost inevitable, that Mrs Morant (even if she didn't start the generator) at least voluntarily sat in the car with windows and doors all closed, with the intention that the exhaust fumes from the generator's engine would fill the car and kill her. By her voluntary act, she caused her own death,[2] and therefore "killed herself".[3]

[6] The two counts which Mr Morant faced were:

1. That on divers dates between the first day of February, 2014 and the first day of December, 2014 at Oxenford or elsewhere in the State of Queensland, Graham Robert Morant counselled Jennifer Lee Morant to kill herself and thereby induced Jennifer Lee Morant to do so.

2. That on or about the 29th day of November 2014 at Oxenford or elsewhere in the State of Queensland, Graham Robert Morant aided Jennifer Lee Morant in killing herself

[7] Particulars were delivered of each of the two counts. They were:

> "**Count 1**
>
> The defendant counselled Jennifer Lee Morant to kill herself by;
>
> a. Encouraging her by referring to and commending another individual who had committed suicide and left insurance monies to his wife/partner; and/or
>
> b. Encouraging her by further suggesting she also commit suicide like the individual did in particular (a); and/or
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> c. Encouraging her by explaining to her what he planned to do with the insurance monies; and/or
>
> d. Encouraging her by explaining it would not be a sin in God's eyes to commit suicide; and/or

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1 This was the subject of an admission: *Criminal Code* (Qld) s 644.

2 *Royall v The Queen* (1991) 172 CLR 378 at 377, 421, 441–449; *Burns v The Queen* (2012) 246 CLR 334 at [16] and [18].

3 *Criminal Code* s 311(b) and 311(c).

e. Encouraging her by explaining she was not strong enough to survive the raptures[4] which were imminent; and/or

f. Encouraging her by agreeing to give a portion of the insurance monies to individuals named on a list provided to him by Jennifer Morant; and/or.

g. Encouraging her by allowing her to visit a friend or friends on the condition she'd commit suicide on her return; and/or

h. Encouraging her by telling her he knew a way to commit suicide; and/or

i. Encouraging her by verbally agreeing to help her to commit suicide

The defendant intended that the counselling would induce her to kill herself and one or a combination of the acts of counselling did induce Jennifer Lee Morant to kill herself.

Count 2

The defendant aided Jennifer Lee Morant to kill herself by;

a. Driving her to the automatic teller to enable her to withdraw the money for the generator; and/ or

b. Driving her to Bunnings at Oxenford for the purpose of purchasing the generator: and/or

c. Assisting with the loading of the generator into the vehicle: and/or

d. Driving her and the generator back to the couple's residential address: and/or

e. Removing the generator from the boot of the car to allow it to be unpackaged; and/or

f. Assisting with the placement of the generator back into the vehicle; and/or

g. Leaving Jennifer Morant with access to the vehicle, by instead driving another vehicle to church on the day of her suicide.

At the time of doing the above acts the defendant intended that the aiding would assist or help the deceased to kill herself."

[8] The evidence to support count 1 (counselling suicide) came from witnesses who had spoken to the deceased, who had told them that Mr Morant had said and done the things particularised. This evidence was admitted by force of s 93B of the *Evidence Act* 1977 (Qld). The Crown case on count 2 (aiding suicide) was that Mr Morant had assisted Mr Morant to purchase the generator and set it up in the boot of the car. That evidence came from various sources, including admissions made by Mr Morant in interviews with police.

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4 A religious reference.

Statutory context

[9] Section 311 of the Code provides:

> "**311 Aiding suicide**
>
> Any person who—
>
> (a) procures another to kill himself or herself; or
>
> (b) counsels another to kill himself or herself and thereby induces the other person to do so; or
>
> (c) aids another in killing himself or herself;
>
> is guilty of a crime, and is liable to imprisonment for life."

[10] The section is headed "Aiding suicide", but creates three offences which can be conveniently described as:

1. Procuring suicide (s 311(a));
2. Counselling suicide (s 311(b)); and
3. Aiding suicide (s 311(c)).

[11] Count 1 on the indictment against Mr Morant is a charge of counselling suicide,[5] and Count 2 is a count of aiding suicide.[6] The elements of counselling suicide are:

1. the accused counselled the deceased to kill herself;
2. the accused intended that the counselling would induce the deceased to kill herself;
3. the counselling did induce the deceased to kill herself; and
4. the deceased did kill herself.

[12] The elements of aiding suicide are:

1. the accused aided the deceased to kill herself;
2. the accused intended that the aiding would assist or help the deceased to kill herself; and
3. the deceased did kill herself.

[13] Both the concept of "counselling" and the concept of "aiding" are ones known to Chapter 2 of the *Code*: Parties to Offences. In order to counsel or aid the commission

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5 *Criminal Code* (Qld) s 311(b).

6 Section 311(c).

of an offence, the counsellor or aider must intend the counselling or aiding to counsel or aid. It has also been consistently held that for the prosecution to prove "counselling" or "aiding" for Chapter 2, it is necessary to prove that the accused knew the "essential elements" of the offence being counselled or aided.[7] Where the offence being counselled or aided is one which requires the actor (the person liable under s 7(1)(a)) to hold a particular state of mind, then one of the "essential ingredients" which must be known to the counsellor or aider is that the actor holds that state of mind.[8]

[14] Suicide, the act of killing oneself,[9] is constituted by an act of a person resulting in the death of that person where the act was done by the person with the intention to cause his or her own death.[10] In that way, the state of mind of the deceased is relevant to the act of suicide and therefore becomes relevant to the criminal liability of a person charged with procuring,[11] counselling[12] or aiding suicide.[13]

General observations on s 311

[15] A person who does an act which causes the death of another kills that other,[14] and, depending upon their state of mind, in the absence of any defence or exculpation so as to render the killing authorised, justified or excused,[15] is guilty of either murder[16] or manslaughter.[17] A person who procures, counsels or aids a person to kill themselves is guilty of an offence under s 311. The voluntary act of the person who dies (the act whereby the person kills himself or herself) severs any causal connection between the act of the person procuring, counselling or aiding and the death of the other person, so the person has not unlawfully killed the other.[18]

[16] The critical distinction, then, between offences alleging that the accused has unlawfully killed, on the one hand, and s 311, on the other, is causation of the death. With murder and manslaughter, the accused must be proved to have caused the death of the deceased. Under s 311, the deceased has cause his or her own death.[19]

[17] Because s 311 and Chapter 2 both import concepts of "aiding" and "counselling", Chapter 2 jurisprudence is clearly useful in construing s 311. Section 7 is as follows:

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7 *Giorgianni v The Queen* (1985) 156 CLR 473 at 487, 488, 500, 506 and 507.

8 *R v Jeffrey* [2003] 2 Qd R 306 at 310.

9 As expressed in s 311: "killing himself or herself".

10 See generally the discussion in *IL v The Queen* (2017) 91 ALJR 764 of the distinction between murder and assisting suicide.

11 *Criminal Code* (Qld) s 311(a).

12 Section 311(b).

13 Section 311(c).

14 Section 293.

15 Section 291.

16 Section 302.

17 Section 303.

18 *Burns v The Queen* (2012) 246 CLR 334.

19 *Carter v Attorney-General for the State of Queensland* [2014] 1 Qd R 111 and generally *IL v The Queen* (2017) 91 ALJR 764.

> "**7 Principal offenders**
>
> (1) When an offence is committed, each of the following persons is deemed to have taken part in committing the offence and to be guilty of the offence, and may be charged with actually committing it, that is to say—
>
> (a) every person who actually does the act or makes the omission which constitutes the offence;
>
> (b) every person who does or omits to do any act for the purpose of enabling or aiding another person to commit the offence;
>
> (c) every person who aids another person in committing the offence;
>
> (d) any person who counsels or procures any other person to commit the offence.
>
> (2) Under subsection (1)(d) the person may be charged either with committing the offence or with counselling or procuring its commission.
>
> (3) A conviction of counselling or procuring the commission of an offence entails the same consequences in all respects as a conviction of committing the offence.
>
> (4) Any person who procures another to do or omit to do any act of such a nature that, if the person had done the act or made the omission, the act or omission would have constituted an offence on the person's part, is guilty of an offence of the same kind, and is liable to the same punishment, as if the person had done the act or made the omission; and the person may be charged with doing the act or making the omission."

[18] Section 7 does not create any offence. It operates so as to make each of the persons identified in s 7(1)(a), (b), (c) and (d) as "deemed to have taken part in committing the offence". The section thereby avoids the common law categorisation of parties to whom criminal liability attaches.

[19] If a s 7(1)(b), (c) or (d) party does more than one act, for instance, both aids and counsels, their criminal liability still attaches only to the one single offence which has been aided or counselled. Often, it does not matter which subsection is engaged; an act may fall within more than one subsection.[20] Unlike s 7, s 311 creates offences. As already observed, the section creates three separate offences each with their own elements. If an accused has done acts[21] which counsel and has done acts which aid, then the accused has, providing other elements are proved, committed two offences, one against each of ss 311(b) and (c). In the present case, there are two separate counts

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20 *R v Jeffrey* [2003] 2 Qd R 306 at 311.

21 *Criminal Code* (Qld) s 2.

and they are properly not charged in the alternative, even though there has only been one death alleged as a suicide.

[20] It cannot be assumed that the concepts of "aiding" and "counselling" are identical in Chapter 2 and s 311. For example, the term "aiding" is probably not as wide when used in s 311 as it is in s 7. To "aid" means to assist or help the actor.[22] To "counsel" is to urge or advise the actor to commit the act constituting the offence.[23] In *R v Beck*,[24] it was held that to encourage by presence at the scene of an offence, thereby giving approval to the commission of the offence by the actor was "aiding". It would be an unusual result if encouraging a person to commit suicide constituted aiding suicide for the purpose of s 311(a). This is because "encouraging" could constitute "counselling" and by s 311(b), counselling suicide is only an offence where the counselling "induces the other person to [suicide]". Under s 7, encouraging is only aiding if in fact the encouragement does "aid", but that may, for the reasons I explain below, be different to actually "inducing" the act. Aiding under s 311 would have to be read so as not to include counselling; otherwise, the necessity of the Crown to prove the element of inducement in the terms expressed in s 311(b) would be avoided.

[21] It is difficult to see how ss 311(a) and 311(b) sit together. Section 311(b) makes a counsellor criminally liable only if the counselling "induces the [person counselled] to [kill themselves]". Counselling which achieves the result intended would fall within the usual meaning of "to procure". There is no need, though, to further consider that aspect.

[22] Section 7 operates with s 9. That provides as follows:

> **"9 Mode of execution immaterial**
>
> (1) When a person counsel another to commit an offence, and an offence is actually committed after such counsel by the person to whom it is given, it is immaterial whether the offence actually committed is the same as that counselled or a different one or whether the offence is committed in the way counselled, or in a different way, provided in either case that the facts constituting the offence actually committed are a probable consequence of carrying out the counsel.
>
> (2) In either case the person who gave the counsel is deemed to have counselled the other person to commit the offence actually committed by the other person."

[23] There is no provision equivalent to s 9 which works to modify the operation of s 311.

[24] Section 8 of the *Code* extends the liability of a party beyond the boundaries of s 7 in order to visit criminal liability upon a party where the commission of the offence is not

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22 *R v Sherrington and Kuchler* [2001] QCA 105; *Humphry v The Queen* (2003) 138 A Crim R 417.

23 *R v Oberbillig* [1989] 1 Qd R 342 at 345.

24 [1990] 1 Qd R 30.

necessarily intended, but is a probable consequence of a common intention which the party holds with the actor.[25] There is also no provision equivalent to s 8 extending liability of a person under s 311 who counsels or aids suicide.

The mental elements

[25] In *Giorgianni v The Queen*,[26] the High Court, applying a provision of the *Crimes Act* 1900 (NSW),[27] which is, for present purposes, indistinguishable from s 7 of the *Code*, held that a person who aids, counsels or procures[28] the actor to commit an offence is only criminally responsible where the party both knows the essential ingredients of the offence and intended to aid, counsel or procure.[29] Therefore, the relevant element of liability is intention, but that will not be established without proof of knowledge.

[26] Where a particular state of mind of the actor is an element of the offence (murder, for instance), that state of mind is an essential ingredient of which the procurer, counsellor or aider must have knowledge.[30] A component of suicide, the act of the deceased to "kill himself or herself" is the intention of the deceased to cause his or her own death.

[27] The questions which arise are:

1. What must an accused actually know of the deceased's intention?

2. What is the necessary temporal connection between the acts of aiding or counselling, the formation by the deceased of the intention to kill himself or herself, and the point at which an accused must hold the necessary knowledge?

[28] In *R v Peter John Nixon*,[31] the jury was directed consistently with a written aid delivered to the jury. The aid was in these terms:

> "<u>The charge is pursuant to section 311 (c) of the Qld Criminal Code</u>
>
> On or about 27th April 2015 at Petrie in State of Queensland Peter Nixon aided John Stephen Nixon in killing himself.
>
> Section 311 of the Criminal code provides that any person who (c) aids another in killing himself or herself is guilty of a crime:
>
> > 'Section 311 Aiding Suicide
> >
> > Any person who-

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25 *Stuart v The Queen* (1974) 134 CLR 426; *R v Barlow* (1997) 188 CLR 1; and for the doctrine of "extended joint criminal enterprise", being the common law equivalent of s 8, see *Miller v the Queen* (2016) 259 CLR 380.

26 (1985) 156 CLR 473.

27 Section 351.

28 Abetting is not relevant her, although the New South Wales statute also referred to abetting.

29 *Giorgianni* at 487–488 per Gibbs CJ and 500 per Wilson, Deane and Dawson JJ.

30 *R v Jeffrey* [2003] 2 Qd R 306 at 310; *R v Barlow* (1997) 188 CLR 1 (a s 8 case).

31 Tried in the Supreme Court of Queensland at Brisbane.

(a) Procures another to kill himself or herself; or

(b) Counsels another to kill himself or herself and thereby induces the other person to do so; or

(c) Aids another in killing himself or herself;

is guilty of a crime…'

Crown must prove all the elements of the offence BRD[32]

(i) You must be satisfied BRD that Mr John Nixon is dead.

(ii) You must be satisfied BRD that that when Mr Peter Nixon gave John Nixon the substance, John Nixon had a specific intention to end his own life.

(iii) You must be satisfied BRD that Mr Peter Nixon knew that his father had a specific intention to end his life.

(iv) You must be satisfied BRD that when Mr Peter Nixon gave John Nixon the substance, he did so for the purpose of aiding him to end his own life.

(a) "Aids" bears its ordinary English meaning which is to assist or help.

(b) It must be an aiding which is intentionally directed towards aiding John Nixon to kill himself.

(c) "Intent" and "intention" are familiar words. In this legal context, they carry their ordinary meaning.

(v) You must be satisfied BRD that John Nixon killed himself. That is, that the substance John Nixon drank on 27 April was a substantial or significant cause of his death or contributed substantially to his death.

(a) It need not have been the only contributing cause.

(b) It does not matter that death did not immediately result.

(c) If at the time he took the substance, John Nixon was already suffering from a disease or disorder, you must be satisfied BRD that the taking of the substance hastened his death."

[29] Therefore, the jury in *Nixon* was directed that the Crown had to prove that, at the time the aiding was done, the person who committed suicide had a specific intention to end his own life and the accused knew the deceased held that intention.

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32 Obviously representing "beyond reasonable doubt".

[30] In *R v Merin Nielsen*,[33] the jury were directed on aiding in s 311, relevantly here, as follows:

> "Also, as I said at the beginning of this trial, aiding does not mean unintentionally or unwittingly aiding. Proof of aiding involves proof of acts or omissions which are intentionally directed towards the end, that Frank Ward had, of killing himself. So if the Crown satisfies you beyond reasonable doubt that the defendant did obtain the cetyl forte in Mexico, and he did supply it to Mr Ward, you must consider whether, in doing those acts, the defendant did them with the intention of aiding Frank Ward to kill himself. Now, there's no need to prove that the defendant knew the minute detail of exactly how and when Frank would kill himself, or that the defendant was ever a hundred per cent certain that Frank Ward would kill himself, but you would have to find that the defendant did the acts with the intention of aiding Frank Ward to kill himself and you would have to be satisfied of that intention beyond reasonable doubt.
>
> If the Crown satisfies you beyond reasonable doubt that the defendant obtained the bottle of cetyl forte from which Mr Ward ingested pentobarbitone and supplied it to Mr Ward, and that, in doing so, he had the intention of aiding Frank Ward to kill himself, that constitutes aiding within the meaning of the section. If the Crown does not satisfy you of these things beyond reasonable doubt, your duty is to acquit the defendant."

[31] In *Nielsen*, there was no specific direction as to the knowledge of the accused of essential ingredients, save the direction that it was unnecessary for the accused to have knowledge of the exact method or timing of the suicide; and certainty that the suicide would occur was also not necessary.

[32] Nixon was acquitted. Nielsen was convicted and there was no appeal. In neither case was there a challenge to the summing up. Undoubtedly, there will be cases, as *Nielsen* apparently was, where knowledge by the accused of "essential ingredients" is not a matter that requires detailed directions. The real issue always is whether there was an intention to aid. Similarly, there will be cases, as *Nixon* apparently was, where knowledge is critical and criminal liability could, on the evidence, only attach if there was a specific knowledge held at some particular point in time.

[33] Here, the mental element of count 1, counselling suicide, does not raise any real difficulty. Complications arise in relation to count 2, aiding suicide, as a result of statements made by Mr Morant in interviews with police.

[34] Obviously, the assessment of the interviews and their significance to the two counts is a matter for the jury. In the interview, Mr Morant seemed to admit that he attended Bunnings Warehouse with Mrs Morant to assist her to purchase the generator which Mrs Morant ultimately (on the Crown case) used to take her own life. He seemed to admit in the interviews that he knew that she may use the generator to suicide. However, he also said that Mrs Morant had, for many years, expressed a desire to end

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[33] Tried in the Supreme Court of Queensland at Brisbane. The sentencing remarks of the trial judge became [2012] QSC 29.

her life. He said, in effect, that she had ample opportunity in the past to suicide, but never did. He said that while he assisted in purchasing the generator, and perhaps had accepted that one day his wife would suicide, given her history of reporting contemplating suicide, but not committing suicide, he had no view of her then present intention.

[35] The interviews raise questions as to the "essential ingredients" of which Mr Morant must be aware at the time of aiding. Mrs Morant may not, when she was at Bunnings, have then had the intention to kill herself. That may have been formed the next day. Mrs Morant may have thought that she may kill herself but may not have been certain that she would.

Counselling

[36] The mental element of counselling or procuring suicide is different from that of aiding suicide. The purpose of counselling and procuring is to cause the person to form the intention to kill himself or herself and to carry that intention out. The purpose of aiding suicide is not to cause the person to form that intention but to assist the person to carry out the intention.

[37] Section 311(b), as already observed, contains an element that the counselling "induced the other person to [kill himself/herself]". This is an element which defines the necessary causal link between the counselling and the act of the deceased. There may have been many reasons why Mrs Morant decided to kill herself. I am unconvinced that an accused is guilty of counselling suicide where the deceased has reached that decision by considering various factors and the counselling is, to use a phrase from the jurisprudence of criminal causation a "substantial or significant cause" of that decision.[34] The counselling must have "induced" the decision of Mrs Morant to end her life. The other factors may have contributed to the decision, but the decision is not "induced" by the counselling unless the decision would not have been made but for the counselling.

[38] The jury was, on the issue of the state of mind of Mr Morant and state of mind of Mrs Morant in count 1, directed:

The Crown must prove beyond reasonable doubt that:

(i) The accused intended, when he counselled the deceased, that the counselling would persuade her to kill herself.

(ii) But for the counselling, the deceased would not have killed herself, by using the generator to cause her death by carbon monoxide poisoning on 30 November 2014.

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[34] *Royall v The Queen* (1991) 172 CLR 378 at 411, 423.

Aiding

[39] I was unable to find any case which considered the mental elements of aiding suicide except *R v Stott and Van Embden.*[35] There, the Court of Appeal considered an appeal from a conviction for manslaughter of a victim who had died from a heroin overdose. One of the alternative cases put by the Crown to the jury was that the accused had supplied the deceased with a syringe of heroin and the deceased injected himself with the heroin and died. On that basis, a criminal negligence case was made under s 289 of the *Code*. The case was decided a decade before *Burns v The Queen*, where the High Court held that in such a case the cuase of death was not supply of the drug, but the voluntary ingestion of the substance.[36] Importantly for present purposes, McPherson JA said:

> "If the appellants supplied the lethal dose of heroin to Bettridge,[37] with or without a syringe for injecting it, they might perhaps have been charged under s. 311(c) of the Code with aiding a person to kill himself. Section 311 is, however, concerned with **Aiding suicide** and, consistently with the sense in which "aiding" in s. 7(1)(c) has recently been interpreted in *R. v. Sherrington & Kuchler* [2001] QCA 105, it seems to me that it is, in that sense, an essential ingredient of the offence created by s. 311(c) that the accused should have been aware of the existence of an intention on the part of Bettridge to take his own life. As to that, there was evidence at the trial that Bettridge had, on at least two occasions in the past, cut his own wrists. He had later consulted Dr Joan Lawrence, a leading psychiatrist, who found him to be suffering from a depressive condition manifested in "mood swings" that were related to bouts of drug use. She prescribed anti-depressant medication, after which his condition improved."[38] (emphasis added)

[40] His Honour's remarks are clearly *dicta*, but obviously powerful and I ought to follow them in the absence of some very good reason not to. By stating that an accused charged under s 311 must be aware of "the existence of an intention on the part of [the deceased] to take his own life", the inference is that the intention must be formed and be known to the accused at the time of the giving of aid. However, the remarks refer to the earlier decision of *R v Sherrington and Kuchler*,[39] which throws a different light on the comments.

[41] In *Sherrington and Kuchler*, the appellants had been convicted of manslaughter. The deceased had been killed by a blow to the neck with at least moderate force which caused a subarachnoid haemorrhage.[40] Both appellants had struck the deceased and there were doubts as to who stuck the fatal blow. Resort was had by the Crown to s 7

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35 [2002] 2 Qd R 313.

36 (2012) 246 CLR 344.

37 The person who died.

38 Muir J (as his Honour then was) agreed with McPherson JA (see [25]), as did Atkinson J, who added some further remarks as to the law of criminal negligence.

39 [2001] QCA 105.

40 At [2].

on the basis that whoever of the two appellants did not strike the blow was a party to the other appellant's act in striking the blow.

[42] McPherson JA[41] analysed s 7 and then said this:

> "Under the Code a person does not need to be present at the commission of the crime in order to be deemed by s 7(1)(c) to have "taken part in" committing the offence by aiding or assisting another in committing it. Of course, it is either explicit or implicit in s 7(1)(c) that the assistance must be given to another "in" committing the offence, which must mean that the participant is aware at least of what is being done or perhaps will be done by the other actor. In the present context, but with two possible qualifications, that requirement presents no difficulty because each of Sherrington and Kuchler knew that the other was inflicting blows or force on Fotheringham, and assisted him in doing it. In that way each of them aided the other in doing an act or acts that (whoever it was who did it) caused or substantially contributed to Fotheringham's death; and that is so whether it was Sherrington or Kuchler who struck the blow (or blows) which led or contributed to that result." (emphasis added)

[43] In this passage, the requisite knowledge for an aider sufficient to visit criminal liability on him includes knowledge that the offence may "perhaps" be committed.

[44] This is consistent with what was said in *R v Beck*.[42] There, the appellant's de facto husband, Watts, had raped and murdered a schoolgirl while she, the appellant, was present. The victim had been abducted by Watts pursuant to a plan agreed with the appellant. The case of murder was put by the Crown on different alternative bases; one in reliance upon s 7 (that she aided) and one in reliance upon s 8, namely that the murder was a probable consequence of the unlawful purposes of abduction. The s 8 case is not relevant here. The Crown alleged that the appellant aided Watts because her presence at the place of the murder encouraged him to commit the offence. Questions arose as to the necessary intent to render her criminally responsible for the murder. Macrossan CJ[43] thought that what was required was an "awareness of the offence which is (or might be) committed".[44] His Honour relied on the statement of Philp J in *R v Solomon*,[45] where his Honour said:

> "It will be noticed that s. 7(c) does not repeat the verbiage of s. 7(a); it does not create criminal responsibility in a person who aids in doing the act which constitutes the offence— the responsibility attaches only to a person who aids in the commission of the offence. That suggests that to be responsible under s. 7(c) the aider must know what offence is being

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41 With whom Wilson JA agreed; Ambrose J delivered a separate judgment which was consistent with the views expressed by McPherson JA.

42 [1990] 1 Qd R 30.

43 With whom McPherson J (as his Honour then was) agreed. Derrington J agreed in the appeal but delivered separate reasons, which were not inconsistent with those of the Chief Justice; see page 44.

44 At 38.

45 [1959] Qd R 123.

committed or at least what *offence* might be committed by the person he is aiding."[46]

[45] The statement in *Beck* that it was sufficient for an accused to have knowledge of an offence which "might be" committed drew criticism in *R v B & P*.[47] There, Pincus JA said this:

> "The necessary mental state of the accused is not so clear, however, with respect to s. 7(1)(c) and that is so because of the expression used in *Beck*, following *Solomon*: "awareness of the offence which is (*or might be*) committed" (emphasis added); see also *Jervis* [1993] 1 Qd.R. 643 at 647, 648. In his reasons in *Beck*, Macrossan C.J. referred to the "taxi driver who innocently drives the passenger part of the way to the place where a crime will be committed by him". Is it enough, to convict the taxi driver of the crime committed by a passenger, to prove that he knew that the person being carried might commit a crime at his destination? An answer is, in my view, suggested by the decision of the High Court in *Giorgianni* (1985) 156 C.L.R. 473. In that case the High Court construed a New South Wales provision corresponding to s. 7 of our Code, namely s. 351 of the *Crimes Act* 1900 (N.S.W.):
>
> > "Any person who aids, abets, counsels, or procures, the commission of any misdemeanour, whether the same is a misdemeanour at Common Law or by any statute, may be indicted, convicted, and punished as a principal offender".
>
> Giorgianni was charged with an offence relating to the death of a person in a motor collision; he was said to be criminally liable under s. 351, although not present at the collision, because he got one Renshaw to drive one of the vehicles involved when it was in a defective state. Gibbs C.J. said:
>
> > "No one may be convicted of aiding, abetting, counselling or procuring the commission of an offence unless, knowing all the essential facts which made what was done a crime, he intentionally aided, abetted, counselled or procured the acts of the principal offender". (487, 488)
>
> Wilson, Deane and Dawson JJ. said in effect that to have aided, abetted, counselled or procured Giorgianni —
>
> > "… must have *intentionally participated* in the principal offences and so must have had knowledge of the essential matters which went to make up the offences of culpable driving on the occasion in question …". (500) (emphasis added)
>
> Their Honours also said, referring to the offences of aiding and abetting and counselling and procuring, that they —
>
> > "… require *intentional participation* in a crime by lending assistance or encouragement … The necessary intent is absent if

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46 At 128.

47 [1999] 1 Qd R 296.

> the person alleged to be a secondary participant does not know or believe that what he is assisting or encouraging is something which goes to make up the facts which constitute the commission of the relevant criminal offence. He need not recognise the criminal offence as such, but his participation must be intentionally aimed at the commission of the acts which constitute it. It is not sufficient if his knowledge or belief extends only to the possibility or even *probability* that the acts which he is assisting or encouraging are such, whether he realises it or not, as to constitute the factual ingredients of a crime". (506, 507) (emphasis added)

I particularly draw attention to the rejection, in the passage just quoted, of the idea that it is enough if the alleged aider or abetter knew of the *probability* that the acts he was assisting were such as to constitute the factual ingredients of a crime. This either throws doubt on, or makes it unsafe to rely too literally on, the proposition that knowledge that a crime might be committed is enough."[48]

[46] Later, Pincus JA referred to *Yorke v Lucas*[49] and observed:

> "It is not clear from the wording of para. (c) what state of mind the accused must have, in order to be guilty as an aider. I incline to the view that, following *Giorgianni* as well as *Yorke v. Lucas*, the proper construction of the provision is that the accused must be shown to have intentionally taken part in the offence. But it is perhaps unnecessary to reach a final conclusion on the application of *Giorgianni* to s. 7 of our Code, a matter which was not argued before us."[50]

[47] Uncertainty can affect the intention of an aider in at least two different ways. Firstly, there can be uncertainty as to the nature and particulars of the offence which is to be committed.[51] Here what was contemplated was Mrs Morant's suicide by carbon monoxide poisoning as a result of the inhalation of exhaust fumes from the generator. Secondly, there can be doubt as to whether the actor will actually commit the identified offence. If what is contemplated is a specific and well-identified offence and the aider gives assistance to that specific end, knowing that the actor may (or may not) commit the offence, then the aider has surely aided by performing acts "intentionally aimed at the commission of the acts which constitute [the offence]",[52] if in fact the actor commits the offence

[48] Proof of the knowledge of the essential matters is necessary to allow the jury to conclude (no doubt with other evidence) that the element is proved, namely an intention to aid the commission of the offence. What knowledge may be necessary to support

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48 At 308–309.

49 (1985) 158 CLR 661.

50 *R v B & P* at 309.

51 See *R v Bainbridge* [1960] 1 QB 129 and others considered by Lee J in *R v Ancuta* [1991] 2 Qd R 413.

52 *Giorgianni v The Queen* (1985) 156 CLR 473 at 506.

that inference is a matter of law.[53] This is consistent with the recent decision of the Court of Appeal in *R v Licciardello.*[54] There, the Court had no criticism of a direction in these terms: the prosecution had to prove "that the defendant had actual knowledge or an expectation of the essential facts of that offence. That is all the essential matters which makes the act done a crime …"[55] (emphasis added).

[49] In some cases, proof of actual knowledge at the time of the aiding will be necessary to support a finding that the aider intended to aid the actor to commit the offence. *R v Jeffrey*[56] and *R v Lowrie & Ross*[57] are both cases where actor and aider joined in beating the deceased. The act which killed and therefore constituted the offence occurred simultaneously with the aiding. No intention to aid could then be found unless the aider had knowledge of the actor's intention, and had that knowledge when aiding.

[50] If Mr Morant here contemplated a particular act by Mrs Morant, namely gassing herself using the generator with the intention to kill herself, and he aided her with the intention that his acts would assist her to intentionally end her life by gassing, then he would be guilty of aiding her suicide even if her intention to end her life by gassing arose some time after the aiding and even if he thought, when he assisted, that the suicide was not a certainty.

[51] The jury was, on the issue of state of mind of Mr Morant and the state of mind of Mrs Morant in count 2, directed:

> The Crown must prove beyond reasonable doubt that:
>
> (i) When the acts of aiding were done, the accused knew that the deceased would or may kill herself by using the generator to cause her death by carbon monoxide poisoning; and
>
> (ii) The accused intended that the acts of aiding would assist or help the deceased to kill herself by carbon monoxide poisoning.

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53 *Doney v The Queen* (1990) 171 CLR 207 at 212, citing in particular *R v R* (1989) 18 NSWLR 74.

54 [2017] QCA 286.

55 At [4], [32].

56 [2003] 2 Qd R 306.

57 [2000] 2 Qd R 529.