Criminal Law – Seminar Notes

Class 1: Crime, Law and Morality

Main questions:

1. *Sources of Criminal Law*
   - NSW is a 'common law' state
   - Unlike in Code states, there is no statute that comprehensively states the criminal law
   - Criminal law is mostly contained in legislation – ***Crimes Act* 1900 (NSW)** – which defines crimes
   - ***Crimes Act*** is ambiguous, and common law resolves this ambiguity
     - E.g., *the courts* have given meaning to the phrase "act [or omission]...causing...death" in **s18(1)(a) *Crimes Act*** (an act or omission causing death is the actus reus of the offences of murder and manslaughter)
   - Some defences are created by common law – e.g., duress and necessity are judge-made defences, and not defined in the ***Crimes Act***
   - Judges also defined two categories of involuntary manslaughter that exist (unlawful and dangerous act manslaughter and criminal negligence manslaughter)
2. *How are the limits of criminal liability determined?*
   - ***Findlay, Odgers and Yeo*** discuss two competing principles that underlie the criminal law: (a) the individual autonomy principle and (b) the community welfare principle.
   - Individual autonomy principle is reflected in the criminal law's insistence that only persons who have ***voluntarily*** performed the actus reus of an offence may be held criminally liable.
     - This principle also reflected in:
       a) the general principle that criminal liability is not established simply by proving that the accused performed an offence's actus reus
       b) the rebuttable presumption that a subjective mens rea must be proved for statutory offences that are silent as to mens rea (see ***He Kaw Teh***)
       c) the temporal coincidence rule
       d) It underlies many of the defences for which the criminal law provides: e.g., self-defence, duress, necessity, and mental illness.
   - Community welfare principle is reflected in the substantive criminal law.
     1. First, objective mental elements – which apply, for example, to offences such as sexual assault and involuntary manslaughter – are perhaps more consistent with this principle than they are with the individual autonomy principle.
     2. Secondly, the CW principle underlies the law's insistence that some of those who have committed criminal conduct involuntarily may nevertheless be institutionalised indefinitely: see ***Bratty v AG for Northern Ireland* [1963] AC 386**.
     3. Thirdly, community protection concerns seem partly to explain judges' failure always strictly to apply the temporal coincidence rule: see ***Thabo Meli v R* [1954] 1 WLR 228**.
     4. Finally, the current content of the 'defence' of self-induced intoxication is also heavily influenced by the CW principle: see **Pt 11A *Crimes Act***.
   - An example of an area of the criminal law that has been influenced by both liberalism and community protection concerns is the law in NSW concerning the 'defence' of self-induced intoxication: see **Pt 11A *Crimes Act*** (especially **ss 428C, 428D**)

Theory

- **Social context and the criminal law**

- Competing principles = moral culpability vs community protection
- Law can protect people in a paternalistic way

- **What is criminal law?**

- Defines activities for which the legislature and judiciary have decided we should be criminally liable
- Public law → prosecuted by the State
- Behaviours that have been criminalised are behaviours that have breached society's moral
- standards → criminal law is normative (value based)

- Statute did not specify that he had to have any particular mental state

- **Issue**
  - Whether knowledge was an essential mental element of this offence?
  - Was this a *mens rea* offence, or a strict or absolute liability?
- **Principle**
  - Gibbs CJ
    - When statutory offences are silent as to *mens rea*, we must question whether a *mens rea* element is needed.
    - There is a presumption that mens rea is an essential ingredient in every offence. But that presumption is liable to be displaced either by words of the statute or the subject matter with which it deals.
    - In deciding whether the presumption has been displaced, three factors must be considered:
      1. Words of the statute, and thus intent of parliament
      2. Subject matter of the offence (nature of the offence)
         - More serious offence (with more severe punishment) = more likely a *mens rea* was intended
         - The gravity of the social problem which the offence seeks to regulate
         - The severity of the punishment attached
      3. Will having no *mens rea* (i.e., strict or absolute liability) assist the enforcement of the law?
         → will it provide administration of justice, and correct punishment?
         → (Lord Reid in ***Sweet v Parsley*** **[1970]** →
    - If the presumption is not displaced, then *mens rea* is imported into the offence
    - If the presumption is displaced, then no *mens rea* must be proved. But the defendant can raise a 'defence' of reasonable mistake (if strict liability). But, if it was intention of parliament for an absolute liability, then no 'defence' of reasonable mistake is available.
    - ***CTM v R*** confirmed the obiter dicta in ***He Kaw Teh*** that, although the defendant has an evidential burden to satisfy before the excuse of honest and reasonable mistake of fact will be left to the jury, the prosecution must negative it beyond a reasonable doubt
  - Brennan J
    - The *mens rea* requirement is a reflection of the purpose of the statute, and human protection for a person who unwittingly engage in prohibited conduct.
    - But, the issue of whether *mens rea* is required as an element of an offence, is entirely different to the issue of the specific *mens rea* required.
    - To determine the *mens rea* element required:
      1. ***Actus reus*** = Conduct (act or omissions)
         - ***Mens rea*** = voluntariness, and intention to do the defined act
      2. ***Actus reus*** = Circumstances in which the conduct was performed
         - ***Mens rea*** = knowledge, or absence of an honest and reasonable, but mistaken belief
      3. ***Actus reus*** = Consequences/Result
         - ***Mens rea*** =
           (1) foresight of the possibility of its occurrence (if recklessness is an element), or
           (2) knowledge of the probability (or likelihood) of their occurrence, or an intention to cause them (is a specific intent is an element)
    - It is implied as an element of the offence that when a person commits the actus reus, he either:
      a. Knows the circumstances which make the doing of that act an offence, OR
      b. Does not believe honestly and on reasonable grounds that the circumstances which are attendant on the doing of that act are such as to make the doing of the act innocent
    - Note: Brennan J refers to voluntariness and intent as the mental states ordinarily required for an act in an offence. He sees it as part of both the physical and mental elements of the offence.
    - However, generally voluntariness or volition is understood to be physical element
- **Held**

- Facilitating prosecution in cases where the mental element required for murder is hard to prove. Constructive liability for the killing is grounded on considerations of policy and practicality, which enables the requisite intention for murder to be "constructed" from that attaching to the foundational offence. On the basis that the foundational offence is particularly serious.

- **Arguments against:**
  - Intention not required → departs from the coincidence rule which requires coincidence between the fault and physical elements for murder. it has been said to be contrary to established principles of criminal liability for someone to be held liable and punished for murder, when that person neither intended to cause death or grievous bodily harm, or foresaw that such an outcome was likely
  - Dubious deterrent effect → It is unlikely that those who embark on a criminal venture, such as an armed robbery, are aware of the existence of an offence of constructive murder, or, even if they are aware of it, that this would deter them from proceeding with the intended foundational offence.
  - Unfairness → person convicted of constructive murder is subject to the same penalty as that for intentional murder. Although the life imprisonment sentence can be reduced in sentencing, judges have scope to give high penalties where the foundational offence required strong retribution from community demands. It is even more unfair for accomplices who stood by while the principal committed the act, and who neither encouraged its commission or wished such an outcome. In NSW, this is of less concern, as the decision in ***Sharah,*** recognises that a mental element is required of the accomplice to the foundational offence, which is not required of the person who caused the death.
  - Double jeopardy → sentence for foundational offence and a sentence for murder (for one act)
  - Inconsistent and confusing
  - Not limited to violent crimes → It has been suggested that the NSW formulation is even more unfair than the rule at common law, because the foundational offence need only be a crime punishable by imprisonment for life or for 25 years, "regardless of the degree of personal danger involved in the crime in question", and also extends to acts committed immediately after the foundational offence.
- **Reform:**
  - MANY calls to abolish the rule [BUT community has limited sympathy for those committing serious crimes and who 'accidently' kill another in the process of its commission]
  - Limit the rule to offences or actions involving violence or inherent danger
  - Confirm operation of constructive murder to the perpetrator → accomplices can be convicted of murder by joint criminal enterprise principle
  - Require additional mental element for accomplices
  - Reduce the offence to manslaughter
- **The commission's concern with s18(1) *Crimes Act 1900* (NSW):**
  1. The range of foundational offences is extensive and includes a number of offences which, are serious and punishable by sentences of imprisonment for 25 years or life, but not of themselves dangerous offences or offences of violence
  2. It is unfair when it applies in relation to accomplices, since they can be convicted of murder for an accidental killing, at the hand of someone else, that they neither intended or wanted.
  3. The overlap between provision for constructive murder, with the extended joint criminal enterprise doctrine, and with murder by reckless indifference. This gives potential for introducing undue complexity into the trial if relied upon by the prosecution as alternative case theories
  4. The fact that it applies to a killing occurring "immediately after" the commission of the foundational offence, raising a potential issue as to the time frame encompassed,

- **Section 18(2)(a)** of the ***Crimes Act*** provides that only 'malicious' acts can give rise to liability for murder. Does this mean that, in a constructive murder case, the accused must have foreseen the possibility that his/her act would cause death?

- The requirement of 'threat causing fear of imminent violence' in common assault – made it hard to prosecute assault charges against those who made nuisance phone calls
- ***Ireland and Burstow* [1997]** → silent phone calls made with intention that the silence cause fear; the victim assailed by uncertainty of his intention – causing fear that the caller's arrival at her door may be imminent → held by UK courts to be assault
- ***S13, 8, 7*** → helps address this issue of requiring 'imminent threat' for offences of stalking and intimidating "another person with intention of causing the other person to fear harm"

***McIlwraith v R* (2017) 265 A Crim R 216, [41]**

- NSWCCA held that → as is the case with the offence of murder, both intention *and* reckless indifference (knowledge of the likelihood that the relevant consequence will be caused) are sufficient mental states.
- The offence can be established by proving an intention to cause a person to fear physical or mental harm, without reference to **subs (3).** This is in part because of the effect of reckless indifference in determining criminal responsibility (for example, it does not create a lesser form of murder) and the fact that **s13(3)** uses the language of reckless indifference
- The offence can be proved by established by intention to cause fear of physical or mental harm → or by establishing **s13(3)**

***Crimes (Domestic and Personal Violence) Act ["C(D&PV) Act"] 2007 (NSW)* →**

Part 4 – Apprehended Domestic Violence Orders (ADVO)

Part 5 – Apprehended Personal Violence Orders (APVO)

Class 9: Assault, wounding and GBH offences/Sexual Offences

Generally (ss 61KC, 61KD, 61KE, 61KF)

***Crimes Act 1900* (NSW)**

61KC	**Sexual touching** Any person (the "alleged offender") who without the consent of another person (the "alleged victim") and knowing that the alleged victim does not consent intentionally: (a) sexually touches the alleged victim, or (b) incites the alleged victim to sexually touch the alleged offender, or (c) incites a third person to sexually touch the alleged victim, or (d) incites the alleged victim to sexually touch a third person, is guilty of an offence. Maximum penalty--Imprisonment for 5 years.
61KD	**Aggravated sexual touching** (1) Any person (the "alleged offender") who without the consent of another person (the "alleged victim") and knowing that the alleged victim does not consent and in circumstances of aggravation intentionally: (a) sexually touches the alleged victim, or (b) incites the alleged victim to sexually touch the alleged offender, or (c) incites a third person to sexually touch the alleged victim, or (d) incites the alleged victim to sexually touch a third person, is guilty of an offence. Maximum penalty--Imprisonment for 7 years. (2) In this section, "circumstances of aggravation" means circumstances in which: (a) the alleged offender is in the company of another person or persons, or (b) the alleged victim is (whether generally or at the time of the commission of the offence) under the authority of the alleged offender, or (c) the alleged victim has a serious physical disability, or (d) the alleged victim has a cognitive impairment.
61KE	**Sexual act**

- Accused was charged with larceny and appealed, arguing the bank consented to his taking of the money through the ATM → that the bank intended the machine to operate within the terms of its programme

- **Held**
  - The bank had not consented to the taking of money by a person who had no account with the bank by programming the machine in a way that facilitated the commission of fraud by a person holding a card
  - The machine was not capable of giving the bank's consent in fact → it is not to be treated as a person with authority to give the bank's consent
  - HCA stated 'the bank consented to the withdrawal...only if the cardholder had an account that was valid. It would be quite unreal to infer that the bank consented to the withdrawal by a cardholder whose account had been closed'
- **Principles**
  - Programming of a machine doesn't constitute consent for taking possession
  - Further if accused is entitled to no money, but an amount is handed to him, this constitutes larceny by mistake, even if given with consent
  - Lack of consent/positive intention of the owner of possessor to pass possession
  - Not 'contrary to the will' – but it's without the consent of the owner

Consent may be vitiated

- Consent can be vitiated if it is given due to threats/intimidation (***R v Lovell***)
- Consent due to fraud is covered by the offence of fraud → **s192E**
- Consent due to mistake is an unresolved legal issue, but if a case arises, both ***Potisk*** and ***Illich*** must be applied
  - Mutual mistake = neither party at the time realises a mistake has been made and later when D realises they have benefited from the mistake they form a dishonest intention
  - Unilateral mistake = D immediately realises other party has made a mistake and from that point forms the dishonest intention to take advantage of it
- According to ***Potisk***, mistaken consent is consent, an actus element is missing, larceny not committed
- According to ***Illich***, obtaining property through mistaken consent does not amount to larceny unless V has made a **fundamental mistake** as to the:
  - identity of the person
  - identity of the thing or
  - excess quantity of goods
- ***Riley*** states that if D becomes aware of V's fundamental error and retains the property, consent is vitiated (this solves the missing MR element)
- BUT for fungibles, consent owing to mistake is not vitiated - i.e. fundamental errors will not be applied where the mistake has resulted in excess money being handed over

***Potisk v R* (1973) 6 SASR 389, 391-392** (facts), **399-404** (disposition) [extracted in Rush and Yeo, 78-84]

- If money is handed over with consent it is not larceny even if the amount is wrong
- The Majority held that the teller did consent to give the money to the defendant (notwithstanding that there was extra money given)
  - The act itself [of giving the money] was consented to and this is sufficient
  - However, this is contrasted to the approach in ***Ilich*** → which talks about the content of the consent
- Bray CJ approved the following remarks of Brett J in ***Middleton* (1873) LR 2 CCR 38**:
  - "Consent or non-consent is an action of the mind: it consists exclusively of the intention of the mind ... If it be said that a man intends to part with the property in a thing which he delivers to another, the meaning of the words is that he intends that the other should take the thing and keep it as his own; and it seems a contradiction in a sense to say that the thing so delivered is taken without his consent."
  - Is this persuasive?
    - Has a person really *consensually* handed over property where he or she has intentionally handed it over, but (for example) has been mistaken as to what he or she was handing over?

- Crown cannot prosecute IL for murder. Victim was not guilty of his own murder and neither was IL.
- The accomplice of a person who unintentionally kills themselves while committing a crime punishable by 25-years or life imprisonment cannot be convicted of murder

- **Judgement**
  - HCA maintained that joint criminal enterprise liability is primary, not derivative.
  - In other words, the passive participants to a JCE are treated as principals in the first degree
    - the law proceeds as though they have actually performed the act causing death in a case of murder or manslaughter.
  - But even so → five Justices found that the appellant could not be convicted of murder.
  - Two members of the majority → Bell and Nettle JJ:
    - Held that the only acts that are attributed to the passive participants in a JCE are those acts that comprise the actus reus of a crime → AND not the acts of the other members
    - The co-offender's act here was not an actus reus: it caused his own death, whereas the actus reus of murder is an act causing the death of another.
    - "Self-killing" was not a crime under **s18, *Crimes Act***
  - On the other hand → Kiefel CJ, Keane and Edelman JJ:
    - Held that all of the acts that the actual perpetrator performs in the course of the foundational enterprise are attributed to the passive participant(s).
    - But, their Honours continued, **s18(1)(a), *Crimes Act*** does not apply to a person who kills him or herself; nor has it ever been applied to the accomplice of a self-killer; and it cannot be held that such an accomplice now can fit within its terms.
  - Justices Gageler and Gordon dissented.
- Where does this leave the law?
  - First, all acts of the actual perpetrator are attributed to the other participants in a JCE → this was accepted by Kiefel CJ, Keane, Edelman, Gageler and Gordon JJ (Bell and Nettle JJ dissenting on this point)
  - Secondly, however, the accomplice of a person who unintentionally kills him/herself while committing a crime punishable by 25 years or life imprisonment cannot be convicted of murder → this was accepted by Kiefel CJ, Keane, Edelman, Bell and Nettle JJ (Gageler and Gordon JJ dissenting), though the first three Justices' reasons differed from those of Bell and Nettle JJ.
  - ***Moussa v R* [2017] NSWCCA 237** → the CCA's analysis is consistent with that presented here – that "self-killing" was not an actus reus that could be attributed → driver (Moussa) drove victim around for victim to commit arson by pouring petrol on property and igniting fire → this caused an explosion, and victim died

Extended Joint Criminal Enterprise (EJCE)

- People have agreed to commit a foundational joint criminal enterprise but during the course of that assault, a person commits a further offence that was not agreed to in the original agreement.
- It will be sufficient to prove that the individual foresaw the possibility that the additional crime might be committed by another member of the group
- EJCE is controversial since it facilitates the extension of joint criminal enterprise for offences which the did not intend or agree to commit
- ***Tangye*** → Hunt CJ criticised prosecutors (and trial judges) for failing to distinguish between JCE and EJCE → the prosecution in that case had two alternate cases of JCE and EJCE
  - Rely on JCE where the Crown cannot establish BRD that the accused was the person who physically committed the offence charged
  - Only need to rely on EJCE where the offence charged is not the same as the enterprise agreed
  - But, both JCE and EJCE can be brought together when the defendant agreed to carry out a particular crime, but another crime was committed which the defendant contemplated as a possible incidence of their agreed JCE

the circumstances he or she perceives them, but the person still believed the conduct was necessary to defend themselves or another person
- Partial defence to murder only – downgrades murder to manslaughter.
- ***Lane* [2013] NSWCCA 317, [50]** → the prosecution must prove the actus and mens of murder before the partial defence comes into operation so as to produce a manslaughter conviction

***Crimes Act 1900* (NSW), s 421**

421	**Self-defence--excessive force that inflicts death (partial defence)** (1) This section applies if: (a) the person uses force that involves the infliction of death, and (b) the conduct is not a reasonable response in the circumstances as he or she perceives them, but the person believes the conduct is necessary: (c) to defend himself or herself or another person, or (d) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person. (2) The person is not criminally responsible for murder but, on a trial for murder, the person is to be found guilty of manslaughter if the person is otherwise criminally responsible for manslaughter.

- Applies when A inflicts death believing that his/her conduct is necessary to defend self/others or prevent deprivation
- A's response is not reasonable in the circumstances as A perceives them
- Partial defence to murder only – downgrades murder to manslaughter.
- NOTE: excessive self-defence (causing death) only applies to protection against threat of personal life or deprivation of liberty – but not for protection of property (**s 420**)

***Ryan and Coulter v R* [2013] NSWCCA 208** [Brown, **956-58**] (concerns the evidential burden)

- **Facts**
  - Ryan convicted of murder of V (husband). She hired hitman to kill her husband.
  - Ryan's mother (Coulter) was also convicted of murder
  - Coulter provided part of money knowing what was intended – convicted as accessory before the fact.
  - Coulter mistakenly believed V had been violent toward daughter – argued self-defence should have been left to jury.
- **Principle**
  - **s 421** – Excessive self-defence is only available to the person who 'uses force' to kill another person:
    1. Accused person must have used force that caused death
    2. And that use of force was not reasonable response in the circumstance as accused perceived them
    3. And the accused must believe the use of force was necessary
  - **s 419** – the prosecution must fail to prove that the person did not (subjectively) hold the relevant belief (the third element) → no legal burden rests on Coulter, only an evidential burden
  - **s 421** – Excessive self-defence may sometimes apply to a secondary participant (e.g., person who hands the primary offender a knife as that person fears their life)
  - Contract killing, if there was subjective belief that it was necessary to protect themselves or another, then self-defence may be available → so self-defence may apply
- **Held**
  - Even assuming that excessive self-defence can be pleaded by a secondary participant, Coulter had not discharged evidentiary burden
  - There was no evidence suggesting her conduct was necessary to protect her daughter against the husband – it fell short of even having the capacity to constitute evidence that Coulter had the requisite belief

- No history of mental illness, but he was a regular, long-term user of ice – and had used ice before the killing

- **Held**
  - Judge refused to leave defence of mental illness to the jury – since drug-induced psychosis alone, without a history of mental illness cannot constitute a "disease of the mind"
  - While the trial judge accepted that the accused was experiencing a drug-induced psychosis at the time of the offence, he found that the evidence did not establish that the accused suffered from a defect of reason arising from a disease of the mind such that the defence of mental illness should be left to the jury.
  - [105] → The suggestions in the psychiatric evidence that some persons who ingest drugs over a period of time may be vulnerable to developing a psychosis was not sufficient as a matter of diagnosis to establish either a disease of the mind, or that the appellant suffered such a disease of the mind at the time he stabbed Mr Huang.
- **Reasoning**
  - ***M'Naghten rules*** were made during an era where drug use was limited
  - In the current era, many prohibited drugs available in the community, and are used/abused with many adverse outcomes
  - Individuals make a choice as to whether they use illegal drugs such as ice – and it can be inferred that users of ice are likely to have some awareness of its severe effects
  - Ongoing ice use can lead to drug-induced psychosis – with violent consequences
  - The defence of mental illness operates narrowly – the accused must prove OBP that they were subject to a defect of reason due to a "disease of the mind"
  - It would be contrary to the policy underling this defence to allow drug-induced psychosis alone to amount to mental health impairment

Fang v R (2018) 97 NSWLR 876, [58]-[105] [noted in Brown, 885-86]

- **Facts**
  - Fang appealed
- **Held**
  - NSWCCA dismissed the appeal
  - The judge was correct to find there was no evidence that "a drug-induced psychosis" (unaccompanied by a separate psychiatric illness) constitutes a disease of the mind as understood in the common law" (at [76])
  - There was no evidence the accused had a recurring mental disorder (at [94]) → so it was open to the judge to not leave the defence of mental illness to the jury

R v Pahl (2017) 266 A Crim R 41, esp. [133]-[153].

- **Facts:** committed burglary, reckless damage to property after taking "excessive amounts of alcohol" in response to work stress – he hallucinated and thought he was being chased – so crashed into many objects that caused damage
- [135] – the accused argued that he suffered from mild neurocognitive disorder and/or post-traumatic stress disorder → and they were relevant mental impairments because they made him vulnerable to developing psychosis when he ingested alcohol.
  - He did not argue that his condition was chronic psychosis
- [136]-[139] – that argument fails because:
  1) Post-traumatic stress disorder is a reactive condition (reaction of a healthy mind to external stimuli) – and not a condition that supports the defence
  2) No medical evidence that PTSD made him susceptible to alcohol-induced psychosis
  3) OBP – he did not suffer a mild neurocognitive disorder due to contradictory medical evidence – and there was insufficient basis for the finding of mild neurocognitive disorder by the supportive doctor – and evidence of his high level of performance at work is inconsistent with the finding

- Specific intent = intent to cause a specific result (beyond the mere act) e.g., **s 61K**: assault with intent to have sexual intercourse
    - Additional specific intent is the intent to have sexual intercourse (beyond mere threat or infliction of harm)

- If there is evidence that an accused's conduct was involuntary because of 'mental health impairment' → that evidence CAN be used to prove that the accused was, on the balance of probabilities, within the **s 28** (mental illness) defence (***Bratty, Radford, Falconer*** and ***Woodbridge***).
    - If the accused fails to prove OBP the **s28** defence (i.e., failed to prove that he/she lacked knowledge of the nature and quality, or wrongfulness, of the conduct) → evidence of mental illness CANNOT be used to obtain an unqualified acquittal on the basis of involuntariness (***Hawkins*** at 512-513 CLR) → that evidence does not go to the voluntariness of the act (**actus reus**), instead it goes to **mens rea**
- If there is evidence that, because of mental illness, an accused person lacked the requisite specific intent for an offence with which he or she has been charged → then evidence of mental illness CAN be used to establish that it is reasonably possible that he or she did not form specific intent? (***Hawkins*** at 513-515 CLR).
- If the accused argues, alternatively, that he or she was within **s28** defence, or, because of mental illness, did not form specific intent, the jury must determine:
    1) Actus reus – evidence of mental illness can't be taken into account for voluntariness of act
    2) Mental illness defence – was she criminally responsible for the act? (i.e., was the **s28** defence made out) → evidence of mental illness can be taken into acount
    3) If no mental illness defence – then consider whether mens rea of specific intent was made out if it is a specific intent offence → can consider evidence of mental illness → (***Minani*** at [32])

***Hawkins v The Queen* (1994) 179 CLR 500** [noted in Brown, **904-05**]

- **Facts**
    - Hawkins was charged with the murder of his father with a rifle.
    - The defence case was that he intended to commit suicide in his father's presence and that, at the last moment, in a disturbed state of mind, he turned the rifle towards his father and pulled the trigger without having the specific intention necessary to murder.
    - The defence did not raise a defence of insanity or wish that defence to be put to the jury.
    - The judge rejected as irrelevant medical evidence which cast doubt on whether the accused was able at the time to form a specific intention to either kill or cause bodily harm to his father, because insanity wasn't raised.
- **Issue**:
    - Can mental illness evidence be used to negate specific intent?
- **Held**
    - Yes, even though evidence of mental disease did not satisfy a jury that the defendant was insane, it was admissible evidence in determining whether he intended to cause death
    - Where insanity was not raised, psychiatric evidence of mental disease is not admissible on the question of voluntariness – instead, it goes to *mens rea*
    - Mental disease cannot go to the voluntariness of the act – since that would allow complete acquittal, but defendants with mental diseases are dangerous to society
    - The judge must direct the jury to consider the physical elements of the offence, before addressing the issue of mental illness defence → and then, considering mens rea
    - NOTE: the alternative approach (which was rejected) was to allow the jury to consider all elements of the offence (actus and mens) before considering mental illness – thereby providing complete acquittal if prosecution does not prove beyond reasonable doubt (***R v S*** – but the court in ***Brewer (No 2)*** rejected this approach)
    - Evidence of mental disease is admissible to the issue of specific intent (intention to cause a specific result)

evidence, then you could not find him guilty because he did not have the ability to form the intention, consequently did not have the intention."

- **Held**
  - The judge's direction was incorrect
  - The direction was as to capacity to form the specific intent. There was no direction as to the relevance of intoxication to whether the appellant did (as opposed to could) form the relevant specific intent.
  - The clear direction as to capacity misled the jury into a false issue – the direction should have been as to whether the specific intent was held, not whether there was capacity to form it.
- **Principle**
  - It is erroneous to direct the jury in terms of whether the accused had the capacity to form the relevant intent and a direction in those terms may give rise to a miscarriage of justice

Discussion:

Are offenders who fail to form criminal intent because of self-induced intoxication, more, less or as culpable as an offender who has formed intent? Or does it depend?

- **Brown, p.189**:
  - The position in NSW seems to be that self-induced intoxication makes the offender more culpable than one who had formed intent
  - Dangerous driving causing death (punishable for 10 years), but if person is drunk (punishable for 14 years)– **s52A, *Crimes Act***
  - Intoxication is an aggravating factor
  - **s 25A**, ***Crimes Act*** → assault causing death
  - **s 25B**, ***Crimes Act*** → assault causing death, where the defendant was intoxicated = more serious offence
- **Julia Quilter**
  - There is a debate surrounding whether intoxication should be the basis for distinguishing between serious and less serious crimes in the context of violence
  - Under 'common sense', a person who is intoxicated whilst committing violence – would indicate that the violence was explicable/understandable or that intoxicated violence is less morally culpable
  - But studies have consistently shown that alcohol increases the risk of violence and dangerous driving
  - In taking the analogy between one-punch death and drink-driving deaths, there is the question that intoxication should be seen as an aggravating factor for certain other forms of violent conduct

***R v Dean-Willcocks* [2012] NSWSC 107**

- **Facts**
  - Defendant drank lots of alcohol at a birthday party
  - He went onto the streets and severely attacked an old Asian man
  - At one point, he was laying on the man, and punched him hard in the head – he died, with several fractures to his skull, neck and rib
- **Held**
  -

Macleod test → ***Peters*** test (for larceny)