



LAWS1206 EXAM Notes

Criminal Law and Procedure (Australian National University)



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murder

Statutes:

Crimes Act 1900 s19A "Punishment for murder"

1. A person who commits the crime of murder is liable to imprisonment for life.
2. A person sentenced to imprisonment for life for the crime of murder is to serve that sentence for the term of the person's natural life.

Crimes (Sentencing Procedure) Act 1999

s21(1): If by any provision of an Act an offender is made liable to imprisonment for life, a court may nevertheless impose a sentence of imprisonment for a specified term.

s61(1): A court is to impose a sentence of imprisonment for life on a person who is convicted of murder if the court is satisfied that the level of culpability in the commission of the offence is so extreme that the community interest in retribution, punishment, community protection and deterrence can only be met through the imposition of that sentence.

Crimes Act 1900 s24 Manslaughter- punishment

Whosoever commits the crime of manslaughter shall be liable to imprisonment for 25 years—

- Provided that, in any case, if the Judge is of the opinion that, having regard to all the circumstances, a nominal punishment would be sufficient, the Judge may discharge the jury from giving any verdict, and such discharge shall operate as an acquittal.

Voluntary Manslaughter: Defended by partial defence, eg. excessive self-defence, extreme provocation, substantial impairment because of mental health or cognitive impairment.

Involuntary manslaughter: AR without MR, in addition to either the act causing death was unlawful and dangerous, or the omission causing death was criminally negligent.

Actus reus:

- An act or omission of the accused (don't forget voluntariness, including intoxication!) (isolated)
- Causing
- The death of a human being

Death of a human being:

When does life begin? Common law (R v Hutty), imported into Crimes Act 1900 s20.

- On the trial of a person for the murder of a child, such child shall be held to have been born alive if it has breathed, and has been wholly born into the world whether it has had an independent circulation or not.

Case law, (R v Iby): child had a heartbeat for two hours, but never breathed unassisted: 'any sign of life after birth is sufficient' (s20 CA p64) thus child was born alive.

Destruction of foetus may constitute an offence of causing grievous bodily harm to the mother (CA s54a), in which the definition is (s4a) the destruction (other than in the course of a medical procedure or a termination of a pregnancy in accordance with the *Abortion Law Reform Act 2019*) of the foetus of a pregnant woman, whether or not the woman suffers any other harm.

- s82: termination of pregnancy by an unqualified person, s85: concealment of birth.

When does life end? See *Human Tissue Act 1983* s33, a person has died when there has occurred: a) irreversible cessation of all function of the person's brain; or b) circulation of blood in the person's body.

Acts and/or Omission:

"there was, in my view ... a need for the trial judge to give specific and close attention to the identification of the various acts which, on the Crown case, might have been the cause of death". (Mason CJ in *Royall v The Queen*)

- this addresses the 'causation issue' (the particular conduct must CAUSE the death),
- and this conduct must have been done with one of the requisite states of mind (mens rea)

Concurrence problems: (the actus reus and mens rea do not occur at the same time)- concurrence must be present for one to be guilty of a crime.

- *Thabo Meli [1954]*: The appellants plotted to kill the victim, and struck him over the head. Thinking that he was already dead, the appellants put the victim's body at the bottom of a cliff to make it look like an accident. The victim died of exposure, not blunt force. It was ruled that the act of striking and abandonment of the victim were parts of one 'ongoing' actus reus- this is sufficient for liability as mental state was present at the beginning of the plan.
- *Fagan v Commissioner of Metropolitan Police*, defendant accidentally drove over police officer's foot, but refused to move- charged with assault of police officer. Ruled that the act was continuing, and "it is not necessary that mens rea should be present at the inception of the actus reus, it can be superimposed upon an existing act" (James J) (continuing act approach)

Omission: can only be a basis for liability when there is a duty to act. There is no duty to take positive action to avert harm or death to someone else. (difference between failing to help, or causing harm)

- *Lane v R [2013]*, "there is a limit on the extent to which an omission may be relied upon to establish either murder or manslaughter".
- *Burns v The Queen [2012]*, "the law does not impose an obligation on individuals to rescue or otherwise to act to preserve human life. Such an obligation may be imposed by **statute or contract** or because of the relationship between individuals... parent and child, doctor and patient..."
- CA s44: "Whosoever, being legally liable to provide any wife, apprentice or servant or any insane person with necessary food, clothing, or lodging, wilfully and without lawful excuse refuses or neglects to provide the same, so that, in any case, his or her life is endangered, or his or her health becomes or is likely to be seriously injured, shall be liable to imprisonment for five years." (duty of care, any guardian of a spouse, servant, apprentice, or physically and/or mentally incapacitated)

COMMON LAW DUTY TO ACT:

- *R v Taktak [1988]*: the voluntary assumption of care can establish a legal duty to act, and the omission of said act can lead to criminal liability for the breach of the legal duty. This case also ruled that the degree of negligence must be gross to constitute criminal negligence leading to manslaughter. The court ruled in this case that Taktak's failure to provide access to medical aid was negligent, but he attempted to help and there was no evidence that Taktak knew the full extent of her drug use and the consequences. The negligence was not extreme or indifferent so to be criminally liable for manslaughter through omission.
- *Russell; Sam [2011]*: special relationship existing between accused and victim (parent-child)
- *R v Stone and Dobinson [1977], Taktak*: The accused has voluntarily undertaken to care and assumed a duty for another who is incapable of self-care. S&D: The jury were entitled to find that a duty of care was owed on the grounds that the victim was not only a lodger in the home of the defendants but also had closer ties to each. In Stone's case, a duty of care was owed on the basis that she was a blood relative, whilst Dobinson had undertaken a duty of care by washing her and providing food.
- *R v Miller [1983]*: Since Miller created a dangerous situation, he had an obligation to try and minimise the harm. "I see no rational ground for excluding from conduct capable of giving rise to criminal liability conduct which consists of failing to take measures that lie within one's power to counteract a danger that one has oneself created" Lord Diplock.
- *R v Pittwood [1902], R v Dytham [1979], R v Instan*, breach of a contractual duty may ground criminal liability for an omission.
- *Burns v The Queen [2012]*: the supplier of a prohibited drug **does not** have a duty to provide assistance.

Voluntariness/Volition: relevant conduct must be 'willed'- a criminal act must be voluntary to be criminally punishable (*He Kaw Tey*)

Ryan v The Queen [1967]: a "deed which was not the result of the accused's will to act cannot be made the source of criminal responsibility in him"

Presumption: conscious action is presumed to be voluntary (*Bratty v AG for Northern Ireland [1963]*, *R v Ryan [1967]*), *R v Falconer*: voluntary unless the defendant shows evidence of involuntary action eg. automatism, medical condition.

- Evidential burden: if the accused establishes the possibility that the act is involuntary then prosecution must prove voluntariness beyond reasonable doubt.
- No legal burden on accused: the prosecution must prove voluntariness.

Automatism: non-insane automatism (external cause: complete acquittal) and insane automatism (internal cause/mental disorder: not guilty by reasons of insanity)

- *Broome v Perkins [1987]*: total loss of voluntary control- defendant suffered from hypo-glycaemia, but was convicted as there was evidence that he had exercised conscious control of the car: “impaired, reduced or partial control is not enough” -CJ
- Reflex (eg. sneeze, cough, spasm, etc)
- *R v Ryan*: Even though the act of shooting was by accident, the victim was already held at gunpoint- the totality of the event must be considered and was not involuntary.
- State of impaired consciousness (sleep, sleepwalking, epilepsy, concussion, hypoglycaemia)
- Action under immense stress.

Intoxication:

Crimes Act 1900 s428g: (1) In determining where a person committed an offence, evidence of self-intoxication can not be taken into account in determining whether the conduct is voluntary. (2) However, a person is not criminally responsible for an offence if the conduct resulted from intoxication that is not self-induced.

- evidence that a person was intoxicated prior to the offence may be taken into account whether they had the mens rea to cause the specific result necessary for an offence of specific intent. However, such evidence may not be taken into account if: (a) the person had resolved before being intoxicated to do the relevant conduct, (b) The person had become intoxicated to strengthen their resolve to do the relevant conduct.

Causation:

Crimes Act 1900 s17A:

- (1) The rule of law that it is conclusively presumed that an injury was not the cause of death of a person if the person died after the expiration of the period of a year and a day after the date on which the person received the injury is abrogated.
- (2) This section does not apply in respect of an injury received before the commencement of this section.

Simple case: a question for the jury ‘applying their common sense’

- *Campbell v The Queen [1981]*: “it would seem to me to be enough if juries were told that the question of cause for them to decide is not a philosophical or scientific question, but a question to be determined by them applying their common sense to the facts as they find them, they appreciating that the purpose of the enquiry is to attribute legal responsibility in a criminal matter”

More complex cases: eg. when there is more than one cause of death: operating and substantial cause test

- *Royall v The Queen [1991]*: “It seems to the court that if at the time of death the original wound is still an operating cause and a substantial cause, then the death can properly be said to be the result of the wound, albeit that some other cause of death is also operating.” -Lord Parker CJ
- Was the accused's conduct a significant (substantial) and continuing (operating) cause of the victim's death at the time they died?

Where there is a novus actus interveniens: break in the chain of causation

- start with the operating and substantial cause test, then:
- Natural consequence test for flight in self preservation [*Royall*], was the death a natural or reasonable consequence of D's conduct?
- Whether the intervening factor is ‘so overwhelming as to make the original wound merely part of the history’ in medical negligence cases [*R v Smith*]
- Ordinary operation of the forces of nature does not break the chain of causation [*R v Hallett*]
- Third party's self defence does not break the chain [*R v Pagett*]

Operating and substantial cause test: (did you find the correct cause)

<p>R v Evans and Gardiner (No 2) [1976] VR 523, 534: stabbed in abdomen – bowel operation performed successfully – returned to apparent health – died 11 months later from constriction of bowel which was a not uncommon consequence of the operation that should have been diagnosed and rectified.</p>	<p>The failure of the medical practitioners to diagnose correctly the victim's condition, <u>however inept and unskilful</u>, was not the cause of death and the real question for the jury was whether the <u>blockage was due to the stabbing</u>. -if they completely neglect the patient this doesn't apply</p>
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<p>R v Blaue [1975] 1 WLR 1411: woman stabbed four times – at hospital required blood transfusion – refused treatment because was Jehovah’s Witness – ‘eggshell’ or ‘thin skull’ rule.</p>	<p>‘It has long been the policy of the law that those who use violence on other people must take their victims as they find them. This in our judgement means the whole man, not just the physical man. It does not lie in the mouth of the assailant to say that his victim’s religious beliefs which inhibited him from accepting certain kinds of treatment were unreasonable. The question for decision is what caused her death. The answer is the stab wound. The fact that the victim refused to stop this end from coming about did not break the causal connection between the act and the death.’</p>
<p>R v Smith [1959] 2 QB 35: defendant was a soldier who stabbed comrade at army barracks – deceased was dropped twice on way to hospital and then there was a failure to diagnose a punctured lung – argued would have survived but for negligence of those treating – 75% chance of survival with proper treatment</p>	<p>‘Putting it another way, only if the second cause is so overwhelming as to make the original wound merely part of the history can it be said that the death does not flow from the wound.’ -only applies to medical negligence</p>

<u>Novus Actus Interveniens (intervening act)</u>	
<p>R v Hallett [1969] SASR 141: after assaulting the deceased, Hallett left him on a beach unconscious – the tide came in and he drowned – argued that the tide was an intervening act.</p>	<p>‘The only question, it seems to us, which can be raised in this connection is whether the action of the sea on the deceased can be regarded as breaking the chain of causation. We do not think it can ... we cannot regard the ordinary operations of the tides ... as being such a supervening cause.’</p>
<p>R v Pagett (1983) 76 Cr App R 279: Pagett using a girl as a shield whilst shooting at police – police returned fire in self-defence and killed her – argued break in the chain of causation.</p>	<p>An act of a third party will only break the chain of causation if it is voluntary in the sense of being ‘free, deliberate and informed’ (at 289).</p> <ul style="list-style-type: none"> - third party self-defence doesn’t break the chain. - original act doesn’t need to be the only cause, only a significant contributor.
<p>R v Evans and Gardiner (No 2) [1976] VR 523, 534: stabbed in abdomen – bowel operation performed successfully – returned to apparent health – died 11 months later from constriction of bowel which was a not uncommon consequence of the operation that should have been diagnosed and rectified.</p>	<p>‘The failure of the medical practitioners to diagnose correctly the victim’s condition, however inept and unskilful, was not the cause of death and the real question for the jury was whether the blockage was due to the stabbing’.</p>

Conduct Test:

- Natural Consequences Test, was death a natural (or reasonable) consequence of D’s conduct?
- Reasonableness Test: no break in the chain unless the victim’s actions were quite disproportionate or unreasonable
- Foreseeability Test (Brennan and McHugh JJ): A will be held to have caused V’s death if the conduct of V was actually foreseen by A or was reasonably foreseeable on an objective test.
- Use of foreseeability is cautioned against

Directions on Causation: [McAuliffe and McAuliffe (1995)]

- Direction 1: the accused can only be convicted if their act caused the victim’s death, and must be a ‘substantial or significant cause’ of the death. Causation should be assessed in a common-sense and practical way, not overly technical

- Direction 2: If the accused's conduct causes the victim to reasonably fear harm, leading the victim to try and escape and the victim dies during that escape, the death is still causally linked to the accused's act, and the chain of causation is not broken produced the victim's response was reasonable or proportionate to the threat caused by the accused.

Mens rea:

- Intent to kill or
- Intent to inflict grievous bodily harm or
- Reckless indifference to human life.

Intention: *[He Kaw Teh]*: "decision to bring about a situation as far as it is possible to do so- to bring about an act of a particular kind or a particular result"

Doctrine of transferred malice: if you intend to kill someone but accidentally kill another, the mens rea is transferred from the target to the victim and you will still be liable for murder.

[cited: R v Royall]: "if a person creates a situation intended to kill and it does kill, it is no answer to a charge of murder that it caused death at a time or in a way that was to some extent unexpected.

- the accused cannot avoid liability just because the exact timing or manner of death was different from what they anticipated. The key point is that the original act created the lethal risk.

Grievous Bodily Harm (GBH): *[DPP v Smith (1961)]* "really serious bodily injury", "need not be permanent" *[Haoui v R (2008)]*

Crimes Act 1900 s4:

- the destruction (other than in the course of a medical procedure) of the foetus of a pregnant woman, whether or not the woman suffers any other harm,
- any permanent or serious disfiguring of the person,
- any grievous bodily disease

Reckless indifference to human life: reckless meaning foresight of probability not a mere possibility *[Royall v R]*

Foresight must be the probability of death, not GBH (s18(1)(a)): "the need for knowledge, awareness, foresight or realisation of the probability of death" *[R v Royall, Mason CJ]*

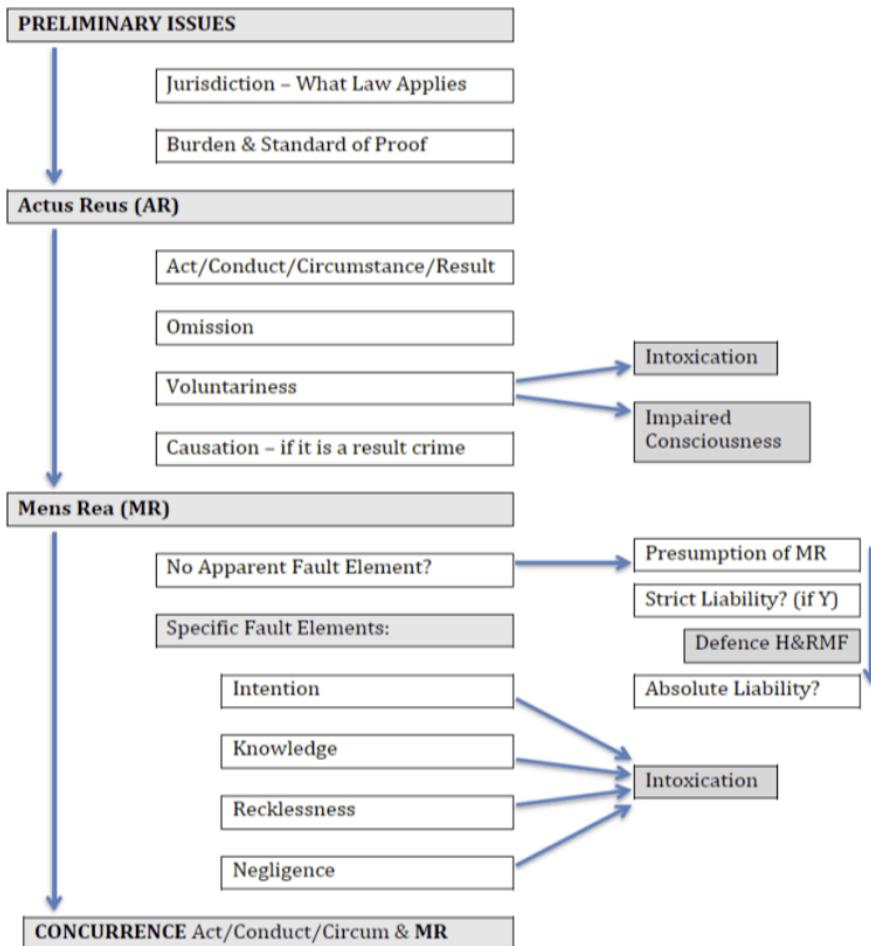
- conscious risk taking- awareness of the risk of death as a probable outcome of the conduct but continuing to engage-recklessness. Foresight must be SUBJECTIVE.

An "offence of specific intent" is an offence of which an intention to cause a specific result is an element. (s428B)

[R v Grant [2002]] Does murder where the MR is reckless indifference apply as a crime of specific intent?

- "the legislature should be taken as having intended that murder, in all of its forms, should come within the operation of s428C" (yes, all murder counts)

Visual Outline of Lectures 2 & 3



manslaughter

Today, the distinction between murder and manslaughter is seen to reflect degrees of seriousness of unlawful killings, based on the everyday understanding that some killings are more blameworthy than others. (NSW Law Reform Commission Report)

Voluntary Manslaughter: the elements of murder are present, but culpability is reduced. *[R v Lavender]*

- (s23): trial for murder: partial defence of extreme provocation
- (s23a): substantial impairment because of mental health impairment or cognitive impairment
- (s22a): infanticide
- (s421): self-defence- excessive force that inflicts death.

Involuntary Manslaughter: unlawful and dangerous act, or criminal negligence. (not mutually exclusive)

Manslaughter by Unlawful and Dangerous Act

Actus Reus:

- same as murder but must involve a voluntary act (not an omission), causing death of a human being.

Mens Rea:

- unlawful act
- dangerous act

Unlawful Act: One must prove the the AR and MR of the underlying unlawful act, must be more than a civil wrong (cannot be a tort) and a 'serious breach of the criminal law' *[Wilson v The Queen (1992)]*

- *Withers v The Queen (No 2) [2010]*: Assault
- *R v McCallum [1969]*: Unlawful wounding

- *R v Dawson [1985]*: Attempted robbery

R v Pullman [1991]

Issue: Is a breach of the Motor Traffic Regulations alone constitute an unlawful act sufficient to find a charge of manslaughter within that category?

Decision: No, not necessarily sufficient, as the regulations contain a diversity of infractions and some are comparatively minor.

Issue 2: If a breach of the MTR causes death, is it excluded as supporting a charge of UDA manslaughter?

Decision: No, such a breach can be an unlawful act.

R v Lamb [1967]: ruled that the unlawful act was ‘assault’, but there was no mens rea for the underlying offence.

Dangerous Act:

Test re: *Wilson v The Queen*: “whether the appellant’s act in punching the deceased was, from the standpoint of a reasonable person, an act carrying with it an appreciable risk of serious injury to the deceased.” Would a reasonable person in the position of the accused appreciate that their conduct exposed the victim to a risk of serious harm?

Parameters of the Objective Test: what circumstances or attributes of the accused are relevant to the consideration of the level of danger a reasonable person would appreciate?

- “any knowledge possessed by the accused that would bear upon whether the act was dangerous” *R v Cornelissen [2004]*
- age (*DPP v TY [2004]*)
- intellectual disability (*R v Thomas [2015]*)
- “the idiosyncrasies of the accused man or his ephemeral emotional or mental state” IS NOT relevant (*R v Wills [1983]*)

Criminal Negligence

Mens Rea:

- Act or omission
- The test in *Nydam v The Queen*

Nydam v The Queen [1977]: “In order to establish manslaughter by criminal negligence, it is sufficient if the prosecution shows that the act which caused the death was done by the accused consciously and voluntarily, without any intention of causing death or grievous bodily harm but in circumstances which involved such a great falling short of the standard of care which a reasonable man would have exercised and which involved such a high risk that death or grievous bodily harm would follow that the doing of the act merited criminal punishment.”

By omission: MR is a failure to meet the standard of care that would be exercised by a reasonable person in fulfilling that duty to act which failure must be of a sufficiently gross nature and occurs in circumstances where there is ‘such a high risk’ of death or GBH that it merits criminal punishment.

assault

Contextual Information

- Common assault: s61
- Aggravated assault: assault in circumstances of aggravation. s59

Aggravating factors:

- with a specific intention, eg. s33 ‘with intent to cause GBH...’
- on a class of people, eg. s56 (clergy, minister), s60 (police), s60e (school)
- resulting in a particular harm s58
- reckless grievous bodily harm s35, wounding with intent s33

Assault by threat: type 1 assault, assault to use of force: type 2 assault or battery

Fagan v Metropolitan Police Commissioner: “An assault is any act which intentionally- or possibly recklessly- causes another person to apprehend immediate and unlawful personal violence... [or constitutes the] use of unlawful force to another person without his [or her] consent.”

Assault by Threat

AR: ‘caused another person to apprehend immediate and unlawful personal violence’

1. Unlawful personal violence (all is unlawful except lawful excuse, eg. police powers, self-defence, or consented to)
2. Immediacy or imminence
3. Apprehension of fear

Imminence: *R v Knight*: threats must be of immediate violence- cannot be one which could be executed at any time. (could be charged under another crime)

Immediacy in context: “a present fear of relatively immediate imminent violence was instilled in her mind from the moment the words were uttered and that fear was kept alive in her mind, in the continuing present, by continuing progress, with her as prisoner, towards the house were the feared sexual violence was to occur... they were a continuing threat... second by second as they progressed towards the house.” *Zanker v Vartzokas [1988]*

Nature of threats: *R v Knight*: “a threat of violence made over the phone could be a threat of immediate violence in given circumstances, and thus an assault”. Mere words are enough to constitute assault, through phone, text or in person as long as they fulfil the other categories. Silent calls can also constitute an assault. (stalking or intimidation, s13)

Conditional threats: A conditional threat can amount to assault [*Rozsa v Samuels (1969)*] looking at the words uttered and the terms of the condition, and whether the accused had a right to impose that threat (eg self defence)

Apprehension: requires the victim to be aware of the threat [*Pemble v The Queen*]

Reasonability: Subjective test! *R v Blaue*, taking the victim as we find them unless it is extremely unreasonable. It will also be important to know whether the victim could be more timid, etc.

Assault by use of Force

1. Act
2. Application of Force
3. Without Consent [*R v Schloss (1897)*]

Application of Force:

- is mere touch sufficient? Yes: “physical contact so persisted in has in the circumstances gone beyond generally acceptable standards of conduct”- hostile intent [*Collins v Wilcock (1984)*]
- to the body or clothing of another? Yes [*Beal v Kelly, R v Thomas*]
- applied through the use of instrument or to object supporting victim: “where an assault involves a battery, it matters not whether the battery is inflicted directly by the body of the offender or through the medium of some weapon or instrument controlled by the action of the offender.”

Consent:

- may be express or implied [*Beer v McCann (1993)*]
- “generally speaking, consent is a defence to battery; and most of the physical contacts of ordinary life are not actionable because they are impliedly consented to by all who move in society and so expose themselves to the risk of bodily contact” *Collins v Wilcock*

Hostile intent: *Boughey v The Queen (1986)*

Limits of Consent: General rule is that a person cannot consent to an act that has the purpose of causing or will probably cause him or her actual bodily harm [*R v Coney (1882)*]

Actual Bodily Harm (ABH): “its ordinary meaning and includes any hurt or injury calculated to interfere with the health or comfort of the victim. Such hurt or injury need not be permanent, but must, no doubt, be more than mere transient or trifling” - *R v Donovan [1934], R v Brown [1992]*

- exceptions: boxing [*Pallante v Stadiums Pty Ltd (1976)*]
- not every infringement of the rules is a crime [*McAvaney v Quigley (1992)*]
- swinging arm tackle in rugby [*R v Carr*]
- personal adornment (piercing, tattoos, etc) [*R v Wilson (1996)*]
- surgery and medical procedures [*Marion's Case (1992)*]

Mens Rea

Intentionally or recklessly

- causing apprehension of immediate personal violence [*MacPherson v Brown (1975)*]
- applying force [*R v Venna (1976)*]

He Kaw Teh [1985] - Intent, in one form, connotes a decision to bring about a situation so far as it is possible to do so - to bring about an act of a particular kind or a particular result. Such a decision implies a desire or wish to do such an act or to bring about such a result. Thus when A strikes B (the act) having decided to or desiring or wishing to strike him, it can be said that he intends to strike B. Intent, in another form, connotes knowledge.

When A strikes B, his action can be divided into A's movement of his fist and B's presence in the path of A's movement. Although A's movement may be voluntary, he is not said to strike B intentionally unless he knows that B (or someone else) is in the path of his moving fist.

Recklessness

- recklessness for murder by reckless indifference requires 'probability' [*Royall*]
- In assault, it is possibility, not probability. "it is accepted law in Australia that for statutory offences other than murder, recklessness requires a realisation on the part of the accused that the particular kind of harm done... might be inflicted (that is, may possibly be inflicted) yet the accused went ahead and acted" [*Coleman (1990)*]
- Test: foresight of the possibility of the AR

DPP v Morgan [1976]: "I take assault as an example of a crime of basic intent where the consequence is very closely connected with the act"

Aggravated Assault

GBH vs Wounding vs ABH

Wounding:

- Needing to break or cut the interior layer of the skin (dermis) and breaking of the outer layer (epidermis) is not sufficient: *R v Smith [1837]*, *Vallance v The Queen [1961]*
- Penetration of the dermis will cause bleeding, and consequently evidence of free bleeding will suffice to prove a wound was inflicted: *R v Devine [1982]*
- Internal blood vessel breaking is not sufficient: *Eisenhower [1984]*
- Split lip is sufficient: *R v Shepperd [2003]*

Psychiatric Injury

Chan Fook [1994]: "The phrase 'actual bodily harm' is capable of including psychiatric injury. But it does not include mere emotions such as fear or distress or panic, nor does it include, as such, states of mind that are not themselves evidence of some identifiable psychiatric condition. The phrase 'state of mind' is not a scientific one and should be avoided in considering whether or not a psychiatric injury has been caused; its use is likely to create in the minds of the jury the impression that something which is no more than a strong emotion, such as extreme fear or panic, can amount to actual bodily harm. It cannot ... In any case where psychiatric injury is relied upon as the basis for an allegation of bodily harm, and the matter has not been admitted by the defence, expert evidence should be called by the prosecution."

- *R v Ireland; R v Burstow*: severe depression and anxiety disorder is recognised as GBH

complicity

"Complicity" is a legal term which broadly embraces the principles of law that extend criminal liability, beyond the direct perpetrator of a crime (the 'principal participant') to another person (the 'secondary participant') who assists or encourages the principal participant to commit (or attempt to commit) the crime, or who is in some way involved jointly with that offender, in its commission, or planned commission." - *NSW Law Reform Commission*

- requires more than one person to be involved
- is a mode of participation, and is not a separate offence (guilty of murder and not complicity in murder)

- not the same as being ‘in company’ or an accomplice

Types of complicity

- JCE: Joint criminal enterprise: two or more persons agree to commit a crime and it is committed, all of them are held liable for that offence
- Extended JCE: When during the course of a JCE, one or more participants commit an additional crime outside the original agreement, other participants are liable for that additional crime if certain conditions are met.
- Accessorial liability: a person who, without any agreement, encourages or assists the commission of a crime, is liable on the basis of accessorial liability
- Accessorial liability after the fact: assisting after the commission of a crime.

Clayton v R, Hartwick v R [2006]

Three people inflicted multiple stab wounds on the victim, one of which caused the victim’s death. The prosecution could not prove who did the fatal stabbing but argued that each of the three accused were liable for murder on the basis of one or more of the three branches of complicity:

First, it was said that the killing occurred in the course of the applicants’ implementation of a plan to cause really serious injury to the deceased. That is, the prosecution alleged that each applicant had participated in a joint enterprise. Alternatively, the prosecution argued that each applicant was guilty of murder because each had agreed to assault the deceased using weapons, and reasonably foresaw the possibility that death or really serious injury might be intentionally inflicted on the victim by one of them in the course of their carrying out the agreed assault. It is this second way of putting the case (‘extended common purpose’) that engaged the principles described in McAuliffe and Gillard. Finally, the prosecution argued that the two applicants who did not inflict the fatal wound had aided and abetted the person who did, by intentionally helping, encouraging or conveying their assent to that person in his or her commission of the murder. This third contention depended upon principles of accessorial liability.

Joint Criminal Enterprise

The law says that if two or more persons reach an *understanding or arrangement* that together they will commit a crime and then, while that understanding or arrangement is still on foot and has not been called off, they are both *present at the scene of the crime* and one or other of them does, or they do between them, in accordance with their understanding or arrangement, *all the things that are necessary to constitute the crime*, they are all equally guilty of that crime regardless of what part each played in its commission. - *R v Lowery and King (No 2) [1972]*

Actus Reus:

- that the accused has reached an ‘agreement or understanding’ with one or more other persons to pursue a JCE that remained in existence at the time of the offence;
- that the accused ‘participated’ in the JCE in some way
- that in accordance with the agreement, one or more parties to the agreement performed all of the acts necessary to commit the offence charged

Understanding or arrangement:

A joint criminal enterprise exists where two or more persons reach an understanding or arrangement amounting to an agreement between them that they will commit a crime. The understanding or arrangement need not be express, and its existence may be inferred from all the circumstances. It need not have been reached at any time before the crime is committed. The circumstances in which two or more persons are participating together in the commission of a particular crime may themselves establish an unspoken understanding or arrangement amounting to an agreement formed between them then and there to commit that crime. - *R v Tangye [1997]*

Possible Crimes: The agreement to commit a crime need not be definitive: it can include crimes that are a ‘possible incident of the execution of their agreement.’ *Miller v The Queen (2016)*

- even if merely possible (contingent), such crimes have to be covered by the agreement, otherwise it could form part of extended JCE.

Participation: A person participates in a joint criminal enterprise by being present when the crime is committed pursuant to the agreement [*Hyunh, Duong and Sem (2013)*]

- Otherwise, they need to demonstrate “evidence of events, other than those pertaining to the offence itself, for proof beyond reasonable doubt of the existence and scope of the agreement or enterprise, and the accused’s participation in it”. - *Sever [2010]*
- Whilst presence at the actual commission of the crime is sufficient, it is not necessary if the person sought to be made liable participated in some other way in the furtherance of the enterprise. A person who agrees with another to murder a victim by poisoning him and who in furtherance of this agreement supplied the poison will be liable under the principle although that person was not present when the poison was administered. -*Dickson [2017]*

“[I]t is the acts, and not the crime of the actual perpetrator which are attributed to the person acting in concert. If the latter person has the relevant mens rea, he or she is guilty of the principal offence because the actus reus is attributed to him or her by reason of the agreement and presence at the scene. It is irrelevant that the actual perpetrator cannot be convicted of that crime because he or she has a defence such as lack of mens rea, self-defence, provocation, duress or insanity.” - *Osland v The Queen [1998]*

“A person cannot act pursuant to an understanding or arrangement with another that, together, they will kill a third person and, at the same time, act under provocation. That is because provocation only arises where there is some act of the deceased which results in the loss of self-control to the point of committing the act which caused death. In that situation, the accused cannot also be taken to have acted so as to give effect to some prior understanding or arrangement with respect to the victim’s death. A fortiori, if he or she is acting in self-defence to some threat or attach by the deceased.” - *Osland v The Queen [1998]*

Primary vs Derivative Liability

Depending on the facts of the case, the liability of the secondary participant may be:

- derivative, that is, dependent on the primary participant committing the offence, as in the case of an accessory before the fact or at the fact, or
- primary, as in the case of a party to a joint enterprise to commit a particular crime, in which case a conviction of the secondary participant does not depend on the primary participant being guilty of the offence.

NSW Law Reform Commission

Mens Rea

- that at the time of the agreement the accused had the state of mind required for the commission of the relevant offences. That satisfies the relevant MR. *McEwan, Robb and Dambitis [2013]*

Extended Joint Criminal Enterprise

If someone in a JCE commits a crime outside the scope of the agreement but was foreseeable, it is an EJCE. (derivative liability)

- there needs to be the foundational crime that was within the ambit of the agreement
- and incidental crime (additional crime)

‘There was no occasion for the Court to turn its attention to the situation where one party foresees, but does not agree to, a crime other than that which is planned, and continues to participate in the venture. However, the secondary offender in that situation is as much a party to the crime which is an incident of the agreed venture as he is when the incidental crime falls within the common purpose.’ -*McAuliffe [1995]*

Where a case of murder is based upon the form of culpability described as ‘extended common purpose’, the identification of the joint criminal enterprise, participation in which results in the accused’s secondary liability, is an important particular of the case which the accused must meet. That is not to say that the prosecution must be able to identify the joint criminal enterprise with complete specificity. However, the judge and the jury must know enough about the enterprise to enable a decision to be made, first, as to whether it is criminal, and, secondly, as to whether the shooting was within the scope of the common purpose reflected in that joint criminal enterprise in that it was foreseen as a possible incident of the enterprise as explained in cases such as McAuliffe and Clayton. -*Taufahema*

Both AR and MR needs to be foreseen:

The culpability of G in the event that P shot and killed Knowles would depend upon the scope of their common design, and what he foresaw as a possible incident of the design. If he foresaw, as a possible incident of carrying out the common design, that P might shoot Knowles with intent to kill or cause grievous bodily harm, then he would be guilty of murder. If he foresaw, as a possible incident, that Knowles might shoot P but without foreseeing such intent, then he would be guilty of manslaughter. -*Gillard [2003]*

But the trial judge erred by failing to direct the jury that for common law murder based on extended joint criminal enterprise the accused must also foresee the consequence of death or really serious bodily harm. In many cases, foresight of this consequence might be a very short step from foresight that a participant might act with murderous intention. -*Mitchell v The King [2023]*

JCE vs Extended JCE

Generally, one or the other will be appropriate: *Tangye [1997]*

- The evidence was clearly sufficient to show a joint enterprise between Jacobs, Painter and Mehajer, to carry out a robbery, in company, of whoever was found in the cafe, with violence, in circumstances where a knife had been taken to the scene and where force was inflicted from the very outset. Whether its scope included the infliction of grievous bodily harm or wounding was a matter for determination by the jury. -*R v Jacobs*
- Alice and Bob agree: ‘We are going to steal some money and, if we encounter resistance, we’ll beat them up’. = JCE in relation to assault/aggravated assault etc. if within the scope of the agreement
- Alice and Bob agree: ‘We are going to steal some money’. Alice notices Bob carries a baseball bat and knows he has a violent temper. = EJCE liability for Alice if Bob commits an additional crime of which she foresaw the possibility

Accessorial Liability

- A type of derivative liability, ie. the primary offender must have committed the crime, even if not convicted.
- Principal in the first degree (the primary perpetrator), Principal in the second degree (those assisting during the commission of the crime), Accessory before or after the fact (not present during the offence)
- Traditionally encompassed aiding, abetting, counselling or procuring (now just encouraging or assisting)

Actus Reus

All the words ... are... instances of one general idea, that the person charged ... is in some way linked in purpose with the person actually committing the crime and is by his words or conduct **doing something to bring about, or rendering more likely, such commission.** *R v Russell [1933]*

Moreover, mere acquiescence or assent to a crime does not make a person liable as a principal in the second degree. What was needed in such a case is proof that the principal in the second degree was linked in purpose with the person actually committing the crime, and was by his or her words or conduct doing something to bring about, or rendering more likely, through encouragement or assistance, its commission. *R v Phan (2001)*

- Not necessary for the primary offender to have been in fact encouraged or assisted.-*Blundell*
- It is enough that assistance or encouragement was offered (with the requisite state of mind – see above)- *Lam*

Assistance	Encouragement
“the primary offender need not be aware of acts of assistance” performed by the accessory. - (<i>Lam</i>)	the words must be spoken or conduct undertaken in the presence of the primary offender so that they “have the capacity to encourage the perpetration of the crime”. -(<i>Lam</i>)
<ul style="list-style-type: none"> - not necessary to show that the principal offender was aware of the encouraging words or acts, “so long as they were communicated or conveyed with the necessary intention by the secondary participant and in circumstances where the principal offender could be aware of them” 	

Presence:

Traditionally presence has been required for ‘aiding and abetting’, not ‘counselling and procuring’ *R v NC [2010]*

Can include being:

- ‘actually present (in the sense of being within sight and sound of the crime) or;

- constructively present (in the sense of being sufficiently near as to be able readily to go to assistance of the principal offender, should the occasion arise).
- Voluntary and deliberate presence during the commission of a crime without opposition or real dissent may be evidence of wilful encouragement or aiding. It seems that all will depend upon a scrutiny of the behaviour of the alleged aider and the principal offender and on the existence which might appear of a bond or connection between the two actors and their actions ... a calculated presence or a presence from which opportunity is taken can project positive encouragement and support to a principal offender. The distinction between a neutral and a guilty presence of a person at the scene of a crime would be for the jury to assess.

Mens Rea: Refer to *Giorgianni [1985]*

1. An intention to assist/encourage the commission of the offence; and
2. Actual knowledge of the ‘essential matters’ of the offence.

‘Essential matters’: the facts and circumstances that together make up the physical and fault elements of the offence. Only actual knowledge will do.

The accessory must possess knowledge of the principal offender's intention.

- The knowledge will usually crystallise in the accessory's mind before he involves himself as an accessory to that crime. - *Stokes and Difford v R [1990]*
- An accessory only needs to know the general type of crime to be committed rather than the specific crime. - *R v Bainbridge [1960]*

Innocent Agent

The doctrine requires that the person who assisted or encouraged the non-responsible person (P) to commit an offence acted with the relevant fault element for the principal offence.' -*Bronitt & McSherry*

- Induced a child to commit a crime [*R v Manley (1844)*]
- Used an airline carrier to import drugs [*White v Ridley (1978) 140 CLR 342*]
- Forced one's spouse to commit a crime [*R v Bourne (1952) 36 Cr App R 125*] (under duress)

Withdrawal

If there is successful withdrawal the accused ceases to be criminally responsible for the crime if the other members go on to commit the offence after the withdrawal. Once an offence is committed, nothing the offender does will affect his or her criminal responsibility. Repentance or attempts to minimise the harm will only be relevant to sentencing. Before an offence is committed, by an accessory:

- The derivative nature of accessorial liability means that you do not become liable as an accessory until a crime is in fact committed or attempted by the principal offender (i.e. there is often a time lag between the procuring of an offence and the commission of the crime procured). If a person withdraws from assisting or encouraging the crime before its commission, then there is no accessorial liability.
- What is generally required is a positive and timely act that unequivocally communicates to the principal offender that the accessory is not proceeding.
- Just changing your mind or mere absence from the scene of the crime (i.e. just ‘not turning up’) will not be enough -*Rook [1993]*
- Where the accused’s participation was in the form of counselling, it was enough for effective withdrawal for that accused to attempt to dissuade the principal offenders from proceeding with the crime. - *Grundy [1977]*
- When an accessory is on the scene, the law suggests that they will have to do more in order to effectively withdraw (i.e. taking reasonable steps to ‘neutralise’ or ‘undo’ their participation in the offence).
- Before an offence is committed, in a JCE:

Withdrawal is possible if there is sufficient time to effectively withdraw from the crime: *Tietie (1988)*

- To effectively withdraw from a common enterprise upon which he has embarked he must withdraw completely. It must be timely. He must make it known to the others that he was withdrawing and he must, by such act and words as may be appropriate, do what he reasonably can to dissuade the others from continuing with the unlawful purpose. - *Tietie (1988)*

It is the job of the Crown to prove ‘beyond reasonable doubt’ that they didn’t withdraw once evidence of withdrawal is presented. *White v Ridley (1978)*

In *Ngawaka v The Queen [2004]* the New Zealand Court of Appeal reviewed the common law authorities on withdrawal:

- There must in fact be a notice of withdrawal, whether by words or actions.
- The withdrawal must be unequivocal.
- That withdrawal must be communicated to the principal offenders, though there is some debate as to whether the communication must be to all the principal offenders.
- Withdrawal may only be effected by taking all reasonable steps to undo the effect of the party's previous actions.

'Reasonable steps to undo the effect' of previous actions will depend on the circumstances.

Accessory after the fact: Governed by offences under ss. 348-350 of the Crimes Act 1900 (NSW), e.g.:

s350: Punishment of accessories after the fact to other serious indictable offences

- An accessory after the fact to any other serious indictable offence [except murder] is liable to imprisonment for 5 years, except where otherwise specifically enacted

At common law, a person (D) will be guilty as an accessory after the fact, in relation to an offence committed by another person (P) where:

- P committed that offence [*R v Williams (1932)*];
- D intentionally provided some positive assistance for the purpose of helping P to escape apprehension, trial or punishment (*R v Levy [1912]*; *R v Andrews [1962]*; *R v Tevendale [1955]*); and
- at the time of providing such assistance, D was aware of the essential facts and circumstances that made up P's offence (*R v Tevendale [1955]* VLR 95; *R v Stone [1981]* VR 737, 739-740).

Intoxication

For JCE, remember that the MR is the same as for the foundational offence.

- Therefore, if the foundational offence is one of specific intent (e.g. murder), self-induced intoxication can be taken into account in establishing mens rea.

For accessorial liability, remember that the MR is not the same as for the foundational offence. It is to (a) assist or encourage the offence; while (b) knowing its 'essential matters'.

- There appears to be no case law on how intoxication rules apply to this MR, but likely the same as for offences of basic intent, i.e. self-induced intoxication is irrelevant.

For extended JCE, likewise no case law on the relevance of intoxication to the foresight of the possibility of the additional offence.

Most likely, self-induced intoxication is irrelevant.

defences

Arguments in Defence:

- automatism (common law)

Complete Defences:

- Self Defence (s418)
- Mental health or cognitive impairment (s28)
- Duress (common law) (someone having their will overborne by the will of another person as a result of a threat, with the objective requirement that a person of reasonable fitness would also have their will overborne by that threat)
- Necessity (common law) (entails acting in order to avoid a greater harm to someone's life or health.)

Partial Defences:

- Excessive self defence (s421)
- Substantial impairment of mind (s23a)
- Infanticide (s22a)
- Excessive Provocation (s23)

Automatism

Reflex: Cough, sneeze, spasm or similar (Ryan)

- What if one accidentally shoots a person one holds at a gunpoint? [*Ryan v R (1967)*; *Murray v R (2002)*]

States of impaired consciousness:

- Sleep: *Jiminez v R (1992)* (what if one falls asleep while driving?)
- Sleepwalking, epilepsy, concussion or hypoglycaemia: *R v Falconer (1990)*
- Action under extreme stress: *R v Falconer (1990)* (extreme stress due to domestic abuse by partner)

Sane Automatism

- Derealisation (e.g. PTSD) : The conduct was not subject to the control and direction of the will: *R v Radford (1985)*

“...the critical point, as Barwick C.J. pointed out in Ryan’s case, is that the conduct was not subject to the control and direction of the will, not the accused’s consciousness or awareness of his conduct.” *Radford*

‘Sound mind’ test	
<u><i>R v Radford</i></u>	‘The significant distinction is between the reaction of an unsound mind to its own delusions or to external stimuli on the one hand and the <u>reaction of a sound mind to external stimuli</u> , including stress producing factors, on the other.’
<u><i>R v Falconer</i></u>	‘..if on the evidence an accused’s acts may have been involuntary as a result of the operation of events upon a <u>sound mind</u> – as a result of <u>sane automatism</u> – then a reasonable doubt about the voluntariness of those acts will be sufficient to entitle him to acquittal.’

Evidential Burden

‘It is sometimes said in that situation that the accused is required to rebut an evidentiary presumption or to discharge an evidentiary burden of proof, but it is merely a requirement that there be evidence to displace ordinary human experience. And it will not be enough for an accused merely to assert that his acts were involuntary or that he suffered a loss of memory. Evidence of his condition at the time of the alleged offence supported by some expert medical opinion will be required before an issue of sane automatism can realistically be said to be raised.

Moreover, those conditions which will admit of involuntariness that is not the product of disease or natural mental infirmity will be quite confined. The few suggested instances would seem to include: sleepwalking in some circumstances, some cases of epilepsy, concussion, hypoglycaemia and dissociative states.’ - *R v Falconer*

- Evidential burden means the accused must produce some evidence to raise a defence.
- It doesn’t require proof on the balance of probabilities—just enough to put the issue before the jury.
- The defence of automatism (excluding insanity) must be supported by credible expert medical evidence—not just the accused's word or memory lapse.
- This prevents weak or speculative claims from being considered by the jury.

Examples of sane automatism:

- Blow to head/concussion: *R v Wogandt (1983)*
- The act of a sleepwalker: *R v Parkes [1992]*, *R v Burgess [1991]*
- Intoxication: *R v O’Connor (1980)*; BUT NOT IF SELF-INDUCED: s 428g
- Hypoglycemia (arising from use of insulin): *R v Quick & Paddison* NOT hyperglycemia resulting from failure to take insulin: *R v Hennessy [1989]*
- An act done under the influence of an anaesthetic: *R v Sullivan (1984)*.

One cannot argue automatism based solely on a mental health or cognitive impairment (‘insane automatism’).

Instead, the accused will need to make out the mental health or cognitive impairment defence based on the balance of probabilities. -*Bratty*

Self-defence

s420- Self-defence: not available if death inflicted to protect property or trespass to property

This Division does not apply if the person uses force that involves the intentional or reckless infliction of death only—

- a) to protect property, or
- b) to prevent criminal trespass or to remove a person committing criminal trespass.

s418- Self-defence: when available

1. A person is not criminally responsible for an offence if the person carries out the conduct constituting the offence in self-defence.
2. A person carries out conduct in self-defence if and only if the person believes the conduct is necessary [subjective]
 - a) to defend himself or herself or another person, or
 - b) to prevent or terminate the unlawful deprivation of his or her liberty or the liberty of another person, or
 - c) to protect property from unlawful taking, destruction, damage or interference, or
 - d) to prevent criminal trespass to any land or premises or to remove a person committing any such criminal trespass,

and the conduct is a reasonable response [objectively reasonable] in the circumstances as he or she perceives them [subjectively perceived circumstances].

TL;DR: Test

The questions to be asked by the jury under s 418 are:

1. Is there a reasonable possibility that the accused believed that his or her conduct was necessary in order to defend himself or herself [etc]; and
2. If there is, is there also a reasonable possibility that what the accused did was a reasonable response to the circumstances as he or she perceived them?

'Believes the conduct to be necessary'	
<i>R v Katarzynski</i> [2002]	‘The first issue is determined from a completely subjective point of view considering all the personal characteristics of the accused at the time he or she carried out the conduct’
NSW Criminal Trial Courts Bench Book	As to whether [the accused] may have personally believed that [his/her] conduct was necessary for self-defence, you must consider the circumstances as [the accused] perceived them to be at the time of that conduct. You must take into consideration any extraordinary attribute of [the accused] which bears on [his/her] perception of those circumstances and which had a bearing on any such belief [he/she] may have formed.
<i>Williams</i> (1984)	‘The reasonableness or unreasonableness of the defendant’s belief is material to the question of whether the belief was held by the defendant at all.’

'Reasonable response in perceived circumstances'	
<i>R v Katarzynski</i> [2002] NSWSC 613 [23] (Howie J):	‘The second issue is determined by an entirely objective assessment of the proportionality of the accused’s response to the situation the accused subjectively believed he or she faced ’. The jury will be looking at the response of the accused, not an ‘ordinary or reasonable person.’ As such, it is slightly subjective in that we take into consideration “the age of the accused, his or her gender, or the state of his or her health” etc. -(<i>Katarzynski</i>)

NSW Criminal Trial Courts Bench Book [6-460]	'If you find that [the accused] did have, or that it is reasonably possible that [he/she] may have had that belief, it matters not that [his/her] belief may have been mistaken.'
Walsh (1992)	<p>Mistaken belief from mental illness</p> <p>'If the jury ... is not satisfied on the balance of probabilities that the accused was not responsible by reason of insanity then, and only then, can it consider whether, if the accused had a deluded belief, such belief could be a circumstance which the accused believed, so as to justify him using force in the defence of himself, and that such belief, although deluded, made it reasonable to use such force.'</p>

'No doubt it will often also be desirable to remind the jury that in the context of self-defence it should approach its task in a practical manner and without undue nicety, **giving proper weight to the predicament of the accused which may have afforded little, if any, opportunity for calm deliberation or detached reflection.**'

- Zecevic v DPP (Vic) (1987)

'Intoxication'	
R v Katarzynski [2002]	<p>[26] "But in my opinion one matter that must be irrelevant to an assessment of the reasonableness of the accused's response is his or her state of sobriety ... As was pointed out in McCulloch, it is logically incongruous '<i>to contemplate the proposition that a person's exercise of judgement might be unreasonable if he was sober, but reasonable because he was drunk.</i>'"</p> <p>[28] For these reasons I direct the jury to the effect that they must take into account the accused's intoxication when considering whether he might have believed that it was necessary to act as he did in defence of himself and when considering the circumstances as he perceived them, but not when assessing whether his response to the circumstances was reasonable.</p> <p>TL;DR: Take intoxication into consideration for "believes conduct to be necessary" but not for "reasonable response in perceived circumstance."</p>
NSW Criminal Trial Courts Bench Book [6-460]	<p>[The accused's] intoxicated state —</p> <ol style="list-style-type: none"> must be taken into account in determining whether [the accused] believed that [his/her] conduct was necessary to defend [himself/herself]; must be taken into account in determining the circumstances as [the accused] perceived them to be; must not be taken into account in determining whether [his/her] response to those circumstances was reasonable. <p>Do we take into consideration s428G/C? (No.)</p>

'Burden of Proof'

'Since Woolmington v Director of Public Prosecutions (1935) AC 42, it has been clearly established that once the evidence discloses the possibility that the fatal act was done in self-defence, a burden falls upon the prosecution to disprove the fact, that is to say, to prove beyond reasonable doubt that the fatal act was not done in self-defence.'

- Zecevic v DPP (Vic) (1987)

Self-defence to lawful conduct

s 422 Crimes Act 1900 (NSW):

This Division is not excluded merely because:

- a) the conduct to which the person responds is lawful, or
- b) the other person carrying out the conduct to which the person responds is not criminally responsible for it.

Excessive Self-defence (partial)

s421: Self-defence- excessive force that inflicts death

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.

Osland v R

Evidence of a long-term abusive relationship, even if accepted, did not afford a person in the position of the appellant a blank cheque to plan and execute the homicide of her abuser, protected by the law of provocation, with only a passing nod at the immediate circumstances said to have driven her to the grave step of participating in the termination of a human life. (*Kirby J at [170]*)

Self-defence may indeed be relevant to a case where an abusive relationship is established by the evidence. Such evidence may assist a jury to understand, as self-defensive, conduct which on one view occurred where there was no actual attack on the accused underway but rather a genuinely apprehended threat of imminent danger sufficient to warrant conduct in the nature of a pre-emptive strike. Clearly, it is still necessary to discriminate between a self-defensive response to a grave danger which can only be understood in the light of a history of abusive conduct and a response "that simply involves a deliberate desire to exact revenge for past and potential - but unthreatened - future conduct." The former will attract considerations of self-defence. The latter will not. (*Kirby J at [172]*)

“Accordingly, I find that the offender stabbed the deceased with an intention to inflict grievous bodily harm because she believed her act was necessary to defend not only herself but her brother and father. However, in accordance with the jury’s verdict, the offender’s conduct was not a reasonable response in the circumstances as she perceived them, thereby rendering her guilty of the crime of manslaughter by way of excessive self-defence. Sentence: 2 years suspended after 6 months” - *R v Silva*

Provocation is not a blank cheque – Just because someone was in a long-term abusive relationship does not automatically justify killing the abuser under the law of provocation. The homicide must still relate to a loss of self-control triggered by a specific provocative act, not a planned killing.

Self-defence may still apply – Evidence of abuse can help explain why the accused acted as if in danger, even if there was no attack happening at that exact moment. A genuine belief in imminent danger can justify a pre-emptive strike.

Self Defence: A proportional response to a perceived or imminent threat, especially if the threat is understandable due to the history of abuse.

Revenge: A planned retaliation for past or anticipated abuse, when no immediate threat exists, is not self-defence. Self-defence requires imminence and necessity, not a general motive to retaliate for abuse.

Mental health or cognitive impairment (complete defence)

Insanity

Mental Health and Cognitive Impairment Forensic Provisions Act 2020

s28 Defence of mental health impairment or cognitive impairment

1. A person is not criminally responsible for an offence if, at the time of carrying out the act constituting the offence, the person had a mental health impairment or a cognitive impairment, or both, that had the effect that the
 - a) did not know the nature and quality of the act, and
 - b) did not know that the act was wrong (that is, the person could not reason with a moderate degree of sense and composure about whether the act, as perceived by reasonable people, was wrong *R v Porter*).
2. The question of whether a defendant had a mental health impairment or a cognitive impairment, or both, that had that effect is a question of fact and is to be determined by the jury on the balance of probabilities.
3. Until the contrary is proved, it is presumed that a defendant did not have a mental health impairment or cognitive impairment, or both, that had that effect.

Mental health impairment

- (1) For the purposes of this Act, a person has a mental health impairment if—
 - a) the person has a temporary or ongoing disturbance of thought, mood, volition, perception or memory, and;
 - b) the disturbance would be regarded as significant for clinical diagnostic purposes, and;
 - c) the disturbance impairs the emotional wellbeing, judgement or behaviour of the person.
- (2) A mental health impairment **may arise from any of the following disorders** but may also arise for other reasons—
 - a) an anxiety disorder,
 - b) an affective disorder, including clinical depression and bipolar disorder,
 - c) a psychotic disorder,
 - d) a substance induced mental disorder that is not temporary.
- (3) A person does not have a mental health impairment for the purposes of this Act if the person's impairment is caused solely by—
 - a) the temporary effect of ingesting a substance, or
 - b) a substance use disorder.

Cognitive impairment

- (1) For the purposes of this Act, a person has a cognitive impairment if—
 - a) the person has an ongoing impairment in adaptive functioning, and
 - b) the person has an ongoing impairment in comprehension, reason, judgment, learning or memory, and
 - c) the impairments result from damage to or dysfunction, developmental delay or deterioration of the person's brain or mind that may arise from a condition set out in subsection (2) or for other reasons.
- (2) A cognitive impairment may arise from any of the following conditions but may also arise for other reasons—
 - a) intellectual disability,
 - b) borderline intellectual functioning,
 - c) Dementia,
 - d) an acquired brain injury,
 - e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder,
 - f) autism spectrum disorder.

Special verdict where defendant and prosecutor agree on impairment

The court may enter a special verdict of act proven but not criminally responsible at any time in the proceedings (including before the jury is empanelled) if—

- a) the defendant and the prosecutor agree that the proposed evidence in the proceedings establishes a defence of mental health impairment or cognitive impairment, and
- b) the defendant is represented by an Australian legal practitioner, and
- c) the court, after considering that evidence, is satisfied that the defence is so established.

Effect of finding of act proven but not criminally responsible because of mental health impairment or cognitive impairment

- A jury must return a special verdict of act proven but not criminally responsible if the jury is satisfied that the defence of mental health impairment or cognitive impairment has been established.

Effect of special verdict

- (1) On the return of a special verdict of act proven but not criminally responsible, the court may make one or more of the following orders –
 - a) an order that the defendant be remanded in custody until a further order is made under this section,

- b) an order that the defendant be detained in the place and manner that the court thinks fit until released by due process of law,
 - c) an order for the unconditional or conditional release of the defendant from custody,
 - d) other orders that the court thinks appropriate.
- (2) Before making an order for the release of a defendant, the court may request a report by a forensic psychiatrist or other person of a class prescribed by the regulations, who is not currently involved in treating the defendant, as to the condition of the defendant and whether the release of the defendant is likely to seriously endanger the safety of the defendant or any member of the public.
- (3) The court must not make an order for the release of a defendant unless it is satisfied, on the balance of probabilities, that the safety of the defendant or any member of the public will not be seriously endangered by the defendant's release.

Referral of defendant to Tribunal

The court must refer the defendant to the Tribunal if a **special verdict of act proven** but not criminally responsible is returned or entered and an order is not made for the unconditional release of the defendant.

Matters that Tribunal must consider when determining whether to release a forensic patient

1) General matters for consideration The Tribunal must not make an order for the release (including the conditional release) of a forensic patient unless it has considered the following matters—

- a) whether or not other care of a less restrictive kind, that is consistent with safe and effective care, is appropriate and reasonably available to the patient or that the patient does not require care,
- b) a report by a forensic psychiatrist or other person of a class prescribed by the regulations, who is not currently involved in treating the patient, as to the condition of the patient and whether the safety of the patient or any member of the public will be seriously endangered by the patient's release,
- c) in the case of the proposed release of a forensic patient subject to a limiting term, whether or not the patient has spent sufficient time in custody.

2) Tribunal must be satisfied patient or public safety not seriously endangered. The Tribunal must not make an order for the release (including the conditional release) of a forensic patient unless it is satisfied that the safety of the patient or any member of the public will not be seriously endangered by the patient's release.

Summary Table

Element	Requirement
Type of impairment	Mental health and/or cognitive
Standard of proof	Balance of probabilities
Effect	Special verdict – not criminally responsible
Burden of proof	On the defence
Key question	Did the impairment stop the person from understanding the nature of the act or that it was wrong?
Post-verdict options	Detention, conditional/unconditional release, referral to Tribunal
Tribunal consideration	Risk to public/patient, psychiatric report, less restrictive alternatives

Mental health, automatism and specific intent (partial defence)

One cannot argue automatism based solely on a mental health or cognitive impairment ('insane automatism'). Instead, the accused will need to make out the mental health or cognitive impairment defence based on the balance of probabilities.

"if there be evidence that the accused was suffering from a mental disease when the incriminated act was done and the evidence is capable of supporting a finding of insanity, the trial judge must give the jury a direction on that issue. Evidence of mental disease that is incapable of supporting a finding of insanity or that does not satisfy the jury that the accused was insane when the incriminated act was done, is inadmissible on, and must be taken to be irrelevant to, the issue whether the act was "voluntary and intentional" [voluntariness & basic intent] But such evidence of mental disease is relevant to and admissible on the issue of the formation of a specific intent..." - *Hawkins v R* (1994)

 Summary:	
Issue	Is mental illness evidence relevant?
Legal insanity	<input checked="" type="checkbox"/> Yes — triggers a mandatory jury direction
Voluntariness / basic intent	<input checked="" type="checkbox"/> No — unless it supports full insanity
Specific intent (e.g., murder)	<input checked="" type="checkbox"/> Yes — admissible to negate specific intent

Substantial Impairment (partial defence)

s 23A Crimes Act 1900 (NSW)

Standard of Proof:

The accused must prove the elements of the defence on the balance of probabilities.

Balance of probabilities: *R v Ayoub [1984]*

Burden of Proof:

s23A(4): The onus is on the person accused to prove that he or she is not liable to be convicted of murder by virtue of this section.

23A Substantial impairment because of mental health impairment or cognitive impairment

(1) A person who would otherwise be guilty of murder is not to be convicted of murder if—

- a) at the time of the acts or omissions causing the death concerned, the person's **capacity to understand events, or to judge whether the person's actions were right or wrong, or to control himself or herself, was substantially impaired**** by a mental health impairment or a cognitive impairment, and
- b) the impairment was **so substantial as to warrant liability** for murder being reduced to manslaughter. (...)

(4) The onus is on the **person accused** to prove that he or she is not liable to be convicted of murder by virtue of this section.

(8) For the purposes of this section, a "person has a cognitive impairment" if--

- a) the person has an ongoing impairment in adaptive functioning, and
- b) the person has an ongoing impairment in comprehension, reason, judgment, learning or memory, and
- c) the impairments result from damage to or dysfunction, developmental delay or deterioration of the person's brain or mind that may arise from a condition set out in subsection (9) or for other reasons.

(9) A cognitive impairment may arise from any of the following conditions but may also arise for other reasons--

- a) intellectual disability,
- b) borderline intellectual functioning,
- c) dementia,
- d) an acquired brain injury,
- e) drug or alcohol related brain damage, including foetal alcohol spectrum disorder,
- f) autism spectrum disorder.

so substantial as to warrant liability:

- Must have some degree of permanency *Tumanako*
- Not emotions, e.g. anger, jealousy; bad temper, attitudes or prejudices. *R v Whitworth*
- Can't include intoxication

**Downgraded standard relative to the full defence, instead of there being required an entire lack of knowledge surrounding the nature and quality of their acts, or the wrongness of them, substantial impairment of understanding is all that is called for.

Feature	s 28 Full Defence	s 23A Partial Defence
Outcome	Not guilty due to mental illness	Guilty of manslaughter, not murder
Standard	Total incapacity to know act or wrongness	Substantial (not total) impairment
Burden of proof	Defence proves on balance of probabilities	Defence proves on balance of probabilities
Verdict	Special verdict: act proven, not responsible	Ordinary manslaughter conviction

Extreme Provocation

s 23 Crimes Act 1900 (NSW)

Trial for murder-partial defence of extreme provocation

"If, on the trial of a person for murder, it appears that the act causing death was in response to extreme provocation and, but for this section and the provocation, the jury would have found the accused guilty of murder, the jury is to acquit the accused of murder and find the accused guilty of manslaughter."

(2) An act is done in response to extreme provocation if and only if:

- a) the act of the accused that causes death was **in response** to conduct of the deceased towards or affecting the accused, and
- b) the conduct of the deceased was a **serious indictable offence**, and
- c) the conduct of the deceased caused the accused to **lose self-control**, and
- d) the conduct of the deceased could have caused **an ordinary person** to lose self-control to the extent of intending to kill or inflict grievous bodily harm on the deceased.

s23 (2) c) the conduct of the deceased caused the accused to lose self-control, an

Loss of self-control NOT loss of all control:-

'The kind of loss of self-control that is here in question is not something that results in a state of automatism. Rather it is something that results in intentional homicide, the conduct of the accused, and the intent with which that conduct occurred, being attributable to the accused's emotional response to the provocation.'

Chhay v R (1994) 72 A Crim R 1, 8 (Gleeson CJ).

(4) Conduct of the deceased may constitute extreme provocation even if the conduct did not occur immediately before the act causing death.

(5) For the purpose of determining whether an act causing death was in response to extreme provocation, evidence of self-induced intoxication of the accused (within the meaning of Part 11A) cannot be taken into account.

Caveats

(3) Conduct of the deceased does not constitute extreme provocation if:

- a) the conduct was only a non-violent sexual advance to the accused, or
- b) the accused incited the conduct in order to provide an excuse to use violence against the deceased.

(6) For the purpose of determining whether an act causing death was in response to extreme provocation, provocation is not negated merely because the act causing death was done with intent to kill or inflict grievous bodily harm.

Conduct of the deceased towards or affecting the accused:

<i>R v Fisher (1837) 8 C & P 182.</i>	'In all cases the party must see the act done ...In this case the father only heard of what had been done from others...'
<i>R v Arden [1975] VR 449, 452.</i>	Rationale for exclusion: if 'hearsay provocation were available, an accused would be justified in taking the life of an innocent man..'

<i>The Queen v R</i> (1981) 28 SASR 321, 326 (King CJ).	Words or conduct cannot amount to provocation unless they are spoken or done in the presence of the killer ... although, of course, such words or conduct may be important as part of the background against which what is said or done by the deceased ^c to the killer is assessed'
<i>Davis</i> (1998) 100 A Crim R 573 (NSWCCA), applying <i>R v Quartly</i> (1986) 11 NSWLR 332,	"We think that there is a strong case for saying that Quartly was wrongly decided on this point. Having regard to the terms of the statute it would seem sufficient for the accused to show that there was provocation on the part of the deceased and that it induced the accused to lose his or her self-control."

TL;DR: Can't be hearsay, must be done directly to killer.



Examples of Caveats in Mental Health Defences:

Defence	Key Caveats
Mental health defence under s 28 (NSW)	Must prove on the balance of probabilities ; not all mental conditions qualify (e.g., intoxication excluded); not every disorder meets the legal threshold.
Substantial Impairment (s 23A)	Doesn't apply to murder unless impairment is substantial enough to justify reduction to manslaughter ; excludes temporary emotions like anger (<i>R v Whitworth</i>); doesn't include voluntary intoxication .
Voluntariness / specific intent	Evidence of mental disease must reach a legal threshold to be relevant to voluntariness or intent (see <i>R v Falconer</i>). Otherwise, it's irrelevant.
Special verdict of not guilty by reason of mental illness	May result in indefinite detention in a mental health facility (not a complete acquittal); subject to Mental Health Review Tribunal review.
Provocation	Cannot be based on non-criminal conduct ; loss of self-control ≠ loss of all control (<i>Chhay v R</i>); intoxication can't be used to support claim of provocation.

Serious indictable offence

"Serious indictable offence" means an indictable offence that is punishable by imprisonment for life or for a term of 5 years or more. - s4 *Crimes Act 1900 (NSW)*

Examples of serious indictable offence

Crimes (Domestic and Personal Violence) Act 2007

Serious indictable: s13 - Stalking or intimidation with intent to cause fear of physical or mental harm

NOT serious indictable: s14 – Contravention of an apprehended violence order

Crime Act 1900

Serious indictable offences

s 59 – Assault occasioning actual bodily harm

s 61I – Sexual assault

s 61L – Indecent assault

s 61O – Aggravated act of indecency (victim under 16)

Not serious indictable offences

s 61 – Common assault

s 61N – Act of Indecency

s 61O – Aggravated act of indecency (victim over 16)

Despite this...

'Despite this restriction, **victims of domestic violence will be able** to rely upon the partial defence in appropriate cases. Domestic violence, particularly long-term abuse, will generally include conduct involving serious indictable offences...' - *Second Reading Speech – NSW AG* (8 May 2014)

What about emotional abuse?

'it is not uncommon for victims of domestic violence, including victims of severe physical abuse, to observe that the physical abuse is easier to withstand than the emotional abuse experienced in such a relationship'

Ordinary person, not reasonable person

'...it is all but impossible to envisage circumstances in which a wrongful act or insult would so provoke the circumspect and careful reasonable man of the law of negligence that ... he would kill his neighbour..'

- **Stingel v The Queen (1990) 171 CLR 312, 328**

The Ordinary person and Ordinary Powers of Self-Control

'The lowest level of self-control which falls within those limits of that range is required of all members of the community' - *Stingel v The Queen*

'In some circumstances, the age of the accused should be attributed to the objective test'. - *Stingel v The Queen*

Nature and evidence of loss of self control:

No standard reaction to loss of self-control.

Loss of self-control may result from anger, fear or panic:	<i>Van Den Hoek v The Queen (1986) 161 CLR 158 at 168 (Mason J).</i>
"[T]imes are changing, and people are becoming more aware that a loss of self-control can develop even after a lengthy period of abuse, and without the need for a specific triggering incident." "What the law is concerned with is whether the killing was done whilst the accused was in an emotional state which the jury is prepared to accept as a loss of self-control"	<i>Chhay v R (1994) 72 A Crim R 1 (Gleeson CJ)</i>
Ferocity of the attack itself can indicate subjective loss of self-control.	<i>The Queen v R (1981) 28 SASR 321; Masciantonio v The Queen (1995) 183 CLR 58, 68; Green v The Queen (1997) 191 CLR 334.</i>

Rogers v R

The test is a purely objective test. As such, we assume the ordinary person is "calm" and it is not relevant if the accused person was "sensitive to the situation or experiencing a depressive episode."

The objective person is "not placed in the position of the accused." A disorder (such as diagnosed depressive disorder) should not be imputed to the hypothetical ordinary person. (*Ziha v Rat, 2014 Amendment to Crimes Act*)

TL;DR The personal characteristics of the accused shall not be taken into account when gauging the gravity of the provocation or insult.

Rogers v R

A notional ordinary person, for the purpose of s.23(2)(d) may act in unreasonable ways. The reaction must be within the range of possible reactions of an ordinary person as assessed by the Court when considering the threshold question of law involved

theft

Section 131.1: Theft

- 1) A person commits an offence if:
 - a) the person dishonestly [1] appropriates [2] property [3] belonging to another with the intention of permanently depriving the other of the property; and
 - b) the [4] property belongs to a Commonwealth entity.

Penalty: Imprisonment for 10 years.
- 2) For the purposes of this Code, an offence against subsection (1) is to be known as the offence of theft.

- 3) Absolute liability applies to the paragraph (1)(b) element of the offence of theft.
 - 4) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against subsection (1).
- Note: For alternative verdicts, see sections 132.1 [receiving] and 134.1 [obtaining property by deception].

Actus Reus

[1] Appropriation

131.3 Appropriation of property

1. For the purposes of this Division, any assumption of the rights of an owner to **ownership, possession or control of property, without the consent of the person to whom it belongs**, amounts to an appropriation of the property. This includes, in a case where a person has come by property (**innocently or not**) without committing theft, **any later such assumption of rights** without consent by keeping or dealing with it as owner.

2. For the purposes of this Division, if property, or a right or interest in property, **is, or purports to be, transferred or given to a person acting in good faith**, a later assumption by the person of rights which the person had believed himself or herself to be acquiring does not, because of any defect in the transferor's title, amount to an appropriation of the property.

Greta borrows a book from the library. She intends to return it but doesn't do so. A year later she sells the book to Bill. Bill, 3 months after buying it from Greta finds out the book was stolen. He decides to keep it.

This is not theft. It was transferred or given to a person acting in good faith. So according to s131.3(2), it is not appropriation.

[2] Property

130.1 Property

property includes:

- a) real property; and
- b) personal property; and
- c) money; and
- d) a thing in action or other intangible property; and
- e) electricity; and
- f) a wild creature that is:
 - i) tamed; or
 - ii) ordinarily kept in captivity; or
 - iii) reduced (or in the course of being reduced) into the possession of a person.

Property or not:

- **Documents** – yes (personal property)
- **Information** – likely no (*Oxford v Moss* (1979) 68 Cr App R 183)
- **Money** – yes (personal property if banknotes; thing in action if bank account)
- **Cryptocurrency** – likely yes (*Ruscoe v Cryptopia Ltd (in Liquidation)* [2020] NZHC 728)

[3] Belonging

130.2 When property belongs to a person

- 1) For the purposes of this Chapter, property belongs to a person if, and only if:
 - a) the person has possession or control of the property; or
 - b) the person has a proprietary right or interest in the property, other than an equitable interest arising only from:
 - i) an agreement to transfer an interest; or
 - ii) an agreement to grant an interest; or
 - iii) a constructive trust.
- 2) Subsection (1) has effect subject to subsections 134.1(9) and (10) (which deal with money transfers).

So, any one of the following will do:

- Possession of the property OR
- Control of the property OR
- Having a proprietary right in the property OR
- Having a proprietary interest in the property (with some exceptions).

131.9 Property belonging to 2 or more people

- If property belongs to **2 or more people**, a reference in this Division (other than paragraph 131.1(1)(b)) to the person to whom the property belongs is a **reference to all of those persons**.

131.6 Obligation to deal with property in a particular way

For the purposes of this Division, if:

- a person receives property from or **on account of another**; and
- the person is under a legal obligation **to the other** to retain and deal with that property or its proceeds in a particular way [e.g. a contract: Hall [1972] 2 All ER 1009];

the property or proceeds belong (as against the person) to the other.

TL;DR: if you receive something from Person A but are under contract to do something with it, it doesn't belong to you it still belongs to Person A.

Also you can steal your own property if you give it to a shop to be repaired but you don't pay for it. By handing it over, you give up ownership according to 130.1(a). When you pay them money, they give back ownership. This transfer didn't "need to be qualified in anyway." -R v Turner

[4] 'A Commonwealth Entity'

'Commonwealth entity' means:

- the Commonwealth; or
- a Commonwealth authority.

Commonwealth authority means a body established by or under a law of the Commonwealth, but does not include:

- a body established by or under:
 - the Australian Capital Territory (Self-Government) Act 1988; or
 - the Corporations Act 2001; or
 - the Norfolk Island Act 1979; or
 - the Northern Territory (Self-Government) Act 1978; or

(aa) a corporation registered under the Corporations (Aboriginal and Torres Strait Islander) Act 2006; or

(ab) an organisation registered, or an association recognised, under the Fair Work (Registered Organisations) Act 2009; or

- a body specified in the regulations.

Property under Commonwealth control

Dickson v R [2010] HCA 30; (2010) 270 ALR 1;

"On 24 December 2003 some 7,870,000 cigarettes were seized by Customs upon a warrant issued under s 203 of the *Customs Act*. One requisite ground for the issue of such a warrant was that there were reasonable grounds for suspicion that the goods were forfeited goods under that statute (s 203(1)(a)(i)). The cigarettes were located at a container x-ray facility. (...) [T]he cigarettes referred to in the presentment were property belonging to the Commonwealth to which the theft provision in s 131.1 of the Criminal Code (Cth) ("the Commonwealth Criminal Code")."

Pellegrino v Director of Public Prosecutions (Cth) (2008) 71 NSWLR 96; if a private company operating a port places goods in an area under Customs control, **the goods belong to the Customs even if the Customs is not aware of their precise nature.**

'Fundamental Mistake'

131.7 Property obtained because of fundamental mistake

- For the purposes of this Division, if:
 - a person gets property **by another's fundamental mistake**; and
 - the person is under **a legal obligation to make restoration** (in whole or in part) of the property, its proceeds or value;
 - then, to the extent of that obligation, the property or proceeds belongs (as against the person) **to the person entitled to restoration**.
- For the purposes of this Division, an intention not to make restoration is:
 - an intention to **permanently deprive** the person so entitled of the property or proceeds; and
 - an appropriation of the property or proceeds without the consent of the person entitled to restoration.
- For the purposes of this section, a fundamental mistake is:

- a) a mistake about the **identity** of the person getting the property; or
 - b) a mistake as to the **essential nature** of the property [**but not its amount!**]; or
 - c) a mistake about the **amount of any money** if the person getting the money is **aware of the mistake** at the time of getting the money.
- 4) In this section:
- money includes anything that is **equivalent to money**. For this purpose, cheques, negotiable instruments and electronic funds transfers are taken to be equivalent to money.

Legal obligation to make restoration

Restoration is like ‘restitution’. Under the principles of restitution:

- ‘[a person is] obliged to pay for a benefit received when the benefit has been given under a mistake as to a material fact on the part of the giver. The mistake must be as to a fundamental or essential fact and the payment must have been due to that fundamental or essential fact.’

-Attorney-General's Reference (No 1 of 1983) [1984] 3 WLR 686:

Mens Rea

Dishonesty

For the purposes of this Chapter, dishonest means:

- a) dishonest according to the standards of ordinary people; and
- b) known by the defendant to be dishonest according to the standards of ordinary people.

131.2 Special rules about the meaning of dishonesty

- 1) For the purposes of this Division, a person’s appropriation of property belonging to another is taken not to be dishonest if the person appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.
- 2) However, the rule in subsection (1) does not apply if the person appropriating the property held it as trustee or personal representative.
- 3) For the purposes of this Division, a person’s appropriation of property belonging to another may be dishonest even if the person or another person is willing to pay for the property.

Intention

5.2 Intention.

1. A person has intention with respect to conduct if he or she means to engage in that conduct.
2. A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
3. A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

131.10 Intention of permanently depriving a person of property

- 1) For the purposes of this Division, if:
 - a) a person appropriates property belonging to another without meaning the other permanently to lose the thing itself; and
 - b) the person’s intention is to treat the thing as the person’s own to dispose of regardless of the other’s rights;

the person has the intention of permanently depriving the other of it.

- 2) For the purposes of this section, a borrowing or lending of a thing amounts to treating the thing as the borrower’s or lender’s own to dispose of regardless of another’s rights if, and only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal.
- 3) For the purposes of this section, if:
 - a) a person has possession or control (lawfully or not) of property belonging to another; and
 - b) the person parts with the property under a condition as to its return that the person may not be able to perform; and
 - c) the parting is done for purposes of the person’s own and without the other’s authority;

the parting is taken to amount to treating the property as the person’s own to dispose of regardless of the other’s rights.

Note: See also paragraph 131.7(2)(a). [fundamental mistake provisions]

Recklessness

5.4 Recklessness.

- 1) A person is reckless with respect to a circumstance if:
 - a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
 - b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (...)
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

Physical elements:

- Appropriation
- Property
- Belonging to someone else...(the someone else being the Cth)

Fault elements:

- With the intention of permanently depriving the other person
- Dishonesty
- Recklessness as to the property belonging to someone else

The default fault element:

For conduct = intention

For circumstance = recklessness

commonwealth criminal code

Prosecution can bring both Commonwealth and state law charges (*Momcilovic v The Queen* [2011] HCA 34; (2011) 245 CLR 1) but the offender **must not be punished twice** (see e.g. *Crimes (Sentencing Procedure) Act 1999* (NSW), s 20)

Criminal Code

4.1 Physical elements.

- (1) A physical element of an offence may be:
 - a) conduct; or
 - b) a result of conduct; or
 - c) a circumstance in which conduct, or a result of conduct, occurs.
- (2) In this Code:

conduct means an act, an omission to perform an act or a state of affairs.

engage in conduct means:

- a) do an act; or
- b) omit to perform an act.

5.1 Fault elements.

- A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.
- Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence [e.g. ‘dishonestly’, etc].

5.2 Intention

- 1) A person has intention with respect to conduct if he or she means to engage in that conduct.
- 2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
- 3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

5.3 Knowledge.

- A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events

5.4 Recklessness.

- 1) A person is reckless with respect to a circumstance if:
 - he or she is aware of a substantial risk that the circumstance exists or will exist; and
 - having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

- 2) A person is reckless with respect to a result if:
 - he or she is aware of a substantial risk that the result will occur; and
 - having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- 3) The question whether taking a risk is unjustifiable is one of fact.
- 4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

5.5. Negligence.

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

- a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
- b) such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence.

5.6 Offences that do not specify fault elements.

If the law creating the offence does not specify a fault element for a physical element that consists only of **conduct, intention** is the fault element for that physical element.

If the law creating the offence does not specify a fault element for a physical element that consists of a **circumstance or a result, recklessness** is the fault element for that physical element.

6.1 Strict liability.

- (1) If a law that creates an offence provides that the offence is an offence of strict liability:
 - a) there are no fault elements for any of the physical elements of the offence; and
 - b) the defence of mistake of fact under **section 9.2** is available.
- (2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:
 - a) there are no fault elements for that physical element; and
 - b) the defence of mistake of fact under **section 9.2** is available in relation to that physical element.
- (3) The existence of strict liability does not make any other defence unavailable.

6.2 Absolute liability.

- (1) If a law that creates an offence provides that the offence is an offence of absolute liability:
 - a) there are no fault elements for any of the physical elements of the offence; and
 - b) the defence of mistake of fact under section 9.2 is unavailable.
- (2) If a law that creates an offence provides that absolute liability applies to a particular physical element of the offence:
 - a) there are no fault elements for that physical element; and
 - b) the defence of mistake of fact under section 9.2 is unavailable in relation to that physical element.
- (3) The existence of absolute liability does not make any other defence unavailable.

There's an agreed presumption that there is MR: *Sherras v De Rutzen*

- Absolute liability states that you don't need a MR, if you commit the conduct, you are liable.
 - If there's no indication that its absolutely liable, then look at Gibbs test.
- a) The words of the statute
 - b) The subject matter of the state:
 - i) Consequences for the community
 - ii) Regulatory vs 'truly criminal' offences

Like if its a serious crime we wanna put them away so we wanna make it strictly liable, but if its really criminal we don't want to give people that status based only very little analysis and also we dont wanna send them to jail for a long time based on only actions.

- The extent to which strict liability could assist in the enforcement of the statute.

Corporate Criminal Liability

12.1 General principles.

- 1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.
- 2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

12.2 Physical elements.

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

12.3 Fault elements other than negligence.

- 1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that **expressly, tacitly or impliedly authorised or permitted** the commission of the offence.
- 2) The means by which such an authorisation or permission may be established include:
 - a) proving that the **body corporate's board of directors** intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
 - b) proving that a **high managerial agent of the body corporate** intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
 - c) proving that a **corporate culture existed within the body corporate** that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
 - d) proving that the **body corporate failed to create and maintain a corporate culture** that required compliance with the relevant provision.
- 3) Paragraph (2)(b) does not apply if the body corporate proves that it **exercised due diligence** to prevent the conduct, or the authorisation or permission.
- 4) Factors relevant to the application of paragraph (2)(c) or (d) include:
 - a) whether authority to commit an offence of the same or a similar character had been given by a **high managerial agent of the body corporate**; and
 - b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a **high managerial agent of the body corporate would have authorised or permitted** the commission of the offence.
- 5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does **not enable the fault element to be proved** by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

12.4 Negligence.

- 1) The test of negligence for a body corporate is set out in section 5.5.
 - 2) If:
 - a) negligence is a fault element in relation to a physical element of an offence; and
 - b) no individual employee, agent or officer of the body corporate has that fault element;
- that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).
- 3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
 - a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
 - b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

Other legislation can disapply parts of the *Criminal Code*.

Example: *Corporations Act*

Section 769A. Despite section 1308A, Part 2.5 of the Criminal Code does not apply to any offences based on the provisions of this Chapter.

Interpretation

1. A code is a piece of legislation, so interpretation legislation applies [Acts Interpretation Act 1901 (Cth)].

2. The first loyalty is to the Code, therefore it must be interpreted in a way that is internally consistent.
3. Pre-existing common law is relevant if there is ambiguity or technical or special meaning. Specifically, when the Code employs words and phrases that are conventionally used to express a general common law principle, it is permissible to interpret the statutory language in the light of decisions expounding the common law, including decisions that come after the Code. ***Most important one. If there is ambiguity, move beyond the code to Common Law.***
4. Where alternative constructions are possible, use contextual interpretation.
5. Prefer interpretations which favour the accused and match blameworthiness.
 - *Kirby J in R v Barlow [1997] HCA 19 and R v Charlie (1999) 199 CLR 387:*

R v LK; R v RK [2010] HCA 17 on terms ‘conspires’, ‘conspiracy’ and ‘overt act’, which are not defined in the Criminal Code (Cth):

‘The theoretical idea of a code is that it replaces all existing law and becomes the sole source of the law on the particular topic. This theory assumes that the code is in no way ambiguous. It also fails to contemplate the notion that expressions may be used that have an accepted legal meaning and that meaning may not be specifically set out in the code.

Week 11 - Theft (Cth Law)

Theft Law

Section 131.1 of the CCC

- | |
|---|
| <p>(1) A person commits an offence if:</p> <ul style="list-style-type: none"> (a) the person dishonestly appropriates property belonging to another with the intention of permanently depriving the other of the property; and (b) the property belongs to a Commonwealth entity. <p style="margin-top: 10px;">Penalty: Imprisonment for 10 years.</p> <p>(2) For the purposes of this Code, an offence against subsection (1) is to be known as the offence of theft.</p> <p>(3) Absolute liability applies to the paragraph (1)(b) element of the offence of theft.</p> <p>(4) Section 15.4 (extended geographical jurisdiction—category D) applies to an offence against subsection (1).</p> <p style="margin-left: 20px;">Note: For alternative verdicts, see sections 132.1 and 134.1.</p> |
|---|

Physical element

Fault element

Physical element	Fault element
Appropriating property... <i>(conduct)</i>	Dishonesty + Intention to permanently deprive
...belonging to someone else <i>(circumstance)</i>	Recklessness <i>(default fault element under s 5.6)</i>
...that someone else is the Commonwealth <i>(circumstance)</i>	N/A (absolute liability)

What is appropriation? Section 131.3

131.3 Appropriation of property

1. For the purposes of this Division, any assumption of the rights of an owner to ownership, possession or control of property, without the consent of the person to whom it belongs, amounts to an appropriation of the property. This includes, in a case where a person has come by property (innocently or not) without committing theft, any later such assumption of rights without consent by keeping or dealing with it as owner.
2. For the purposes of this Division, if property, or a right or interest in property, is, or purports to be, transferred or given to a person acting in good faith, a later assumption by the person of rights which the person had believed himself or herself to be acquiring does not, because of any defect in the transferor's title, amount to an appropriation of the property.

- Any assumption of the rights of an owner to ownership, possession or control of property without the consent of the person to whom it belongs to
- Includes where a person has come by property (innocently or not) without committing theft, any later assumption of rights without consent by keeping or dealing with it as owner. Very broad definition!
- “Sitting on the bonnet of another person’s car could amount to appropriation because this is one of the owner’s rights” - Model Criminal Code Officers’ Committee
- **R v Easom** - a criminal looked through the contents of a bag, but didn’t find anything he liked so he returns the bag intact - still appropriation because they’re asserting rights of ownership to look through the bag

Delayed Appropriation: if you come by property innocently without committing theft, but then appropriate the property later by assuming rights, that’s theft

- **Good faith provisions:** HOWEVER, **Section 131.2(2)** states that ‘if property, or a right, or interest in property, is, or purports to be transferred or given to a person acting in good faith’ when the person giving it to them didn’t own it, then that is not appropriation (Eg if you buy a stolen book and you didn’t know it, you are not breaking the law. If you later find it’s stolen, it’s still not theft (probably another crime under money laundering))

What is property?

Section 130.1

‘Property’: s 130.1

property includes:

- (a) real property; and
- (b) personal property; and
- (c) money; and
- (d) a thing in action or other intangible property; and
- (e) electricity; and
- (f) a wild creature that is:
 - (i) tamed; or
 - (ii) ordinarily kept in captivity; or
 - (iii) reduced (or in the course of being reduced) into the possession of a person.

- Documents – yes (personal property)
- Information – likely no (*Oxford v Moss (1979) 68 Cr App R 183*)
- Money – yes (personal property if banknotes; thing in action if bank account)
- Cryptocurrency – likely yes (*Ruscoe v Cryptopia Ltd (in Liquidation) [2020] NZHC 728*)

Belonging to someone else: Section 130.2

130.2 When property belongs to a person

- (1) For the purposes of this Chapter, property **belongs to** a person if, and only if:
- (a) the person has possession or control of the property; or
 - (b) the person has a proprietary right or interest in the property, other than an equitable interest arising only from:
 - (i) an agreement to transfer an interest; or
 - (ii) an agreement to grant an interest; or
 - (iii) a constructive trust.
- (2) Subsection (1) has effect subject to subsections 134.1(9) and (10) (which deal with money transfers).

So, any one of the following will do:

Possession of the property OR

Control of the property OR

Having a proprietary right in the property OR

Having a proprietary interest in the property (with some exceptions).

Property can belong to 2 or more people - Section 131.9

131.9 Property belonging to 2 or more people

- (1) If property belongs to 2 or more people, a reference in this Division (other than paragraph 131.1(1)(b)) to the person to whom the property belongs is a reference to all of those persons.

- **R v Turner** - a man takes his car to a mechanic to get repair work done. Once the repair work is completed, he drives off without paying. Assuming the fault element is present (intention, recklessness), can you steal your own car?
 - Property can belong to 2 or more people - the mechanic possessed and controlled the property at the time he was working on it + it was in his garage. Since two people owned it, he stole it from the mechanic.

Obligation to deal with property in a particular way - Section 131.6

131.6 Obligation to deal with property in a particular way

For the purposes of this Division, if:

- (a) a person receives property from or on account of another; and
- (b) the person is under a legal obligation to the other to retain and deal with that property or its proceeds in a particular way [e.g. a contract: *Hall* [1972] 2 All ER 1009];

the property or proceeds belong (as against the person) to the other.

- If you receive property from someone and you're under a legal obligation to the other to retain with the property in a particular way, the property still belongs to the other person
- **Wakeman v Farrar:** a man claimed a cheque from the health department which never came. He went up to the counter asking for it, and signed a declaration that if it came he would send it back. It came and it did not. Because he had a **legal obligation** to deal with the cheque in a certain way, even though the cheque was in his possession, it belonged to the health department.

What is a commonwealth entity?

Dictionary in the *Criminal Code* (Cth)

Commonwealth entity means:

- (a) the Commonwealth; or
- (b) a Commonwealth authority.

Commonwealth authority means a body established by or under a law of the Commonwealth, but does not include:

- (a) a body established by or under:
 - (ii) the *Australian Capital Territory (Self-Government) Act 1988*; or
 - (iii) the *Corporations Act 2001*; or
 - (iv) the *Norfolk Island Act 1979*; or
 - (v) the *Northern Territory (Self-Government) Act 1978*; or
- (aa) a corporation registered under the *Corporations (Aboriginal and Torres Strait Islander) Act 2006*; or
- (ab) an organisation registered, or an association recognised, under the *Fair Work (Registered Organisations) Act 2009*;
- or
- (b) a body specified in the regulations.

What is a commonwealth authority/entity?

- Eg national museum
- Is ANU a commonwealth authority? Yes

Dickson v R - when the commonwealth temporarily detains something, they own it: Lots of cigarettes were seized by customs upon a warrant under the customs act. The customs are considered a commonwealth authority. These cigarettes were stolen, however Commonwealth Code applied since the property belonged to the Commonwealth. When the cigarettes were temporarily detained, they belonged to the Commonwealth.

Pellegrino v Director of Public Prosecutions - ‘if a private company operating a port places goods in an area under Customs’ control, the goods belong to the Customs even if the Customs is not aware of their precise nature’ - you can steal from the Commonwealth even if they didn’t know it was there

Fundamental mistake

131.7 Property obtained because of fundamental mistake:

131.7 Property obtained because of fundamental mistake

(1) For the purposes of this Division, if:

- (a) a person gets property by another’s fundamental mistake; and
- (b) the person is under a legal obligation to make restoration (in whole or in part) of the property, its proceeds or value; then, to the extent of that obligation, the property or proceeds belongs (as against the person) to the person entitled to restoration.

(2) For the purposes of this Division, an intention not to make restoration is:

- (a) an intention to permanently deprive the person so entitled of the property or proceeds; and
- (b) an appropriation of the property or proceeds without the consent of the person entitled to restoration.

(3) For the purposes of this section, a fundamental mistake is:

- (a) a mistake about the identity of the person getting the property; or
- (b) a mistake as to the essential nature of the property; or
- (c) a mistake about the amount of any money if the person getting the money is aware of the mistake at the time of getting the money.

(4) In this section:

money includes anything that is equivalent to money. For this purpose, cheques, negotiable instruments and electronic funds transfers are taken to be equivalent to money.

Property belonging to someone else:

- If it’s a fundamental mistake
 - And I have a legal obligation to make restoration
 - Then its property belonging to someone else
-
- Eg lets say I give you a piece of family jewellery and I think it’s rubbish. But then I realise “yo it’s actually a family heirloom”, and you’re under a legal obligation to make restoration of the property, then I still own the property.

What is a fundamental mistake?

- A mistake about the identity of the person getting the property
- A mistake as to the essential nature of the property [but not its amount!]
- A mistake about the amount of any money if the person getting is aware of the mistake at the time of getting the money

What does intention not to make restoration look like?

1. There is an intention to permanently deprive the person who is entitled to the property
2. There is an appropriation of the property or proceeds without the consent of the person entitled to restoration

This acts as shortcuts to establish theft - you establish intention and appropriation

What is legal obligation to make restoration? (not defined in CCC)

- ‘a person is obliged to pay for a benefit received when the benefit has been given under a mistake as to a material fact on the part of the giver. The mistake must be as to a fundamental or essential fact, and the

payment must have been due to that fundamental fact' - Attorney-General's Reference (No 1 of 1983).

Intention:

5.2 Intention.

- (1) A person has intention with respect to conduct if he or she means to engage in that conduct.
- (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
- (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

1. Means to engage in that conduct
 2. Intention to circumstance if they believe it exists/will exist (eg you believe it belongs to the Commonwealth)
- **Lloyd:** a friend took reels from the cinema, got his friend to copy, and then gave it back. **Not theft - did not intend to permanently deprive**
 - **Easom:** guy rummages through a bag to steal but doesn't like anything and puts it back. - **not theft, conditional intent (intent to steal only if there's something you want) is not a crime, intention to permanently deprive hadn't been made out**
 - **Sharp v McCormick:** a guy took a car coil and if it didn't fit his car he would return it - **theft - intention to permanently deprive had been made out, he treated the coil as his own**

Intention to permanently depriving a person of property - Section 131.10

- (1) For the purposes of this Division, if:
 - (a) a person appropriates property belonging to another **without meaning the other permanently to lose the thing itself**; and
 - (b) the person's **intention is to treat the thing as the person's own to dispose of regardless of the other's rights**;the person has the intention of permanently depriving the other of it.
- (2) For the purposes of this section, a borrowing or lending of a thing amounts to treating the thing as the borrower's or lender's own to dispose of regardless of another's rights **if, and only if, the borrowing or lending is for a period and in circumstances making it equivalent to an outright taking or disposal**.
- (3) For the purposes of this section, if:
 - (a) a person has possession or control (lawfully or not) of property belonging to another; and
 - (b) the person parts with the property under a condition as to its return that the person may not be able to perform; and
 - (c) the parting is done for purposes of the person's own and without the other's authority;the parting is taken to amount to treating the property as the person's own to dispose of regardless of the other's rights.

Note: See also paragraph 131.7(2)(a). **[fundamental mistake provisions]**

The intention to permanently deprive includes:

1. Appropriates property belonging to another without meaning the other loses the property permanently,
2. Intention to treat the thing as the person's own to dispose of regardless of the other's rights

3. Borrowing and lending can become intention to permanently derive only if the circumstances warrant it equivalent to an outright taking or disposal

Treating the property as someone's own to dispose of regardless of the other's rights

1. if a person has possession or control (lawfully or not) of property belong to another and
 2. the person parts with the property under a condition as to its return that the person may not be able to perform and
 3. the parting is done for purposes of the person's own and without the other's authority
 4. the parting is taken to amount as treating the property as the person's own to dispose of regardless of the other's rights
- “Disposals” and “borrowings” will need to have a quality of permanence about them before the section can be satisfied (eg defendant melts down the victim’s bracelet intending to give back the melted silver) - Model Criminal Code Officer’ Committee

Dishonesty

130.3 Dishonesty

For the purposes of this Chapter, **dishonest** means:

- (a) dishonest according to the **standards of ordinary people**; and
- (b) **known by the defendant to be dishonest** according to the standards of ordinary people.

Note: The following provisions affect the meaning of **dishonesty**:

- (a) section 131.2 (theft);
- (b) section 134.1 (obtaining property by deception).

- Dishonest to the standards of ordinary peoples; and
 - known by the defendant to be dishonest according to the standards of ordinary people
- **Anderson v Bigmore**: if the defendant doesn't know they're being dishonest (eg mistake of fact) then we must consider that (supports ‘known by the defendant to be dishonest’)

Special rules about the meaning of dishonestly

131.2 Special rules about the meaning of dishonesty



- (1) For the purposes of this Division, a person's appropriation of property belonging to another is taken not to be dishonest if the person appropriates the property in the belief that the person to whom the property belongs cannot be discovered by taking reasonable steps.
- (2) However, the rule in subsection (1) does not apply if the person appropriating the property held it as trustee or personal representative.
- (3) For the purposes of this Division, a person's appropriation of property belonging to another may be dishonest even if the person or another person is willing to pay for the property.

1. Not appropriation if the person appropriates the property in the belief that the person to whom the property belongs to cannot be discovered by taking reasonable steps
 - a. Doesn't apply if the person appropriating the property held it as trustee or personal representative
2. Appropriation is still appropriation even if they intent to pay for it

Recklessness in the Commonwealth Criminal Code

5.4 Recklessness.



- (1) A person is reckless with respect to a circumstance if:
 - (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (...)
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

A person is reckless with respect to circumstance if:

1. they are aware of a **substantial risk** that the circumstance exists/will exist
2. Having regard to the circumstances known to them, it is unjustifiable to take that risk
3. The question whether taking a risk is unjustifiable is a fact
4. If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element

Claim of Right defence

9.5 Claim of right



- (1) A person is not criminally responsible for an offence that has a physical element relating to property if:
 - (a) at the time of the conduct constituting the offence, the person is under a mistaken belief about a proprietary or possessory right; and
 - (b) the existence of that right would negate a fault element for any physical element of the offence.
- (2) A person is not criminally responsible for any other offence arising necessarily out of the exercise of the proprietary or possessory right that he or she mistakenly believes to exist.
- (3) This section does not negate criminal responsibility for an offence relating to the use of force against a person.

1. The person is under a mistaken belief about a proprietary or possessory right; and

- the existence of that right would negate a fault element for any physical element of the offence.

So if someone thinks the property is theirs, and removes it from someone's possession, then they do not have the requisite MR for theft. (not dishonestly)

- So prosecution will fail because no MR!

Very hard to see where Claim of Right defence will happen (because that means that MR for theft is not met)

commonwealth criminal code

Section 51 of the Constitution - expresses incidental power

Other heads of power in ss 51 and 52 - implied incidental power

Section 61 - Executive power

Section 51

Section 51 of the Constitution

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

- trade and commerce with other countries, and among the States;
- taxation; but so as not to discriminate between States or parts of States;
- bounties on the production or export of goods, but so that such bounties shall be uniform throughout the Commonwealth;
- borrowing money on the public credit of the Commonwealth;
- postal, telegraphic, telephonic, and other like services; [...]

Section 61

... xxix. external affairs;

.... xxxix. matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth.

61. Executive power

The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.

External affairs power - Commonwealth v Tasmania.

To be a law with respect to external affairs it is sufficient that it:

- (a) implements any international law; or
- (b) implements any treaty or convention whether general (multilateral) or particular; or
- (c) implements any recommendation or request of the United Nations Organization or subsidiary organizations such as the World Health Organization, The United Nations Education, Scientific and Cultural Organization, The Food and Agriculture Organization or the International Labour Organization; or
- (d) fosters (or inhibits) relations between Australia or political entities, bodies or persons within Australia and other nation States, entities, groups or persons external to Australia; or
- (e) deals with circumstances or things outside Australia; or
- (f) deals with circumstances or things inside Australia of international concern.

Commonwealth v Tasmania [1983] HCA 21 per Murphy J

- Once Australia enters a treaty, it can make legislation about that treaty, including criminal law

Section 109: Inconsistency of Laws - When a law is inconsistent with the Criminal Code, you must always use the Criminal Code as the law.

Inconsistency of laws

Australian Constitution, s 109. Inconsistency of laws

When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid.

- A state law is inconsistent with Commonwealth law if the former criminalises conduct ‘deliberately excluded’ from the latter (*Dickson v The Queen [2010] HCA 30; (2010) 241 CLR 491*, in the context of conspiracy to commit theft)
- A state law is inconsistent with Commonwealth law if the latter is meant to ‘express by its enactment, completely, exhaustively, or exclusively, what shall be the law governing the particular conduct or matter’ (*Ex parte McLean [1930] HCA 12; (1930) 43 CR 472, 483 per Dixon J*)
- Prosecution can bring both Commonwealth and state law charges (*Momcilovic v The Queen [2011] HCA 34; (2011) 245 CLR 1*) but the offender must not be punished twice (see e.g. *Crimes (Sentencing Procedure) Act 1999 (NSW), s 20*)

- A state law is inconsistent with Commonwealth law if the former criminalises conduct ‘deliberately excluded’ from the latter - Dickson v The Queen (It wasn’t punishable under Commonwealth law, but punishable under Victorian law. Victorian law was deemed incompatible)
- State law is inconsistent with Commonwealth law if Commonwealth law is meant to express its enactment entirely and to extinguish any other law - Ex parte McLean
- Prosecution can bring both laws, but the offender must not be punished twice
 - Eg it’s criminal to money launder in both jurisdictions but you should only be punished once

Example: Drugs - allows for concurrent operation

Example: drugs

Criminal Code (Cth), s 300.4. Concurrent operation intended

(1) This Part is not intended to exclude or limit the concurrent operation of any law of a State or Territory.

(2) Without limiting subsection (1), this Part is not intended to exclude or limit the concurrent operation of a law of a State or Territory that makes:

- (a) an act or omission that is an offence against a provision of this Part; or
 - (b) a similar act or omission;
- an offence against the law of the State or Territory.

(3) Subsection (2) applies even if the law of the State or Territory does any one or more of the following:

- (a) provides for a penalty for the offence that differs from the penalty provided for in this Part;
- (b) provides for a fault element in relation to the offence that differs from the fault elements applicable to the offence under this Part;
- (c) provides for a defence in relation to the offence that differs from the defences applicable to the offence under this Part.

Four basic principles of social justice

Why do we want to have a code?

- There are benefits of having law condensed in a single document

The criminal law should be (Matthew Goode, Codification of the Australian Criminal Law)

- Easy to discover
- Easy to understand - should have the law all in one document
- Cheap to buy/access -
- democratically made and amended

Good codes (Matthew Goode, Codification of the Australian Criminal Law):

1. Are preemptive - displaces all other law, the code is the only one that should be held
2. Systematic - orderly
3. Comprehensive, inclusive ,and independent - you don't need to look at external sources to understand

Purpose of the criminal code

2.1 Purpose. The purpose of this Chapter is to codify the general principles of criminal responsibility under laws of the Commonwealth. It contains all the general principles of criminal responsibility that apply to any offence, irrespective of how the offence is created.

MCCOC Commentary:

In principle, the basic rules of criminal responsibility should not vary from one State or Territory to another. In practice, the growth of Commonwealth criminal legislation and the increased incidence of prosecutions involving both Commonwealth and State offences in the same case highlight the need to rationalise this fundamental area.

2.2 Application.

- (1) This Chapter applies to all offences against this Code.
- (2) Subject to section 2.3 [provisions on intoxication], this Chapter applies on and after 15 December 2001 to all other offences.
- (3) Section 11.6 [definition of offences against the laws of the Commonwealth] applies to all offences.

Physical Elements - Section 4.1

4.1 Physical elements.

- (1) A physical element of an offence may be:
 - (a) conduct; or
 - (b) a result of conduct; or
 - (c) a circumstance in which conduct, or a result of conduct, occurs.

(2) In this Code:

conduct means an act, an omission to perform an act or a state of affairs.

engage in conduct means:

- (a) do an act; or
- (b) omit to perform an act.

Fault elements - Section 5.1

5.1 Fault elements.

- (1) A fault element for a particular physical element may be intention, knowledge, recklessness or negligence.
- (2) Subsection (1) does not prevent a law that creates a particular offence from specifying other fault elements for a physical element of that offence [e.g. 'dishonestly', etc].

Intention - Section 5.2

5.2 Intention.

- (1) A person has intention with respect to conduct if he or she means to engage in that conduct.
- (2) A person has intention with respect to a circumstance if he or she believes that it exists or will exist.
- (3) A person has intention with respect to a result if he or she means to bring it about or is aware that it will occur in the ordinary course of events.

Knowledge - Section 5.3

5.3 Knowledge.

A person has knowledge of a circumstance or a result if he or she is aware that it exists or will exist in the ordinary course of events.

Recklessness - substantial risk!! 5.4

- (1) A person is reckless with respect to a circumstance if:
 - (a) he or she is aware of a substantial risk that the circumstance exists or will exist; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (2) A person is reckless with respect to a result if:
 - (a) he or she is aware of a substantial risk that the result will occur; and
 - (b) having regard to the circumstances known to him or her, it is unjustifiable to take the risk.
- (3) The question whether taking a risk is unjustifiable is one of fact.
- (4) If recklessness is a fault element for a physical element of an offence, proof of intention, knowledge or recklessness will satisfy that fault element.

Negligence

5.5. Negligence.

A person is negligent with respect to a physical element of an offence if his or her conduct involves:

- (a) such a great falling short of the standard of care that a reasonable person would exercise in the circumstances; and
- (b) such a high risk that the physical element exists or will exist;

that the conduct merits criminal punishment for the offence.

Default Fault Elements

5.6 Offences that do not specify fault elements.

- (1) If the law creating the offence does not specify a fault element for a physical element that consists only of conduct, intention is the fault element for that physical element.
- (2) If the law creating the offence does not specify a fault element for a physical element that consists of a circumstance or a result, recklessness is the fault element for that physical element.

Strict Liability - no fault element - Section 6.1

6.1 Strict liability.

- (1) If a law that creates an offence provides that the offence is an offence of strict liability:
 - (a) there are no fault elements for any of the physical elements of the offence; and
 - (b) the defence of mistake of fact under section 9.2 is available.
- (2) If a law that creates an offence provides that strict liability applies to a particular physical element of the offence:
 - (a) there are no fault elements for that physical element; and
 - (b) the defence of mistake of fact under section 9.2 is available in relation to that physical element.
- (3) The existence of strict liability does not make any other defence unavailable.

A law has to expressly / imply that there is strict liability

- No fault elements
- Defence of mistake of fact (not mistake of the law)

If the law that creates an offence provides that strict liability applies to a particular physical element of the offence

1. There are no fault elements for that physical element
2. The defence of mistake of fact is available
3. Other defences apply

Absolute liability

Absolute liability

6.2 Absolute liability.

- (1) If a law that creates an offence provides that the offence is an offence of absolute liability:
 - (a) there are no fault elements for any of the physical elements of the offence; and
 - (b) the defence of mistake of fact under section 9.2 is unavailable.
- (2) If a law that creates an offence provides that absolute liability applies to a particular physical element of the offence:
 - (a) there are no fault elements for that physical element; and
 - (b) the defence of mistake of fact under section 9.2 is unavailable in relation to that physical element.
- (3) The existence of absolute liability does not make any other defence unavailable.

NO DEFENCE OF MISTAKE OF FACT.

Other key features of the Criminal Code (Cth)

- Codified provisions in respect of issues such as burden and standard of proof; voluntariness; defences (but *not causation*).

Though Chapter 2 has nothing to say on the topic of causation, since applications of the concept are practically confined to particular offences involving damage or injury, a standard definition has been employed throughout the *Code*. A typical instance occurs in Part 7.8 – *Causing harm to and impersonation and obstruction of, Commonwealth public officials*. Section 146.2, which deals with causing harm to Commonwealth official, states that “a person’s conduct is taken to cause harm if it substantially contributes to harm.” The *Code* adopts the same definition of causation in Part 10.7 *Computer Offences*.²⁸ It is a restatement of a principle of Australian common law which would be implied in any event, without specific statutory provision.

The Commonwealth Criminal Code: A Guide for Practitioners

- Codified provisions on corporate criminal responsibility (Part 2.5 of the *Criminal Code*).

- Chapter 2 of the CCC - also contains provisions to burden and standard of proof, BUT NOR CAUSATION!!!!
- “A standard definition has been employed throughout the code” - **substantially contributes to the harm**

Corporate criminal liability?

12.1 General principles.

(1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

(2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

Corporate liability is possible.

Physical elements of Corporate criminal liability

12.2 Physical elements.

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

The actions of the employee or agent to prescribed to the corporate body

How to interpret CCC

When legislation from the CCC has been enacted, pre existing legislation must be treated as if they have been repealed and re-enacted. Don't look at common law.

How do we interpret a code? (1)

Here is a summary of main points from Kirby J in *R v Barlow [1997] HCA 19* and *R v Charlie (1999) 199 CLR 387*:

1. A code is a piece of legislation, so interpretation legislation applies [[Acts Interpretation Act 1901 \(Cth\)](#)].
2. The first loyalty is to the Code, therefore it must be interpreted in a way that is internally consistent.
3. Pre-existing common law is relevant if there is ambiguity or technical or special meaning. Specifically, when the Code employs words and phrases that are conventionally used to express a general common law principle, it is permissible to interpret the statutory language in the light of decisions expounding the common law, including decisions that come after the Code.
4. Where alternative constructions are possible, use contextual interpretation.
5. Prefer interpretations which favour the accused and match blameworthiness.

Eg: “legal obligation to make restoration” - not clear in the act, however we use common law for this

Special or technical meaning?

R v LK; R v RK [2010] HCA 17 on terms ‘conspires’, ‘conspiracy’ and ‘overt act’, which are not defined in the *Criminal Code* (Cth):

[96], citing Pearce & Geddes, *Statutory Interpretation in Australia*:

‘The theoretical idea of a code is that it replaces all existing law and becomes the **sole source** of the law on the particular topic. This theory **assumes that the code is in no way ambiguous**. It also fails to contemplate the notion that expressions may be used that have an **accepted legal meaning** and that meaning may not be specifically set out in the code.’